

1986

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### Recommended Citation

William T. Pizzi, Privilege Against Self-Incrimination in a Rescue Situaition, The, 76 J. Crim. L. & Criminology 567 (1985)

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# CRIMINAL LAW

## THE PRIVILEGE AGAINST SELF-INCRIMINATION IN A RESCUE SITUATION\*

WILLIAM T. PIZZI\*\*

### I. INTRODUCTION

Imagine that the kidnapping of a child has taken place, that the kidnappers have contacted the child's family with a hefty ransom demand and that the kidnappers have issued the usual warning that if there is any delay in meeting the ransom demand, they will kill the child. Imagine further that the police apprehended one of the kidnappers when he arrived at the "drop"—the location selected for handing over the ransom money. At this point the police are unsure where the child is being held and obviously have good reason to fear that the life of the child is in serious danger. How should the police proceed in questioning the kidnapper?

Those familiar with the writings of Judge Henry Friendly may recognize the origins of this inquiry from an article he wrote in 1965,<sup>1</sup> just after the Court decided *Escobedo v. Illinois*,<sup>2</sup> in which he expressed concern over expansion of the right to counsel and asked the following question:

If such a tragedy were to strike at the family of a writer who is enthused about extending the assistance of counsel clause to the station

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\* I want to thank my colleagues and other friends for their criticisms and suggestions as this article took shape. In particular, I want to thank Albert Alschuler, Richard Collins and Barry Nakell for their written comments on earlier drafts of this paper.

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<sup>1</sup> Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

<sup>2</sup> 378 U.S. 478 (1964).

house, would he really believe the fundamental liberties of the suspect demanded the summoning of a lawyer, or at least a clear warning as to the right immediately to consult one, before the police began questioning in an effort to retrieve his child?<sup>3</sup>

Two years later, after the Court in *Miranda v. Arizona*<sup>4</sup> made clear that it was the privilege against self-incrimination, not the right to counsel, that controlled the interrogation of suspects,<sup>5</sup> Judge Friendly asked the same question in regard to *Miranda*.<sup>6</sup>

This article examines the issues surrounding the question of the application of the privilege against self-incrimination in a rescue situation. In its analysis, this article develops the implications of Judge Friendly's kidnapping hypothetical and uses the kidnapping hypothetical as a vehicle for examining the scope of the privilege against self-incrimination.

## II. THE IMPORTANCE OF THE HYPOTHETICAL

When Judge Friendly originally put forward the hypothetical, one critic belittled its importance by insisting that it presented simply an "emotional dilemma" because the number of kidnappings is "so statistically insignificant that any case is newsworthy nationwide."<sup>7</sup> Whatever the dubious merits of this criticism in the late 1960's, there are strong reasons today for looking at the kidnapping hypothetical in greater detail. It is no secret that many citizens are growing concerned, and even angry, about our criminal justice system. It is frequently suggested that the courts have gone too far in expanding the rights of defendants but show no sympathy or concern for the victims of crime.<sup>8</sup> Public distrust even has led to the formation of organizations that monitor judicial rulings and decisions.<sup>9</sup> In addition, there have been voter-initiated referenda in two states aimed at limiting the courts' power to exclude relevant evi-

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<sup>3</sup> Friendly, *supra* note 1, at 949.

<sup>4</sup> 384 U.S. 436 (1966).

<sup>5</sup> The Court has made it clear that *Escobedo* now is to be limited to its own facts. See *Moore v. Illinois*, 434 U.S. 220 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972).

<sup>6</sup> H.J. FRIENDLY, BENCHMARKS 277 (1967).

<sup>7</sup> Graham, *What is "Custodial Interrogation?" California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59, 119 n.319 (1966).

<sup>8</sup> See, e.g., *Christian Sci. Monitor*, Nov. 28, 1983, at 1, col. 1 (report on meeting of judges from around the country to consider recommendations to improve the judicial system's treatment of victims); *N.Y. Times*, Jan. 28, 1983, § B, at 7, col. 3 (report of Chairman of President's Task Force, on Victims of Crime); Royster, *Thinking Things Over*, *Wall St. J.*, Oct. 27, 1982, at 32, col. 3; Editorial, *Making Criminals Pay*, *Wall St. J.*, Sept. 23, 1982, at 34, col. 1.

<sup>9</sup> *N.Y. Times*, June 1, 1983, § A, at 21, col. 1.

dence.<sup>10</sup> Because the kidnapping hypothetical directly involves a victim and some difficult police decisions, it presents an excellent vantage point from which to examine the balance that exists or ought to exist in the criminal justice system between the rights of the suspect and the legitimate concern for the victim. Even though kidnappings may be relatively few in number, what such cases say about the value of human life and the rights of the defendant may be much more significant in terms of public respect for the system of criminal justice than the system's disposition of other incidents which occur more frequently.

Aside from the perspective the hypothetical affords for examining the criminal justice system, the legal issues surrounding the kidnapping hypothetical deserve attention in their own right. While hopefully we never will reach the stage that some countries have reached where kidnapping is big business,<sup>11</sup> the kidnapping hypothetical is only one of many dangerous situations in which innocent lives are threatened. Among such situations are prison takeovers, airline hijackings and various acts of terrorism, like planting bombs.<sup>12</sup> These situations are usually highly visible and put tremendous pressure on those who must decide the best way to handle the crisis with the minimum loss of life. No one can predict in advance the factual twists that may arise in a given situation,<sup>13</sup> nor is there a single formula for resolving such crises.<sup>14</sup> But in a world

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<sup>10</sup> In June, 1982, voters in California approved Proposition 8, entitled the "Victims' Bill of Rights." CAL. CONST. art. I, § 28. Proposition 8 includes a provision challenging the exclusionary rule. The relevant subsection declares in part that "relevant evidence shall not be excluded in any criminal proceeding." CAL. CONST. art. I, § 28 (d).

Florida also passed a referendum issue in 1982 designed to limit independent expansion of the state constitutional provision on search and seizure. The amendment to the Florida Constitution provides that the search and seizure clause shall be construed in conformity with the fourth amendment of the United States Constitution as interpreted by the United States Supreme Court. FLA. CONST. art. I, § 12. This amendment limits Florida's state exclusionary remedy to the parameters of the federal exclusionary rule. See *State v. Lavazzoli*, 434 So.2d 321 (Fla. 1983).

<sup>11</sup> In Italy and some Latin American countries, for example, reports suggest that kidnapping has become more profitable and less likely to lead to conviction than bank robbery. R. CLUTTERBUCK, *KIDNAP AND RANSOM: THE RESPONSE* 21 (1978).

<sup>12</sup> The randomness of political terrorism and the realization that terrorism is possible in any setting make terrorism more frightening to a society than the more numerous homicides committed for money or revenge. See *id.*

<sup>13</sup> In *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975), for example, prisoners in the District of Columbia jail, who had taken hostages, marched boldly into federal court holding the jail's director a hostage at gunpoint to obtain a "hearing" before a federal district judge on their demands.

<sup>14</sup> Research has shown that

[t]here is no blueprint for dealing with a "Type A" or "Type B" hostage situation. All sorts of variables, game rule changes, supervisory twists, and plain fate come

where major police departments have found it necessary to form hostage negotiation teams<sup>15</sup> and where extraordinary precautions against terrorism have become a necessary part of planning major sporting events,<sup>16</sup> it would seem that, at a minimum, we should understand the relevant constitutional questions.

Unfortunately, cases similar to the kidnapping hypothetical do occur. One recent example is a New York case, *People v. Krom*.<sup>17</sup> In *Krom*, a masked gunman tied up the husband of the victim and kidnapped the man's wife. The kidnapper called the victim's father later the same day and demanded a million dollars ransom.<sup>18</sup> The following evening he called the father's home again, but this time the victim's husband answered the phone and recognized the kidnapper's voice as someone he had known for several years.<sup>19</sup> The caller immediately hung up.

The police went to the home of the suspect the next day. In the garage the police observed a sports car that seemed to fit the description of a car seen in the victim's neighborhood on the night of the kidnapping.<sup>20</sup> When the suspect came out of his house, the police told him they believed he might have some information that would help them find the victim. The police told the suspect the results of the investigation up to that point and also gave him the *Miranda* warnings.<sup>21</sup> The suspect said that he might be able to help, but he insisted on being paid \$400,000 for his information.<sup>22</sup> Although he was not yet under arrest, the police then asked the suspect to come to the station house.

At the station, the suspect continued to demand large sums of money for his information and asked to see the victim's wealthy father so that arrangements for payment could be made. He insisted

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into play. The negotiator must be able to survive for periods without structure or precedent. He must have confidence in his skills and decisions.

NATIONAL INSTITUTE OF CORRECTIONS, CORRECTIONS INFORMATION SERIES: PRISON HOSTAGE SITUATIONS at 11 (1983).

<sup>15</sup> See A.H. MILLER, *TERRORISM AND HOSTAGE NEGOTIATIONS* 17-18 (1980).

<sup>16</sup> When Los Angeles hosted the Olympic Games, there was a security force of 17,000 to protect the athletes. Local police officials were equipped with a full arsenal of anti-terrorist equipment, including a robot that could be used to defuse bombs. N.Y. Times, Apr. 2, 1984, at 1, col. 3. A 50-agent F.B.I. "hostage-rescue team" also was among the security force. Penn, *New Terrorist Groups Are Appearing in U.S., Resembling Old Ones*, Wall St. J., July 26, 1984, at 1, col. 1.

<sup>17</sup> 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139 (1984). For a discussion of the court's decision in *Krom*, see *infra* notes 174-83 and accompanying text.

<sup>18</sup> *Id.* at 192, 461 N.E.2d at 277-78, 473 N.Y.S.2d at 140-41.

<sup>19</sup> *Id.* at 193, 461 N.E.2d at 278, 473 N.Y.S.2d at 141.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

the victim was safe.<sup>23</sup> At one point, the suspect even drew up agreements to be signed by the victim's father and the police promising him money and immunity for his information. When the police said that they could not sign such an agreement, the suspect started to leave the station house.<sup>24</sup> At that point, the police arrested the suspect.<sup>25</sup> The suspect then asked for an attorney.<sup>26</sup> The suspect was permitted to call a private attorney who had represented his family on another occasion. Discussions ceased in order to permit counsel to come to the station.<sup>27</sup>

When counsel arrived, the suspect told him that he would not be paid unless he (the suspect) obtained some of the ransom money. The attorney responded that he would not represent the suspect and left, telling the suspect to call the public defender.<sup>28</sup> The police asked the suspect if he wanted them to reach the public defender.<sup>29</sup> The suspect replied that he would represent himself and repeated his request to meet with the victim's father.<sup>30</sup> Finally, the victim's father came to the station house to meet with the suspect. The father agreed to pay Krom's attorney's fees, to finance his bail and to provide \$10,000 for "expenses."<sup>31</sup> The suspect then led the police to a wooded area where the victim had been placed in a coffin-like box in a shallow hole in the ground. When the police opened the box, they found that the victim had suffocated.<sup>32</sup>

Should the police have acted more decisively in *Krom*? That is a difficult question to answer based on only an appellate opinion, and it may be that no action by the police would have made a difference to the victim's life in that case. The point of detailing the facts of *Krom* is not to second-guess the police, but rather to emphasize the importance of the relevant constitutional considerations. It is crucial that, at a minimum, police understand exactly how the Constitution bears on their conduct when they face a life-threatening situation. A terrible tragedy could occur if the police hesitate to act because of a mistaken belief or even uncertainty about the demands of the Constitution in such a situation.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 194, 461 N.E.2d at 278, 473 N.Y.S.2d at 141.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, 461 N.E.2d at 279, 473 N.Y.S.2d at 142.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 195, 461 N.E.2d at 279, 473 N.Y.S.2d at 142.

III. *MIRANDA* IN A CRISIS SITUATIONA. THE ORIGINS OF *MIRANDA*

The first problem facing the police in the kidnapping hypothetical is whether they are required to administer *Miranda* warnings to the kidnapper who is clearly in their custody and from whom they want to learn the victim's whereabouts. Until relatively recently in our constitutional history, the privilege against self-incrimination did not cover police questioning of suspects. Instead, the due process clause and the prohibition against the use at trial of involuntary confessions controlled the conduct of the police in the station house.<sup>33</sup> In 1964, however, the problem of involuntary confessions was considered in connection with the privilege against self-incrimination. In *Malloy v. Hogan*,<sup>34</sup> the Court announced that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will. . . ." Moreover, in 1966 in *Miranda v. Arizona*,<sup>35</sup> the Court firmly established the control of the privilege over police interrogation of suspects.

It had been obvious in the years prior to *Miranda* that the Court was looking for a broader solution to the problem of custodial interrogation than that provided by the voluntariness doctrine. The confessions area was difficult for the Court to police because there is limited review of trial court findings<sup>36</sup> and because the number of cases the Court could take was necessarily only a small percentage of the cases raising a confession issue.<sup>37</sup> Moreover, the Court appeared to want a test that focused less on the suspect and more on the police conduct.

In *Miranda*, the Court specifically conceded that the confessions in the four consolidated cases before it might be voluntary in traditional terms.<sup>38</sup> The Court, however, was concerned with modern

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<sup>33</sup> See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 462-67 (1964).

<sup>34</sup> 378 U.S. 1, 8 (1964).

<sup>35</sup> 384 U.S. 436 (1966).

<sup>36</sup> It has been suggested that the Court has been concerned that even when trial court decisions are formally beyond reproach, the decisions may be wrong. See Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 710 (1968).

<sup>37</sup> Between 1936, when the Court decided *Brown v. Mississippi*, 297 U.S. 278 (1936), and 1964, the Court decided only 37 coerced confession cases. See Herman, *supra* note 33, at 457 n.49; Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 n.1 (1964).

<sup>38</sup> 384 U.S. at 457.

psychological interrogation techniques that were very effective in pressuring suspects to make incriminating statements and that made physical coercion unnecessary. Much of the majority opinion is devoted to a review of techniques in police training manuals that are designed to "keep the subject off balance" in order to "persuade, trick or cajole him out of exercising his constitutional rights."<sup>39</sup> Among the techniques of which the Court was critical were: (1) the tactic of encouraging a suspect to talk by minimizing the moral seriousness of the offense or casting blame on the victim;<sup>40</sup> (2) the "Mutt and Jeff" technique where one officer plays the role of the angry, relentless investigator who is very threatening in his demeanor, while the other officer plays the role of the gentle, kind-hearted, understanding officer who, after the threatening officer leaves the room, encourages the suspect to open up to him;<sup>41</sup> and (3) the use of outright deception, such as when a suspect is frightened into confessing by the fact that he has been picked out of a lineup by a fictitious "witness to the crime" who has been coached to select him.<sup>42</sup>

Consistent with its criticism of police tactics, the Court concluded that the prosecution may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards sufficient to secure the privilege against self-incrimination.<sup>43</sup> The opinion then outlined the famous warnings that, in the absence of other fully effective safeguards, must be given to a suspect in custody prior to interrogation.<sup>44</sup>

#### B. *MIRANDA* IN A RESCUE SITUATION: CONFUSION IN THE COURTS

The four cases that were consolidated in *Miranda* all involved purely investigative questioning by the police.<sup>45</sup> Although the investigation of crimes and the enforcement of the criminal laws may

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<sup>39</sup> *Id.* at 455.

<sup>40</sup> *Id.* at 450.

<sup>41</sup> *Id.* at 452.

<sup>42</sup> *Id.* at 453.

<sup>43</sup> *Id.* at 467.

<sup>44</sup> The warnings that must be given are that the suspect has a right to remain silent, that anything he says may be used as evidence against him, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed to represent him. *Id.* at 467-79.

<sup>45</sup> *Miranda v. Arizona* involved custodial questioning concerning a rape and kidnapping incident, *id.* at 491-92; *Vignera v. New York* involved custodial questioning concerning a robbery three days earlier, *id.* at 493-94; *Westover v. United States* involved custodial interrogation concerning two prior robberies, *id.* at 494-95; and *California v. Stewart* involved custodial interrogation concerning a series of purse-snatch robberies where, in one case, the victim died of the injuries sustained, *id.* at 497-98.



be the police functions most visible for the courts, they are only two of many important responsibilities that police carry out, and those tasks occupy only a minority of an officer's time.<sup>46</sup> Another important police duty is the task sometimes referred to as "crisis intervention"<sup>47</sup> or "peacekeeping."<sup>48</sup> This duty has been described as "a broad and most important mandate which involves the protection of lives and rights ranging from handling street corner brawls to the settlement of violent family disputes. In a word, it means maintaining public safety."<sup>49</sup>

When the focus of a police inquiry shifts from investigative questioning to questioning that has as its primary objective saving lives, the courts have been struggling to understand how to apply the broad language of *Miranda*. Two of the cases that evidence this struggle are *United States v. Mesa*<sup>50</sup> and *People v. Dean*.<sup>51</sup>

In *United States v. Mesa*, the FBI surrounded a motel room in which Mesa had barricaded himself. Mesa was believed to be armed, possibly suicidal and possibly holding hostages.<sup>52</sup> For over three and a half hours, an agent specially trained in hostage negotiation techniques tried to defuse the situation. Among the techniques used by the agent to gain Mesa's confidence was an effort to portray himself as Mesa's friend.<sup>53</sup> The conversation between Mesa and the agent covered many personal matters including the circumstances of a shooting that Mesa had committed the previous day.<sup>54</sup> Finally, Mesa surrendered and then was given *Miranda* warnings.<sup>55</sup>

Prior to his trial for the shootings, Mesa sought to have the in-

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<sup>46</sup> Estimates of the amount of an officer's time actually devoted to investigating and arresting criminals range from as little as 10%, see Martin, *Police and Crisis Intervention*, in VANCE BIBLIOGRAPHIES, PUBLIC ADMINISTRATION SERIES: BIBLIOGRAPHY P 410 at 2 (1980), up to about 30% of an officer's time, see Misner, *Enforcement: The Illusion of Security*, 208 NATION 488 (1969). See generally STANDARDS RELATING TO THE URBAN POLICE FUNCTION 32-37 (Tent. Draft 1972).

<sup>47</sup> Martin, *supra* note 46, at 2.

<sup>48</sup> See J.S. CAMPBELL, J.R. SAHID & D.P. STANG, LAW AND ORDER RECONSIDERED, REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION OF THE CAUSES AND PREVENTION OF VIOLENCE 286 (1969).

<sup>49</sup> *Id.*

<sup>50</sup> 638 F.2d 582 (3d Cir. 1980).

<sup>51</sup> 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974).

<sup>52</sup> 638 F.2d at 583.

<sup>53</sup> The agent tried to be supportive of Mesa. For example, the agent said "I'm concerned about you Rigoberto, I'm concerned about your welfare, and I'm concerned about your health and I want to make absolutely certain that you and I trust each other and we can bring this problem to a successful solution." *Id.* at 584. The Court of Appeals for the Third Circuit noted that this statement was "representative" of the conversation designed to keep Mesa talking and build trust between the agent and Mesa. *Id.*

<sup>54</sup> *Id.* at 583-84.

<sup>55</sup> *Id.* at 584.

criminating statements he made to the agent regarding the shootings, which had been recorded, suppressed on the ground that the agent failed to give him *Miranda* warnings prior to initiating their discussion.<sup>56</sup> The district court suppressed the statements, concluding that the defendant had been interrogated while in custody and thus the requirement that *Miranda* warnings be given had been violated.<sup>57</sup> The Court of Appeals for the Third Circuit reversed the suppression order, but the three judges went three different ways in their reasoning. One judge concluded that the defendant, although he had been surrounded by between twenty-five and thirty law enforcement officers, had not been in custody for purposes of *Miranda* when the statement was given; therefore, *Miranda* warnings had not been required.<sup>58</sup> Another judge concluded that Mesa had not been interrogated within the meaning of *Miranda* because the questions were asked for primarily noninvestigative reasons; thus, he felt it unnecessary to address "the difficult issue" of whether Mesa had been in custody.<sup>59</sup> Finally, a dissenting judge agreed with the district court that *Miranda* had been violated because Mesa had been in custody and had been interrogated without the required warnings in a seige atmosphere "replete with the very same dangers to Mesa's Fifth Amendment rights as are present in a station house custody situation."<sup>60</sup>

It is interesting to apply the line drawn in the *Mesa* decision to the kidnapping hypothetical. If Mesa had been in custody and the case had involved a buried victim or one left in a room with a bomb, a majority of the court would have concluded that the failure to give *Miranda* warnings rendered the suspect's statements inadmissible at his trial.

A second example of the problem courts have had applying *Miranda* in a life-threatening situation is *People v. Dean*,<sup>61</sup> a case which is one of a line of California cases that have fashioned a "rescue exception" to the requirement of *Miranda* warnings.<sup>62</sup> In *Dean*, a case with a strong resemblance to the kidnapping hypothetical, the police disarmed and arrested a kidnapping suspect. The suspect then was

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<sup>56</sup> *Id.*

<sup>57</sup> 487 F. Supp. 562 (D.N.J.), *rev'd*, 638 F.2d 582 (3d Cir. 1980).

<sup>58</sup> 638 F.2d at 586-89 (3d Cir. 1980) (Chief Justice Seitz wrote the opinion for the court).

<sup>59</sup> *Id.* at 589-91 (Adams, J., concurring).

<sup>60</sup> *Id.* at 591, 594 (Weiner, D.J., dissenting).

<sup>61</sup> 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974).

<sup>62</sup> See also *People v. Modesto*, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965); *People v. Riddle*, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170 (1978), *cert. denied*, 440 U.S. 937 (1979).

asked questions about the victim's health and whereabouts without having been given *Miranda* warnings.<sup>63</sup> At the time of the questioning, the officer did not know if the victim was dead or alive or even how many kidnappers were involved. The defendant gave incriminating answers that led officials to the body of the victim.<sup>64</sup>

While *Miranda* on its face would seem to have required the suppression of the statements that Dean gave the police because Dean was in custody when he was questioned, the California Court of Appeals concluded that *Miranda* was inapplicable because "[w]hile life hangs in the balance, there is no room to require admonitions concerning the right to counsel and to remain silent. It is inconceivable that the *Miranda* court or the framers of the Constitution envisioned such admonishments first be given under the facts presented to us."<sup>65</sup>

C. *NEW YORK v. QUARLES*: THE "PUBLIC SAFETY"  
EXCEPTION TO *MIRANDA*

At the end of its 1983 term, the Supreme Court decided *New York v. Quarles*,<sup>66</sup> a case that sheds light on the issues raised in *Mesa* and *Dean*. By creating a public safety exception to the requirement of *Miranda* warnings in *Quarles*, the Court's opinion is consistent with the conclusion of the California court in *Dean* that *Miranda* warnings are not needed when life is at stake. The Court's conclusion in *Quarles* also would have obviated the struggle in *Mesa* over the issues of custody and interrogation in a standoff situation.

In *Quarles*, shortly after midnight a young woman approached a police car in which two officers were patrolling and told them that she just had been raped. She described the offender and told the officers that he had entered a nearby grocery store and that he was carrying a gun.<sup>67</sup> Police went to the store, and when they began to approach Quarles, who fit the description that the woman had given, the suspect ran to the back of the store. Quarles was out of sight momentarily, but the officers then surrounded and arrested him.<sup>68</sup> The police frisked Quarles and found an empty shoulder holster but no gun. After he had been handcuffed, one of the po-

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<sup>63</sup> When asked at the suppression hearing why he had failed to give warnings to Dean, the officer replied that he "was only concerned with the girl's safety and her whereabouts and it really never entered [my] mind." 39 Cal. App. 3d at 884, 114 Cal. Rptr. at 561.

<sup>64</sup> *Id.* at 879, 114 Cal. Rptr. at 558.

<sup>65</sup> *Id.* at 882, 114 Cal. Rptr. at 559.

<sup>66</sup> 104 S. Ct. 2626 (1984).

<sup>67</sup> *Id.* at 2629.

<sup>68</sup> *Id.* at 2629-30.

lice, Officer Frank Kraft, asked Quarles where the gun was.<sup>69</sup> Quarles nodded in the direction of some empty cartons and said, "the gun is over there."<sup>70</sup> Police retrieved a loaded .38 caliber revolver from one of the cartons. Quarles then was read his *Miranda* warnings.<sup>71</sup> He waived his rights and, responding to the officer's questioning, admitted that the gun was his and that he had purchased it in Florida.<sup>72</sup>

The trial court, at Quarles' trial for criminal possession of a weapon,<sup>73</sup> suppressed the gun and the statement "the gun is over there" as fruits of a *Miranda* violation.<sup>74</sup> The trial court also suppressed Quarles' statement admitting ownership of the gun because the prior *Miranda* violation had tainted that evidence.<sup>75</sup> The New York Court of Appeals affirmed the suppression ruling by a 4-3 vote in an opinion that refused to recognize an exigency exception to the requirement of *Miranda* warnings because the court found no indication from the officer's testimony at the suppression hearing that his motive was to protect his own safety or the safety of the public.<sup>76</sup>

The Supreme Court reversed, ruling that the facts presented 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 the exception does not turn on the subjective motives of the individual officers involved. The Court reasoned 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."<sup>77</sup> While acknowledging that by its decision "to some degree we lessen the desirable clarity of [the *Miranda*] rule,"<sup>78</sup> the majority emphasized that police have "only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront,"<sup>79</sup> and this exception "lessens the necessity for that on-the-scene

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<sup>69</sup> *Id.* at 2630.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> The Supreme Court opinion states that the record does not indicate why the state failed to prosecute the rape charge. *Id.* n.2.

<sup>74</sup> *Id.* at 2629-30.

<sup>75</sup> *Id.* at 2630.

<sup>76</sup> *People v. Quarles*, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982), *rev'd*, 104 S. Ct. 2626 (1984).

<sup>77</sup> 104 S. Ct. at 2633.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200, 214 (1979)).

balancing. . . ."<sup>80</sup>

The majority admitted that *Miranda* was meant to reduce the likelihood that "suspects would fall victim to constitutionally impermissible practices of police interrogation in the presumptively coercive environment of the station house,"<sup>81</sup> but it concluded that the "judicially imposed strictures of *Miranda*"<sup>82</sup> could be relaxed to ensure public safety. The Court reminded the dissenters that Quarles was still free to argue "that his statement was coerced under traditional due process standards" on remand.<sup>83</sup>

In dissent, Justice Marshall, joined by Justices Stevens and Brennan, first attacked the majority's factual assumption that there had been a concern for public safety when the officer asked Quarles where the gun was.<sup>84</sup> Marshall pointed out that the lower courts found nothing to suggest that the officers were motivated by a concern for public or personal safety. Although the store was open at the time of this incident, there were apparently no customers in the store, and the only employees present were the clerks at the check-out counter. Thus, the relevant area easily could have been cordoned off to search for the gun that was obviously nearby.

On the legal merits, Justice Marshall argued that the majority in effect had approved the use of coercion.<sup>85</sup> He stressed that the whole rationale of *Miranda* was to combat the inherent pressures that custody brings to bear on suspects in the physical control of the police and that now the Court was allowing such pressure to be exploited.<sup>86</sup> Marshall also predicted that the exception would prove unworkable and that in exchange for abandoning "the rule that brought eighteen years of doctrinal tranquility to the field of custodial interrogations,"<sup>87</sup> police would have to suffer "through the frustrations of another period of constitutional uncertainty"<sup>88</sup> as courts worked out the parameters of the new "public safety" exception.

Justice O'Connor agreed with the other three dissenters that Quarles' statement should have been suppressed because of the *Miranda* violation.<sup>89</sup> O'Connor argued that the exception "unnecessa-

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<sup>80</sup> 104 S. Ct. at 2633.

<sup>81</sup> *Id.* at 2632.

<sup>82</sup> *Id.* at 2630 n.3.

<sup>83</sup> *Id.* at 2631 n.5.

<sup>84</sup> *Id.* at 2641 (Marshall, J., dissenting).

<sup>85</sup> *Id.* at 2647 (Marshall, J., dissenting).

<sup>86</sup> *Id.* (Marshall, J., dissenting).

<sup>87</sup> *Id.* at 2644 (Marshall, J., dissenting).

<sup>88</sup> *Id.* at 2645 (Marshall, J., dissenting).

<sup>89</sup> *Id.* at 2634 (O'Connor, J., concurring in part and dissenting in part).

rily blurs the edges of the clear line heretofore established and makes *Miranda's* requirements more difficult to understand."<sup>90</sup> Nevertheless, O'Connor would have permitted the gun to be used against Quarles because she found that "nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation. . . ."<sup>91</sup>

*Quarles* presents a rather weak fact situation for a public safety exception as compared to cases like *Mesa* and *Dean* where there could be no dispute about the officers' concern for the safety of others. The Court's conclusion in *Quarles* that public safety was threatened because "an accomplice might make use of [the gun]" or "a customer or employee might later come upon it"<sup>92</sup> seems rather speculative. The rape victim's careful description of the rapist certainly implied that there was but one perpetrator, and the fact that a citizen might find the gun, although no citizens appeared to be in the vicinity of the arrest, hardly turns it into a bomb.

On the other hand, there is something troubling about requiring an officer to stop and give warnings to an arrested suspect at a time when the officer's concern is focused in part on the weapon that remains missing. Even though the suspect is under arrest, until the nearby gun has been found the situation is not completely stabilized. While the opinion appears a bit overdramatic in suggesting the dangers in this particular situation, the opinion is important recognition of the fact that the arrest of the suspect does not necessarily mark the end of a criminal episode from the police's perspective. To the extent that the police's concerns about maintaining public safety now are to be considered in deciding the point at which *Miranda* warnings must be given, this decision shows a welcome sensi-

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<sup>90</sup> *Id.* at 2636 (O'Connor, J., concurring in part and dissenting in part).

<sup>91</sup> *Id.* at 2634 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor believed that the admissibility of Quarles' statements made after the gun had been found and after *Miranda* warnings had been given admitting that he purchased and owned the gun should turn solely on whether the trial court found Quarles' statements to be voluntary. Justice O'Connor nevertheless admitted that the issue of whether the failure to give *Miranda* warnings can "taint" subsequent admissions is still an open question for the Court. *Id.* n.1 (O'Connor, J., concurring in part and dissenting in part).

Since the *Quarles* decision, the Court has decided the "open question" mentioned by Justice O'Connor in that case. In *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the Court, in an opinion written by Justice O'Connor, ruled that where a statement has been obtained from an arrestee after proper *Miranda* warnings, the privilege does not require suppression of such statement solely because there was an earlier voluntary statement obtained without having been preceded by *Miranda* warnings. While the holding of *Elstad* is limited to a second statement situation, the language and reasoning in the opinion is broadly phrased in terms of "fruits" and thus might be read to permit the use at trial of any fruits of a voluntary statement obtained in violation of *Miranda*. *Id.* at 1293-93.

<sup>92</sup> 104 S. Ct. at 2632.

tivity to the police task. It would have been a stronger and clearer opinion, however, if the Court had downplayed its emphasis on this particular situation as one of threatened danger demanding "spontaneity rather than adherence to a police manual"<sup>93</sup> and instead based its conclusion firmly on what a police manual should tell its officers about public safety: in a situation involving the arrest of a suspect known to be armed, make sure the situation is completely under control, and *that includes taking control of the gun*, before worrying about interrogation safeguards.

#### D. APPLYING THE PUBLIC SAFETY EXCEPTION

Unfortunately, the test that officers and courts are supposed to apply after *Quarles* is a strange one. The Court in *Quarles* stressed that *Miranda* need not be applied "with all its rigor to a situation in which police officers ask questions *reasonably prompted by a concern for public safety*."<sup>94</sup> The relevant test, however, does not ask if the questions were "reasonably prompted by a concern for public safety." Instead, the Court emphasized that the subjective motivation of the officer is not a factor, and courts are to decide whether the particular "exigency" justified the questions, independent of the officer's intent.

This objective approach, which is supposed to be sympathetic to what the police are trying to do but at the same time ignores the justification for their actions, is another example of the Court's strange fascination with objective-sounding tests that are designed to avoid the need to consider the officer's intent or motive. The Court in *Rhode Island v. Innis* also followed an objective approach.<sup>95</sup> In that case, the defendant, who had been arrested for a shotgun killing of a taxi driver, had been given *Miranda* warnings and had asked for an attorney at the scene of the crime.<sup>96</sup> On the way to the station, within hearing of the suspect in the police car, one officer said to the other that there was a school for handicapped children nearby and expressed concern that one of the children might find the missing gun and hurt himself.<sup>97</sup> At that point, the suspect interrupted the officers' conversation and led the officers to the gun.<sup>98</sup> The issue in that case was whether there had been "interrogation" in violation of *Miranda*.

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (emphasis added).

<sup>95</sup> 446 U.S. 291 (1980).

<sup>96</sup> *Id.* at 293-94.

<sup>97</sup> *Id.* at 294-95.

<sup>98</sup> *Id.* at 295.

The Court in *Innis* announced an "objective" test, independent of the intent of the officers, for determining whether "interrogation" had taken place for purposes of *Miranda*.<sup>99</sup> According to the Court in *Innis*, interrogation for purposes of *Miranda* includes not just express questioning, but also "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."<sup>100</sup> Intent is not a part of the test; instead, a court should consider only whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response.<sup>101</sup> Based on the facts before it and its new objective test, the Court in *Innis* concluded that although the officers' comments obviously had "struck a responsive chord"<sup>102</sup> with *Innis*, the officers did not know that their comments were reasonably likely to elicit an incriminating response. The record revealed no evidence that the officers were aware that *Innis* was "*peculiarly susceptible* to an appeal to his conscience concerning the safety of handicapped children."<sup>103</sup>

The test in *Innis* is a maverick. Consider the case itself: does the Court in *Innis* really mean that it would reach the same result even if the officers had decided before getting into the car to drive to the station to try the old "handicapped child" routine in an effort to break down the defendant and obtain the incriminating weapon? Is conduct that clearly is intended to get a response from the arrestee permissible as long as it does not rise to the level of being "reasonably likely" to succeed in eliciting an incriminating response?<sup>104</sup>

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<sup>99</sup> The *Innis* test, despite its emphasis on objective factors, has an interesting subjective component — the background of the defendant. Because the background of the particular defendant is considered in applying the "reasonably likely to elicit" test, what constitutes interrogation could vary from case to case even though the conduct and motives of the police are identical. In dealing with a particularly "hard boiled" defendant, for example, there may be more leeway in what police can try in an effort to get a response.

<sup>100</sup> *Id.* at 301.

<sup>101</sup> In a footnote, however, the Court noted that intent is relevant as a barometer of whether the police should have known that their conduct was likely to elicit an incriminating statement. *Id.* at 301-02 n.7. The Court found that if the police practice "is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* But see *infra* note 104 and accompanying text.

<sup>102</sup> 446 U.S. at 303.

<sup>103</sup> *Id.* at 302-03 (emphasis added).

<sup>104</sup> Recently, the New York courts have struggled with the issue of whether it was interrogation under *Innis* when a detective placed stolen property that had been recovered from an employee of the arrestee just outside the cell of a burglary-murder suspect who then asked to speak to police and admitted his guilt. See *People v. Ferro*, 92 A.D.2d 298, 460 N.Y.S.2d 585 (1983), *rev'd*, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237



The other side of ignoring intent is presented by the situation where a police officer takes measures in the presence of the suspect clearly aimed at the safety of others which happen to meet the "reasonably likely to elicit an incriminating response" test. Is it now interrogation where an officer warns other officers of the possible presence of a gun and that warning also happens to cause the suspect in custody to give an incriminating response?<sup>105</sup> Not surprisingly, even after *Innis*, courts continue to emphasize heavily the officer's motive in deciding whether interrogation has taken place in violation of *Miranda*.<sup>106</sup>

As in *Innis*, the Court in *Quarles* maintained that lower courts should use an objective test, independent of the subjective motivations of the officers, to determine whether a public safety exception exists. But when the majority opinion in *Quarles* is examined closely, despite what the Court said about the irrelevance of subjective motivation, the opinion certainly assumes throughout that Officer Kraft was motivated by public safety concerns. The Court stressed that "Officer Kraft needed an answer to his question . . . to insure that further danger to the public did not result. . . ." <sup>107</sup> In reply to the dissenters' argument that the distinction being drawn is unworkable, the majority pointed out that "[t]he facts of this case clearly demonstrate . . . an officer's ability to recognize it." <sup>108</sup> Moreover, the thrust of the majority opinion, which expressed complete confidence in officers' ability to "distinguish almost instinctively between questions necessary to secure their own safety . . . and questions designed solely to elicit testimonial evidence from a suspect," <sup>109</sup>

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(1984), *cert. denied*, 105 S. Ct. 2700 (1985). What is interesting about the struggle is that it really should have been an easy issue because the detective involved admitted from the start that he placed the furs in sight of the suspect specifically to get the arrestee to tell what had happened. 92 A.D.2d at 302, 460 N.Y.S.2d at 587.

<sup>105</sup> In *United States v. Bennett*, 626 F.2d 1309 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981), an officer shouted a warning to other officers that the arrested suspect had a gun. That warning prompted an incriminating response from the arrestee. When the defendant argued on appeal that the warning amounted to interrogation under the *Innis* standard, the Court of Appeals for the Fifth Circuit found that it would be absurd to require an officer concerned with the safety of other officers to have to assure the suspect at the same time that his warning was not part of an interrogation. *Id.* at 1312.

<sup>106</sup> See, e.g., *United States v. Voice*, 627 F.2d 138, 145 (8th Cir. 1980); *Howard v. United States*, 452 A.2d 966, 968 (D.C. App. 1982), *cert. denied*, 460 U.S. 1087 (1983); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462, 466 (1983); *People v. Bryant*, 87 A.D. 2d 873, 874-75, 449 N.Y.S.2d 314, 316 (1982), *aff'd*, 59 N.Y.2d 786, 451 N.E.2d 476, 464 N.Y.S.2d 729 (1983); *State v. Guayante*, 63 Or. App. 212, 217-18, 663 P.2d 784, 787 (1983).

<sup>107</sup> 104 S. Ct. at 2633.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

certainly seemed to imply both that the distinction was drawn properly in this case and that the purpose for which such questions are asked should be of some importance in deciding whether public safety justified the questions.

The Court's rationale for avoiding an inquiry into the intent of the officer is contained in its assertion that most police officers in Officer Kraft's position "would act out of a host of different, instinctive, and largely unverifiable motives."<sup>110</sup> Motives may be "unverifiable" in the sense that there is no simple litmus test for determining the reasons for action, but just as the heart of criminal law is a question of intent, in determining whether an officer has violated the Constitution, the logical starting point must be an understanding of what the officer was trying to do. To try to erect a public safety exception to *Miranda* that works independently of a genuine concern for public safety on the part of the officer is awkward at best.

The fact that there may have been more than one motive behind the action of the officer in *Quarles* is not surprising because the police perform multiple tasks in our society,<sup>111</sup> and most of human behavior, legal and illegal, springs from multiple motives. But as long as the officer believed that his actions were immediately necessary to ensure public safety<sup>112</sup> and as long as the officer's conduct and belief were reasonable, that ought to be the central consideration in the application of a public safety exception, whether or not there were other objectives that the officer was trying to achieve at the same time. A good analogy to police action in an emergency situation is self-defense, where there is no requirement that the actor's sole motive in employing force be self-protection.<sup>113</sup> One sus-

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<sup>110</sup> *Id.* at 2632.

<sup>111</sup> See STANDARDS RELATING TO THE URBAN POLICE FUNCTION § 1.1 at 7 (Tent. Draft 1972).

<sup>112</sup> On the facts as explained in the opinion, including the fact that *Miranda* warnings were given immediately after the gun was located, it appears that the officer who asked about the gun was acting out of a general concern for public safety. The opinion suggests that the concern for public safety mandates that the police quickly secure a loaded gun that is loose in a public place. Obviously, the lower courts were using a different standard in concluding that there was no subjective motivation to protect public safety and appear to have been requiring an actual subjective apprehension of imminent injury to self or others. See 58 N.Y.2d at 666, 444 N.E. 2d at 985, 458 N.Y.S.2d at 521. This seems too narrow a concept of public safety.

<sup>113</sup> The draftsmen of the Model Penal Code noted that

while the actor must believe in the necessity of his defensive action for the purpose of his own protection . . . the draft does not demand that this be the sole motive of his actions. The existence of other motives does not detract from the reason why the privilege is granted. Moreover, an inquiry into dominant and secondary purposes would inevitably be far too complex.

MODEL PENAL CODE § 3.04 comments at 17 (Tent. Draft No. 8, 1958).

pects that for all the talk in *Quarles* about the irrelevance of the motive of the police officer, when lower courts decide which cases fall within the public safety exception, as has proved true in applying *Innis*, what the officer was trying to do usually will be the determining factor.<sup>114</sup>

E. *QUARLES* AND THE KIDNAPPING HYPOTHETICAL

*Quarles* seems to resolve the question of the need for *Miranda* warnings in the kidnapping hypothetical. If the possible, but very unlikely, risk that a loaded but discarded gun threatens public safety is sufficient to permit some questioning without warnings, it would seem that the equally serious and much more likely threat of harm to a kidnapping victim also would permit a public safety exception to *Miranda*. This matter, however, is not as clear as it might be because the opinion in *Quarles* sometimes seems to be directed only to a fast-developing, "on-the-scene" situation. Thus, it is possible that the public safety exception outlined in *Quarles* may not apply to the kidnapping hypothetical where questioning might take place at the station house many hours after the abduction. Is the kidnapping hypothetical (or a hostage negotiation or a prison takeover) a situation requiring "spontaneity rather than adherence to a police manual?"

Even assuming that *Quarles* resolves the issue of the need for warnings, where do the police go from there? In *Quarles*, the suspect spoke right up and indicated the location of the gun. But what if the kidnapper seemed more reluctant? Would it be wrong for the police to beg or plead with the kidnapper for the information, perhaps by making an impassioned plea to return the child to those who love him or her? Would it be improper for the police to try to scare the kidnapper into revealing the victim's whereabouts by explaining how capital punishment works in their jurisdiction? Could the police use some of the pressure tactics mentioned in *Miranda*? Perhaps, for example, the police could indicate sympathy with the kidnapper and suggest that the victim's wealthy parents may have deserved to have their child kidnapped. Or perhaps the police could bluff the kidnapper into revealing the whereabouts of the victim by falsely suggesting that they have more knowledge about the crime than they actually have. Does the Court's statement in *Quarles* mentioning that *Miranda* was concerned with "constitutionally impermissible practices of police interrogation"<sup>115</sup> suggest that such

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<sup>114</sup> See *supra* note 106 and accompanying text.

<sup>115</sup> 104 S. Ct. at 2632.

techniques are always wrong, no matter what the police are trying to do?<sup>116</sup>

Consider the next problem: what happens if the kidnapper tells the police officer that he wants to say nothing. In *Miranda*, the Court specifically said that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."<sup>117</sup> In *Michigan v. Mosley*,<sup>118</sup> however, the Court upheld the constitutionality of a confession taken from a suspect by a detective who had questioned Mosley about a murder in an interrogation session that took place two hours after Mosley had refused to answer questions about the robbery for which he was in jail. The second detective had been completely unaware of the earlier interrogation session. The Court ruled that Mosley's "right to cut off questioning" had been respected fully on these facts and distinguished the case before it from a situation "where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind."<sup>119</sup>

Must the police back off immediately in the kidnapping hypothetical, or is there to be a public safety exception to the requirement that the police cut off questioning if so requested by the suspect in custody? Standard hostage negotiation strategy emphasizes the need to keep talking with those holding the hostages in order to build a good working relationship.<sup>120</sup> Should the fact that the kidnapper is in custody make any difference where the police objective of rescuing the victim remains the same?

Finally, what if the kidnapper demands to see an attorney? In

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<sup>116</sup> Whether the interrogation techniques outlined in *Miranda* remain proper after warnings are given is a matter of debate. While a subsequent edition of the manual referred to by the Court in *Miranda* suggests that these techniques still are permissible after warnings are given, see J. REID & F. INBAU, CRIMINAL INTERROGATION AND CONFESSIONS (2d ed. 1967), it has been argued that many of the techniques mentioned by the Court should be regarded as "impermissible per se," White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 601 (1979).

<sup>117</sup> 384 U.S. at 473-74.

<sup>118</sup> 423 U.S. 96 (1975).

<sup>119</sup> *Id.* at 105-06. Where the defendant was questioned again on the same offense after having initially refused to answer questions, courts have not hesitated to rule the subsequent statements inadmissible on the authority of *Mosley*. See, e.g., *United States v. Hernandez*, 574 F.2d 1362, 1368 (5th Cir. 1978); *United States v. Clayton*, 407 F. Supp. 204, 206 (E.D. Wis. 1976).

<sup>120</sup> See, e.g., NATIONAL INSTITUTE OF CORRECTIONS, CORRECTION INFORMATION SERIES: PRISON HOSTAGE SITUATION 6 (1983); M. MIRON & A. GOLDSTEIN, HOSTAGE 95-97 (1979).

*Edwards v. Arizona*,<sup>121</sup> the Court ruled that once a suspect has invoked his right to counsel he "is not subject to further interrogation . . . until counsel has been made available to him, unless [he] himself initiates further communication, exchanges, or conversations with the police." Must all questioning now cease until a lawyer is present to help protect the defendant's privilege against self-incrimination? Would it be wrong for the police to plead with the kidnapper to change his mind about talking with a lawyer and to help them find the victim?<sup>122</sup> Or is there now to be an *Edwards* exception to take its place along side the *Miranda* exception fashioned in *Quarles*?<sup>123</sup>

*Quarles* is an ad hoc solution to the issue of *Miranda* warnings only. While any exception to *Miranda* is bound to be controversial, *Quarles* is a timid opinion in terms of the privilege against self-incrimination. The thrust of the *Quarles* opinion is that the Court can relax the "judicially imposed strictures of *Miranda*,"<sup>124</sup> but that is as far as it can go. To the extent that the *Quarles* opinion suggests that the Court is willing to bend the requirement of *Miranda* warnings in a public safety situation, but that the other rules relevant to investigative interrogations, such as the right to cut off questioning, the right to have counsel present and limitations on interrogation tactics, apply even in a situation like the kidnapping hypothetical, the opinion is troubling because such safeguards could, in some situations, reduce the likelihood that the victim will be rescued safely.

#### IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION

##### A. ONE SOLUTION: SPLIT THE BABY

One of the merits of the kidnapping hypothetical is that its clash with the rules surrounding routine custodial interrogation is so pervasive that it leaves no alternative but to move beyond the rules and their exceptions and to look again at the origin of those rules: the privilege against self-incrimination. Before considering the privilege, however, one disposition to the controversy surrounding the rescue situation or other such life-threatening crises should be considered. It is the argument that the dilemma presented between protecting

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<sup>121</sup> 451 U.S. 477, 484-85 (1981).

<sup>122</sup> This question does not dispute that there are some situations where providing a lawyer (or a priest or a social worker) may be a sound tactic to help convince the kidnapper to disclose the victim's location, but that consideration is separate from the question of whether a lawyer constitutionally is required where it appears to the police that the presence of a lawyer would not be a good strategic move.

<sup>123</sup> New York has fashioned an exception to its state right to counsel rules to handle the kidnapping situation. See *infra* notes 174-83 and accompanying text.

<sup>124</sup> 104 S. Ct. at 2630 n.3.

the life of the victim and the fifth amendment rights of the defendant is really a false dilemma because there is no such conflict.

In his dissent in *Quarles*, for example, Justice Marshall argued 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. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial.<sup>125</sup>

This is exactly the approach that critics have used to attack the rescue exception to *Miranda* that was developed by the California courts and employed in *Dean*.<sup>126</sup> In an influential article on *Miranda*, Professor Kenneth Graham argued that in the rescue situation

. . . the conflict is not between the victim's life and the defendant's constitutional rights, but rather between the interest of the state in prosecuting the defendant and his constitutional rights. This is so because the police may in fact acquire the lifesaving information so long as they do not attempt to use it to prosecute the defendant.

If the conflict is stated in this way, then the resolution seems implicit in the very principle of constitutional safeguards in criminal trials — the interest of the state in prosecution of crime must give way to the rights of the defendant.<sup>127</sup>

Notice that Justice Marshall and Professor Graham are completely comfortable with the assumption that the constitutional rights of the defendant are defined independently of the victim's life. While most citizens at least would be puzzled and perhaps even outraged at the notion that the privilege against self-incrimination and its attendant rules come into play when the police are asking questions of a kidnapper aimed at saving the life of the victim, neither Justice Marshall nor Professor Graham suggest that this consideration is unusual. Indeed, Justice Marshall stated that "[t]he policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety."<sup>128</sup>

This approach to the Constitution and the privilege treats the victim very badly. By placing sound and reasonable measures aimed at saving the life of the victim in conflict with what should be a concurrent police objective, enforcement of the criminal law, the vic-

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<sup>125</sup> *Id.* at 2648 (Marshall, J., dissenting).

<sup>126</sup> For a discussion of *Dean*, see *supra* notes 61-65 and accompanying text.

<sup>127</sup> Graham, *supra* note 7, at 120.

<sup>128</sup> 104 S. Ct. at 2649 (Marshall, J., dissenting).

tim's life now turns on a choice that an officer will have to make between pressing forward in an effort to save the victim while possibly jeopardizing the prosecution of the kidnapper and trying to balance both concerns and thereby increasing the risk to the victim's life. These conflicting objectives present a difficult choice for police and may make delay the most attractive alternative.

The uncertainty of the full impact on a later prosecution of actions that the officer takes to rescue the victim complicates the officer's dilemma. At stake is not simply the admissibility of statements pressured from the suspect in order to rescue the victim, but derivative physical evidence as well. The scope of suppression will, of course, depend on the amount of pressure put on the suspect<sup>129</sup> and the applicability of rules dealing with fruits of the poisonous tree, such as the inevitable discovery exception.<sup>130</sup> At the point at which the police have to act, they cannot be assured that the impact of their actions on a later prosecution will not be significant.

One of the major conclusions of the ABA Project on Standards for Criminal Justice dealing with the urban police function was that in order to achieve "optimum police effectiveness, the police should be recognized as having complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses."<sup>131</sup> The solution proposed by Marshall and Graham, which forces legitimate police objectives into sharp conflict, runs counter to the ABA recommendation, and their proposal is very unfair in what it asks of the police. Under Marshall and Graham's solution, police in a stressful situation are told that they may "split the baby," if they wish, in order to rescue the victim. By making what would seem to be reasonable and necessary police conduct costly in terms of a later prosecution of the kidnapper, the "solution" adds to the tension and undermines police effectiveness which may increase the danger to the victim.

This solution also seems inconsistent with what police were told in *Miranda*, where the Court was highly critical of the tactics the police were employing in the station house.<sup>132</sup> The majority in *Quarles* consciously referred to *Miranda* as being concerned with "constitu-

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<sup>129</sup> In *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the Court limited the poisonous fruit doctrine in connection with *Miranda* violations, and it may go even further in that direction. *Elstad* was premised on the voluntariness of the statement obtained in violation of *Miranda*. For a discussion of *Elstad*, see *supra* note 91.

<sup>130</sup> According to *Nix v. Williams*, 104 S. Ct. 2501 (1984), if the prosecution is able to show by a preponderance of the evidence that the fruits ultimately would have been discovered by lawful means, then the court is not required to suppress the subject fruits.

<sup>131</sup> STANDARDS RELATING TO THE URBAN POLICE FUNCTION 10 (1980).

<sup>132</sup> See *Miranda*, 384 U.S. at 445-58. For a discussion of whether *Miranda* should be

tionally impermissible practices of police interrogation."<sup>133</sup> Now, however, police are being told that warnings and trickery may be turned on or off as the police wish. One could not blame an officer who had read *Miranda* and now reads Marshall's solution to the public safety situation for concluding that there is a shell game going on with respect to the source of the violation of the privilege: sometimes the privilege is violated in the station house, and sometimes the privilege is violated only at trial.<sup>134</sup> But one thing is certain about this game: at a motion to suppress, the officer always loses.

#### B. CRITICISMS OF THE POLICIES OF THE PRIVILEGE

When one looks at the policies behind the privilege, it is hard not to conclude that the privilege leads a charmed existence. Despite sustained and powerful criticisms of policies that are sometimes vague and platitudinous,<sup>135</sup> the privilege has continued to expand.

Consider just a few of the critics of the privilege. In 1827, Jeremy Bentham parodied the various arguments sometimes put forward in favor of the privilege. One of the arguments Bentham attacked was the "fox-hunter's reason,"<sup>136</sup> the argument that "fairness" demands that the defendant not have to give evidence that may incriminate himself because it would take the sport out of prosecution by making conviction too easy. Bentham also attacked "the old woman's reason,"<sup>137</sup> the argument that it is hard on a defendant to be put in a situation where he may have to incriminate himself.

In the 1940's, two evidence scholars urged a cautious approach to the privilege. Wigmore concluded a section in his treatise that analyzed the policies offered in support of the privilege<sup>138</sup> with the

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read as an outright condemnation of some of the tactics criticized in that opinion, see *supra* note 116.

<sup>133</sup> 104 S. Ct. at 2632.

<sup>134</sup> Justice Marshall argued in his dissenting opinion that the policies of the privilege are not "diminished" by the fact that public safety is a concern of the police. One of the policies Justice Marshall specifically mentioned is the assurance that "criminal investigations will be conducted with integrity and that the judiciary will avoid the taint of official lawlessness." *Id.* at 2649 (Marshall, J., dissenting). But see *infra* notes 148-56 and accompanying text.

<sup>135</sup> The most complete overview of the policies of the privilege is found in Friendly, *supra* note 36, at 679-96.

<sup>136</sup> J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE*, in 7 *THE WORKS OF JEREMY BENTHAM* 454 (Bowring ed. 1843).

<sup>137</sup> *Id.* at 452.

<sup>138</sup> For Wigmore, the basis for the privilege lay in the belief that "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such



following warning:

In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. The privilege cannot be enforced without protecting crime; but that is a necessary evil inseparable from it, and not a reason for its existence. We should regret the evil not magnify it by approval.<sup>139</sup>

In the same passage Wigmore criticized the "current judicial habit" with respect to the privilege, which is "to laud it indiscriminately with false cant,"<sup>140</sup> and he urged that the privilege "be kept within limits the strictest possible."<sup>141</sup> Similarly, in 1946, Professor Charles McCormick expressed the hope that

the courts as they become more conversant with the history of the privilege will see that it is a survival that has outlived the context that gave it meaning, and that its application today is not to be extended under the influence of a vague sentimentality but is to be kept within the limits of realism and common sense.<sup>142</sup>

Scholars are not the only ones concerned about the sweep of the privilege. In 1966, just a few months before *Miranda* was decided, Justice Walter V. Schaefer of the Illinois Supreme Court expressed concern that interrogation was threatened by constitutional developments.<sup>143</sup> In a series of lectures in early 1966, Justice Schaefer reviewed the justifications for the privilege and argued that "[t]he chief difficulty with the privilege is that it runs counter to our ordinary standards of morality."<sup>144</sup>

In 1968, Judge Henry Friendly of the Second Circuit wrote a lengthy and powerful article that carefully analyzed the values and policies that have been offered in defense of the privilege.<sup>145</sup> Judge Friendly's analysis of the policies and values involved led him to conclude that the way the Court solved the problem of custodial interrogation in *Miranda* failed to give sufficient weight to "the need of the police to get information from the person best able to furnish it."<sup>146</sup> Judge Friendly also proposed a constitutional amendment

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evidence, and to be satisfied with an incomplete investigation of other sources." 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 309 (3d ed. 1940).

<sup>139</sup> *Id.* at 317.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 318.

<sup>142</sup> McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946).

<sup>143</sup> In *Miranda*, the Court referred to Justice Schaefer as "one of our country's most distinguished jurists." 384 U.S. at 480.

<sup>144</sup> W.V. SCHAEFER, *THE SUSPECT AND SOCIETY* 59 (1967).

<sup>145</sup> Friendly, *supra* note 36, at 679-96.

<sup>146</sup> *Id.* at 724.

aimed in part at solving some of the abuses that led to *Miranda* while accommodating the need of the police and society for information.<sup>147</sup>

Whatever the merits of *Miranda* and the Court's decisions with respect to the privilege in an investigative setting, Justice Marshall's insistence that the policies of the privilege are "not diminished" simply because police are trying to protect public safety seems incorrect. Consider, for example, the policy that sometimes is said to be at the core of the privilege: the privilege protects a fair state-individual balance so that the power of the state does not overwhelm the individual in a way that undercuts the adversary process.<sup>148</sup> This policy, vague as it is, seems far less applicable in a rescue situation than in a routine investigative setting. In a rescue situation where the criminal episode has not ended, it seems a bit premature to suggest that the concerns of an adversary system of justice should determine how the crisis at hand is to be resolved by the authorities. More importantly, in a routine investigative setting the balance of power heavily favors the state, but in a serious public safety situation the balance of power may be dramatically in favor of the suspect. In a case like *Krom*, for example, it is the kidnapper who is in a position where he has tremendous leverage.

To put the position of the kidnapper in better perspective, consider the situation in a case like *Krom* solely from a contractual perspective. If the victim's father had signed the contractual agreement demanded by the kidnapper, which asked for \$400,000 in exchange for the release of the victim, and the victim consequently was found alive, surely no court in the country would enforce such a contract. Such a contract probably is not supported by consideration because the kidnapper has, in addition to a moral duty, a preexisting legal duty to help release the victim from the harm that he engineered.<sup>149</sup> In addition, such a contract clearly would be the product of unlawful duress and thus unenforceable.<sup>150</sup>

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<sup>147</sup> *Id.* at 721-22.

<sup>148</sup> See 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 317-18 (McNaughton rev. 1961). See also Friendly, *supra* note 36, at 693-94.

<sup>149</sup> Under the law of contracts, the courts generally "have ruled that where a party does or promises to do what he is already legally obligated to do or promises to refrain from doing or refrains from doing what he is not legally privileged to do he has not incurred a detriment." J.D. CALAMARI AND J.M. PERILLO, CONTRACTS § 4.7 at 145 (1977).

<sup>150</sup> Duress has been defined to include "[t]hreats of personal injury, . . . [t]hreats of destroying, injuring, seizing land or other things, or, . . . [a]ny other wrongful acts that compel a person to manifest apparent consent to a transaction . . . or cause such fear as to preclude him from exercising free will and judgment in entering a transaction." 13 WILLISTON, CONTRACTS § 1603, at 661-63 (3d ed. Williston & Jaeger 1970). In *United States v. West*, 607 F.2d 300 (9th Cir. 1979), the Court of Appeals for the Ninth Circuit

The same concerns found in contract cases undercut the enforceability of any grant of immunity that might be obtained through concern over the safety of other citizens. An example of such problems in an immunity context is *United States v. McBride*,<sup>151</sup> where a prosecutor was forced to promise immunity to an arrested extortionist and another accomplice to secure the suspects' cooperation in locating and disarming bombs that were alleged to have been secreted around a refinery in order to extort fifteen million dollars. In that case, the court struggled with the enforceability of the immunity agreement. The court reached a shaky compromise, concluding that although a promise to fulfill a preexisting legal duty is not valid consideration, the defendant's relinquishment of his rights under the privilege was valid consideration.<sup>152</sup> The court then ruled, however, that the agreement was voidable for duress because "[t]o enforce the resulting agreement simply because the magnitude of the impact of the original extortion letter enabled McBride to adopt a cooperative and benign attitude toward officials once he was in custody, would be to permit him and [his accomplice] to profit from their earlier criminal behavior."<sup>153</sup>

*McBride* is an interesting example of the pressures that may heavily favor the suspect in a rescue situation. While it is clear that if the privilege was applicable, use immunity protecting McBride from the use at trial of the information supplied and its fruits was all that McBride was entitled to under the Constitution,<sup>154</sup> he was able to extort a promise of transactional immunity for both himself and another accomplice who was also in custody.<sup>155</sup> It is not surprising that negotiation guidelines for prison hostage situations suggest that amnesty must be a nonnegotiable item.<sup>156</sup> If public policy so overwhelmingly rejects grants of immunity and the enforceability of contracts which are entered into through a fear for the safety of

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ruled that an amnesty agreement between prison officials and prisoners who had taken hostages was void for duress, and the prisoners could be prosecuted for their actions.

<sup>151</sup> 571 F. Supp. 596 (S.D. Tex. 1983).

<sup>152</sup> *Id.* at 605.

<sup>153</sup> *Id.* at 612. The court went on to conclude, however, that actions of the government after it had determined that all bombs had been removed amounted to ratification of the agreement. *Id.* at 613.

<sup>154</sup> See *Kastigar v. United States*, 406 U.S. 441 (1972); see generally C. WHITEBREAD, CRIMINAL PROCEDURE § 14.04, at 261-63 (1980).

<sup>155</sup> Certainly, the federal immunity statute was not designed for this purpose. See *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975).

<sup>156</sup> See NATIONAL INSTITUTE OF CORRECTIONS, CORRECTION INFORMATION SERIES: PRISON HOSTAGE SITUATIONS 13 (1983); see also J.P. NEEDHAM, NEUTRALIZATION OF PRISON HOSTAGE SITUATIONS 12 (1977).

others, this certainly suggests that there is something amiss with the conclusion that the privilege is applicable in such a setting.

### C. ANOTHER LOOK AT *MIRANDA*

In deciding what the role of the fifth amendment privilege should be in a life-threatening situation like the kidnapping hypothetical, it makes sense to consider again the case that first moved the fifth amendment into the area of police interrogation—*Miranda v. Arizona*. *Miranda* represented a sharp departure from the prior history of the privilege. Justices Harlan and White wrote powerful dissenting opinions in *Miranda* criticizing the expansion of the fifth amendment into the station house, a decidedly nonjudicial setting. Justice Harlan referred to the Court's reliance on the fifth amendment as a "trompe l'oeil", and he found that the Court's opinion "reveals no adequate basis for extending the Fifth Amendment's privilege to the police station."<sup>157</sup> Justice White also found that the application of the privilege to police interrogation has "no significant support in the history of the privilege or in the language of the Fifth Amendment,"<sup>158</sup> and that the Court's decision is simply "at odds with American and English legal history."<sup>159</sup>

In an article entitled in part *A Dissent From the Miranda Dissents*,<sup>160</sup> Professor Yale Kamisar, a leading authority on the privilege, tried to make up for the obvious historical deficiencies in the majority opinion in *Miranda*. While conceding that *Miranda* "is unquestionably a sharp departure from the recent past,"<sup>161</sup> Kamisar argued that the extension of the fifth amendment in *Miranda* to the station house makes sense because our modern system of criminal investigation, with its focus on professional police, is really an outgrowth of a historical system in which magistrates did the work, including the interrogation of suspects, that is now done by police in investigating crime. Kamisar supported his argument in part by reference to an earlier article by Professor Edmund M. Morgan on the evolving role of police in our society:

The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger. . . . Investigation by the police is not judicial, but when it consists of an examination of an accused, it is quite as much an official

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<sup>157</sup> 384 U.S. at 510 (Harlan, J., dissenting).

<sup>158</sup> *Id.* at 526 (White, J., dissenting).

<sup>159</sup> *Id.* at 531 (White, J., dissenting).

<sup>160</sup> Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the New "Fifth" Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

<sup>161</sup> *Id.* at 63 (emphasis in original).

proceeding as the early English preliminary hearing before a magistrate, and it has none of the safeguards of a judicial proceeding. If the historical confines of the privilege are to be broadened, this surely is an area that needs inclusion. . . .<sup>162</sup>

Kamisar's analysis of the function that the privilege served prior to the establishment of professional police forces led him to conclude that "the application of the privilege to police interrogation can be defended as either a logical deduction from the constitutional provision or a practical condition upon its successful operation."<sup>163</sup>

Notice that Professor Kamisar's defense of the Court's decision in *Miranda* regarding police interrogation is a functional one. His argument suggests that now that police are performing the investigative function previously handled by magistrates, the privilege should apply to the police in that capacity. Unfortunately, even Professor Kamisar, who made a strong case for the extension of the fifth amendment to police investigative questioning, seems to have lost sight of the fact that his argument in defense of *Miranda* is premised upon police functioning in a traditional investigative capacity. Kamisar's argument says nothing about the application of the privilege when police are performing a task that judges do not perform, namely, when police act in a peacekeeping capacity aimed at restoring order and preventing the loss of life. Consider, however, his comments about police questioning in a lifesaving context from another article:

It seems to me, as it did to Professor Kenneth Graham a dozen years ago, that so long as the police conduct is likely to elicit incriminating statements and thus endanger the privilege, it is police "interrogation" *regardless of its primary purpose or motivation*, and that if it otherwise qualifies as "interrogation," *it does not become something else* because the interrogator's main purpose is the saving of a life rather than the procuring of incriminating statements, even though self-incrimination may be seen as a windfall.<sup>164</sup>

Professor Kamisar is certainly correct that interrogation is interrogation just as a rose is a rose, but he is wrong when he assumes that all government questioning to obtain information that happens to be incriminating must be treated the same for purposes of the privilege against self-incrimination. His starting point that all police conduct that is likely to elicit incriminating statements endangers "the privilege," besides begging the question, constitutes an ex-

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<sup>162</sup> *Id.* at 69 (quoting Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 27-28 (1949)).

<sup>163</sup> Kamisar, *supra* note 160, at 81.

<sup>164</sup> Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 GEO. L. J. 1, 9 (1978) (emphasis in original).

treme view of the privilege: the privilege is designed to be an absolute protection of incriminating information in any and all contexts. Unfortunately, this view which determines the scope of the fifth amendment by ignoring the purpose and function of police conduct, was adopted by the Court in *Innis*.<sup>165</sup>

One sees reasoning similar to Kamisar's in many places. Recall the *Mesa* case where a panel from the Court of Appeals for the Third Circuit split three ways but reversed the suppression of the statements that a barricaded gunman made to a hostage negotiator who was trying to talk the gunman into a peaceful surrender but failed to precede such efforts with *Miranda* warnings.<sup>166</sup> Echoing the dissenting opinion in *Mesa*,<sup>167</sup> a Note in the *Yale Law Journal* criticized the ruling in *Mesa* because "the same concerns" that motivated the Court in *Miranda* were present in this armed encounter between the gunman and the negotiator; thus, warnings were required by the logic of that case.<sup>168</sup> The Note stressed, for example, that the negotiation technique of professing friendship in *Mesa* is exactly the sort of interrogation technique the Court was concerned with in *Miranda* because it might "tend to discourage suspects from invoking their right against self-incrimination."<sup>169</sup>

The suggestion that "the same concerns" that motivated the Court in *Miranda* are present in *Mesa* is shocking in the sterility of its analysis. It is true that *Miranda* was concerned with a defendant who was not free to go and that *Mesa* involved a surrounded gunman who was not free to go. It also is true that *Miranda* raised serious questions about various interrogation techniques, such as false assurances of friendship, and that similar techniques are included in training manuals for hostage negotiators. It also is true that being confronted by the guns of a team of sharpshooters can be even more frightening and intimidating than the station house atmosphere which concerned the Court in *Miranda*. But these comparisons simply point to the folly of approaching the scope of the fifth amendment solely from the defendant's point of view while totally ignoring the threat to the lives of others and the purpose and function of the police conduct.

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<sup>165</sup> 446 U.S. 291 (1979). See also *supra* notes 95-103 and accompanying text.

<sup>166</sup> See *supra* notes 52-60 and accompanying text.

<sup>167</sup> See *supra* note 60 and accompanying text.

<sup>168</sup> Note, *Standoff Situations and the Fifth Amendment*, 91 YALE L.J. 344 (1981).

<sup>169</sup> *Id.* at 351.

## V. A MORE LIMITED VIEW OF THE FIFTH AMENDMENT

A. A MODEL TO CONSIDER: *PEOPLE V. KROM*

Critics of the argument that the fifth amendment privilege is not applicable to a crisis situation like the kidnapping hypothetical face the initial problem, emphasized by both the majority opinion in *Quarles*<sup>170</sup> and the dissenting opinion of Justice Marshall,<sup>171</sup> that the exceptions under the fourth amendment, such as that permitting a police search in exigent circumstances, have no analogy under the fifth amendment because the fourth amendment is phrased in terms of reasonableness, while the fifth amendment is absolute in its phrasing and permits no exceptions, even if reasonable.<sup>172</sup> In *Quarles*, the Court finessed the problem by concluding that even if reasonable exceptions are not permitted to the fifth amendment, exceptions to the "judicially imposed strictures of *Miranda*" are permissible in limited circumstances.<sup>173</sup> The relevant issue is not, however, whether fifth amendment rules permit exceptions in emergency situations, but whether the fifth amendment is meant to apply in circumstances where the police are functioning in a situation which is primarily noninvestigative and where life is at stake.

An opinion that emphasizes the distinction between police functioning in an investigative capacity and police functioning in an emergency setting where life is at stake is *People v. Krom*,<sup>174</sup> a case mentioned earlier for its powerful facts.<sup>175</sup> *Krom* is a model for the sort of analysis that ought to be used in considering the scope of the privilege in a life-threatening situation. *Krom* involved a suspect in custody who repeatedly insisted on both immunity and money before he would lead the authorities to the kidnapping victim. At one point in the discussions with police, Krom requested a specific attorney, and that attorney came to the station but left after he failed to reach a fee agreement with Krom. Krom then waived his right to counsel and eventually led the police to the victim. The victim, whom Krom had placed in a coffin-like box, had suffocated by the time the police arrived. The police then brought Krom back to the station where he gave a complete confession.

Prior to trial, Krom sought to suppress the statements and

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<sup>170</sup> 104 S. Ct. at 2630 n.3.

<sup>171</sup> *Id.* at 2648 n.10 (Marshall, J., dissenting).

<sup>172</sup> Both opinions cite as authority *Fisher v. United States*, 425 U.S. 391, 400 (1976), where the Court, in dicta, stated that "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness."

<sup>173</sup> 104 S. Ct. at 2630 n.3.

<sup>174</sup> 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139.

<sup>175</sup> See *supra* notes 17-32 and accompanying text.

other information that he initially had provided the police after he initially requested counsel. Krom relied on the New York Constitution, which the New York Court of Appeals has interpreted to bar further questioning of a suspect in custody in the absence of counsel once the suspect has requested counsel.<sup>176</sup> In *Krom*, the New York Court of Appeals drew a sharp distinction between the questioning that had taken place before the victim's body had been found and the questioning that had taken place at the station after the death of the victim had become known. The difference the court observed was in the function the police were performing. A "primary goal" of the police, the court found, is "to prevent crime and provide emergency assistance to those whose lives may be in danger."<sup>177</sup> Once a crime has been committed, however, police perform their "secondary role of attempting to apprehend the person responsible, and gathering sufficient evidence to obtain a conviction."<sup>178</sup>

The requirement of counsel is a limitation on the "investigative techniques available to the police."<sup>179</sup> If the same restriction were imposed "where the police are engaged in their primary duty of attempting to provide assistance to a person whose life is, or may be, in danger, there is the additional risk that delay or frustration of the investigation may result in death or injury of the victim."<sup>180</sup> To hold that the special restrictions of the state right to counsel extend to where police are trying to save a life would "either dangerously limit the power of the police to find and possibly rescue the victim or would, perversely, permit the kidnapper to continue his ransom demands and negotiations from the sanctuary of the police

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<sup>176</sup> *People v. Cunningham*, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1980). At the time *Cunningham* was decided, the position of the United States Supreme Court on this suppression issue was uncertain. The uncertainty about the Court's position resulted from its narrow holding in *Michigan v. Mosley*, 423 U.S. 96 (1975). In *Mosley*, the Court upheld the admissibility of a custodial statement that Mosley gave to a second detective after he had declined to answer questions about a separate crime for a different detective. In *Edwards v. Arizona*, 451 U.S. 477 (1981), however, the Court held that once a suspect in custody invokes his right to counsel, he must not be subject to further interrogation until counsel has been made available to him, unless he himself initiates further exchanges with the police.

The Court of Appeals in *Krom* found that the *Edwards'* standard had been satisfied, presumably because the court felt that Krom had initiated further discussion with the police. 61 N.Y.2d at 197, 461 N.E.2d at 280, 473 N.Y.S.2d at 143. The New York rule, however, is broader than *Edwards* because it mandates the presence of counsel at any further questioning and does not allow an uncounseled waiver of that right. *Id.*

<sup>177</sup> *Id.* at 198, 461 N.E.2d at 281, 473 N.Y.S.2d at 144.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*



station.”<sup>181</sup>

Based on the above reasoning, the court ruled that the conduct of the police in continuing to question the suspect in an attempt to find the victim did not violate the state right to counsel, but that once the victim had been found, further questioning “could only serve to provide evidence for use against the defendant at trial.”<sup>182</sup> Thus, the defendant should not have been questioned after the victim’s body was discovered. Nevertheless, given all the other evidence against Krom at trial, the court concluded that the admission of the statement obtained after the victim’s body was discovered was a harmless error.<sup>183</sup>

Although *Krom* is only a state constitutional decision involving the right to counsel, its analysis suggests a way to make sense of the privilege against self-incrimination in a rescue situation. The privilege is designed to set up a balance in an investigative setting between the suspect and the state. The privilege and its attendant rules, however, should not control in a crisis situation where the primary purpose of the state conduct is to prevent a tragedy from occurring.

In the standoff situation in *Mesa*,<sup>184</sup> one of the members of the divided panel that upheld the admissibility of incriminating statements made by the gunman to the negotiator reached a conclusion along the lines that have been suggested in this article. Judge Adams concluded that because the agent’s “prime motivation was to achieve a peaceful resolution of the confrontation” and because the conversation was “nonadversarial and noninquisitive in nature,”<sup>185</sup> the exchange between the gunman and the negotiator did not constitute a fifth amendment interrogation. Adams admitted, however, that because the agent “had a secondary purpose of gathering possible evidence” against Mesa, the interrogation issue was “an extremely close one.”<sup>186</sup>

The problem with this analysis is that it is inconsistent with the Court’s sweeping view of fifth amendment interrogation in *Innis* which asks only whether the questions were “reasonably likely to elicit an incriminating response,” independent of the officer’s motivation in seeking the information. Thus, applying *Innis* to the kidnapping hypothetical, the question asking where the victim is being

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<sup>181</sup> *Id.* at 200, 461 N.E.2d at 282, 473 N.Y.S.2d at 145.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 200-01, 461 N.E.2d at 282-83, 473 N.Y.S.2d at 145-46.

<sup>184</sup> See *supra* notes 52-60 and accompanying text.

<sup>185</sup> 638 F.2d at 589-90 (Adams, J., concurring).

<sup>186</sup> *Id.* (Adams, J., concurring).

held is fifth amendment "interrogation" regardless of the fact that the officer's dominant and overriding objective is securing the victim's safety and well-being.

Yet one of the oddities of *Innis* is that despite its broad conception of fifth amendment interrogation, the Court was very careful to exclude by fiat from its definition of interrogation questioning by the police that is "normally attendant to arrest and custody."<sup>187</sup> By that language, the Court was sanctioning the long line of cases that have held that the privilege is inapplicable to routine questioning during the booking and administrative processing of an arrested suspect.<sup>188</sup> Those cases make it clear that despite the fact that no *Miranda* warnings have been given (or the arrestee previously has asserted his right to remain silent) and despite the fact that the pressure of obtaining bail may necessitate the arrestee's cooperation in providing such information, information obtained in the booking process is not protected by the privilege. In *United States ex rel. Hines v. LaVallee*,<sup>189</sup> the leading case on booking information, the Court of Appeals for the Second Circuit explained that "[d]espite the breadth of the language in *Miranda*, the Supreme Court was concerned with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data for booking. . . ."<sup>190</sup> In *Hines*, the defendant's response to a booking question about his family status turned out to be very incriminating

<sup>187</sup> For a discussion of the *Innis* test, see *supra* notes 99-101 and accompanying text.

<sup>188</sup> See, e.g., *United States v. Prewitt*, 553 F.2d 1082, 1085-86 (7th Cir.), *cert. denied*, 434 U.S. 840 (1977); *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *People v. Dalton*, 91 Ill. 2d 22, 434 N.E.2d 1127 (1972). But see *Proctor v. United States*, 404 F.2d 819, 820-21 (D.C. Cir. 1968).

During oral argument in *Quarles*, Justice O'Connor specifically mentioned the line of booking cases when counsel for Quarles argued that, despite the public location of the arrest, officers should have administered warnings to Quarles prior to any questioning. Justice O'Connor asked, "What about booking questions? Some of those questions, such as name and address, can be incriminating depending on the crime and what the police need to know. However, we have found such questions to be proper." The attorney for Quarles responded that "[t]hose questions are not like the 'where is your gun' inquiry." 34 Crim. L. Rptr. 4182 (1984).

<sup>189</sup> 521 F.2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976).

<sup>190</sup> *Id.* at 1113. See also *Varner v. State*, 418 So. 2d 961, 962 (Ala. Crim. App. 1982) (booking questions are "'non-investigative' questions not designed to investigate crimes or the involvement of the arrested person or others in crimes"); *State v. Simoneau*, 402 A.2d 870, 873 (Me. 1979) ("brief neutral questions which are not part of an effort to elicit a confession or admission do not constitute 'interrogation'").

The American Law Institute's Model Code of Pre-Arrest Procedure, which includes provisions dealing with the conditions that must be met prior to questioning a suspect in custody, also states that it is concerned in such provisions only with investigative questioning. In other words, the Code only focuses on "questioning designed to investigate crimes or the involvement of the arrested person or others in crimes." MODEL CODE OF PRE-ARREST PROCEDURE § 140.8(5) (1975).

because his response that he had been married for eleven years and had two children was exactly what the robber-rapist had told the victim.

In other cases, courts have held that booking questions aimed at determining the defendant's name or alias,<sup>191</sup> address,<sup>192</sup> age<sup>193</sup> and other similar information<sup>194</sup> need not be preceded by *Miranda* warnings. While sometimes courts bolster their reasoning by referring to the questions being asked as "neutral"<sup>195</sup> or "routine,"<sup>196</sup> there is no such thing as neutral information in the abstract. In a particular case, one's age can supply an element of the offense,<sup>197</sup> one's address can lead to the discovery of evidence<sup>198</sup> or to powerful impeachment evidence,<sup>199</sup> one's medical condition can be incriminating in a drug case<sup>200</sup> and, as *Hines* shows, even one's family status can be powerfully incriminating in a given case.

*Innis* impliedly rejects the reasoning of *Hines*, which makes the inapplicability of the privilege turn on the noninvestigative purpose for which the information was sought. Thus, it was necessary for the Court in *Innis* to carve out an exception for booking information in the middle of its new test for fifth amendment interrogation. It is certainly a strange set of priorities that would exclude from the protection of the privilege against self-incrimination a demand for an arrestee's address for booking purposes, but would put within the protection of the privilege a request for the same information from an arrestee in an attempt to rescue the victim.

#### B. THE PRIVILEGE IN OTHER NONINVESTIGATIVE SETTINGS

The kidnapping hypothetical can be viewed as part of the Court's continuing struggle to make sense of the privilege against

<sup>191</sup> See *United States v. Prewitt*, 553 F.2d 1082 (7th Cir.), cert. denied, 434 U.S. 840 (1977); *State v. Landrum*, 112 Ariz. 555, 544 P.2d 664 (1976).

<sup>192</sup> See *State v. Cozad*, 113 Ariz. 437, 556 P.2d 312 (1976); *Mills v. Maryland*, 278 Md. 262, 363 A.2d 491 (1976).

<sup>193</sup> See *People v. Hernandez*, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448 (1968); *Pulliam v. State*, 264 Ind. 381, 345 N.E.2d 229 (1976).

<sup>194</sup> See *State v. Rasmussen*, 92 Idaho 731, 736, 449 P.2d 837, 842 (1969) (fact that defendant gave his occupation as "pimp" during booking admissible).

<sup>195</sup> *Simoneau*, 402 A.2d at 873.

<sup>196</sup> *Pulliam*, 264 Ind. at 387, 345 N.E.2d at 236; *Grimes v. State*, 44 Md. App. 580, 586, 409 A.2d 767, 771 (1980); *State v. Cunningham*, 153 N.J. Super. 350, 352, 379 A.2d 860, 861 (1977).

<sup>197</sup> See *Hernandez*, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448; *Pulliam*, 264 Ind. 381, 345 N.E.2d 229.

<sup>198</sup> See *Toohy v. United States*, 404 F.2d 907 (9th Cir. 1968); *Cunningham*, 153 N.J. Super. 350, 379 A.2d 860.

<sup>199</sup> See *Farley v. United States*, 381 F.2d 357 (5th Cir. 1967).

<sup>200</sup> See *State v. Mitchell*, 421 So. 2d 851 (La. 1981).

self-incrimination in settings that are primarily noninvestigative. The best examples of this struggle are the opinions of the Court dealing with the privilege in connection with self-reporting statutes.

In 1927 in *United States v. Sullivan*,<sup>201</sup> for example, the Court refused to get into the question of how one can be compelled, consistent with the privilege, to provide the amount of one's taxable income from illegal sources on a tax return by simply asserting that "[i]t would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."<sup>202</sup> But the claim that a large amount of unexplained income may be powerfully incriminating is not extreme or extravagant at all.<sup>203</sup>

Another example of the Court's struggle with the privilege in connection with self-reporting statutes is *California v. Byers*,<sup>204</sup> where the Court upheld the constitutionality of a statute that required a driver involved in an accident to stop at the scene and give his name and address. Byers claimed that he could not be prosecuted for violating the statute because the information would have been incriminating in his situation. The California Supreme Court agreed and, to save the statute, inserted a guarantee of "use immunity" to protect those who complied with the statute from the use in a criminal prosecution of the information supplied or its fruits.<sup>205</sup>

The four-person plurality began its opinion with a finding that the statute did not present a substantial risk of self-incrimination because most drivers who complied would risk no criminal prosecution.<sup>206</sup> The problem with this conclusion, even assuming the Court's empirical assertion is correct, is that the risk of incrimination for purposes of the privilege is always an individual determination, and here Byers did run the risk of criminal prosecution. The

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<sup>201</sup> 274 U.S. 259 (1927).

<sup>202</sup> *Id.* at 263-64.

<sup>203</sup> A response "tends to incriminate" if it might provide a clue that leads investigators to discover facts that could constitute links in a chain of circumstantial evidence proving criminal conduct. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The burden of proof is heavily in favor of the person invoking the privilege. The Court has found that a response may not be compelled unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." *Id.* at 488 (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881) (emphasis omitted)). According to the definition of an incriminating answer in *Hoffman*, it is apparent that a large amount of unexplained income on a tax return certainly may be an important link in the chain of evidence leading to conviction.

<sup>204</sup> 402 U.S. 424 (1971) (plurality opinion).

<sup>205</sup> *Byers v. Justice Court*, 71 Cal. 2d 1039, 458 P.2d 465, 80 Cal. Rptr. 553 (1969), *vacated*, 402 U.S. 424 (1971).

<sup>206</sup> 402 U.S. at 430 (plurality opinion).

plurality then found that the information required was not really incriminating because requiring one to stop is not testimonial, and the disclosure of one's name and address is "an essentially neutral act."<sup>207</sup> It would be hard not to agree with the five members of the Court who replied that in the situation facing Byers, stopping and providing information hardly would be "neutral"; for all practical purposes, it would be an admission of identity for the criminal prosecution.<sup>208</sup>

The most interesting opinion in *Byers* is that of Justice Harlan, the swing vote in the case, who argued that the privilege is meant to be absolute when the governmental purpose is the enforcement of the criminal law, but it allows a balancing of interests when other important governmental interests are at stake.<sup>209</sup> In this situation, given the California legislature's concern about establishing a system of fiscal responsibility for automobile accidents, Justice Harlan concluded that the statute did not violate the privilege, even though the information that must be supplied was incriminating.<sup>210</sup>

Justice Harlan's view of the privilege as absolute when the governmental purpose is the enforcement of criminal law but as allowing a balancing of interests when information is sought for other important governmental purposes is consistent with the view of the privilege that has been argued in this article. Although the positions are consistent, it is important to emphasize that the need for an exception to the privilege in the kidnapping hypothetical and other rescue situations seems much more compelling than in the self-reporting cases. In the self-reporting cases, use immunity is a viable option, even if it may be costly in terms of the effect on criminal

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<sup>207</sup> *Id.* at 432 (plurality opinion).

<sup>208</sup> Despite its lack of a consistent rationale, *Byers* is the authority on which reporting statutes consistently are upheld. See, e.g., *United States v. Dichne*, 612 F.2d 632, 638 (2d Cir. 1979), *cert. denied*, 445 U.S. 928 (1980) (upholding reporting requirement of Bank Secrecy Act dealing with transporting currency outside country); *United States v. Stirling*, 571 F.2d 708, 729 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978) (upholding reporting requirements of the securities laws); *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo. 1985) (upholding recordkeeping and reporting requirements by purchaser of valuable personal property).

<sup>209</sup> 402 U.S. at 440 (Harlan, J., concurring). There are hints of a balancing approach in the plurality opinion as well. Commenting on the variety of self-reporting statutes in our society, the plurality opinion concedes that information in such reports could be "a link in the chain" of evidence leading to conviction. Nevertheless, the plurality opinion also finds that "under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Id.* at 427-28 (plurality opinion). The plurality, however, avoids the need to use a balancing approach by concluding that the response called for by the subject statute was not incriminating.

<sup>210</sup> *Id.* at 444-48 (Harlan, J., concurring).

prosecution in some situations. In a rescue situation, however, use immunity from use of potentially incriminating information needed to rescue the person at peril, which is designed to protect those who have put a person at risk and who would seem to have both a moral and legal obligation to remove the threat, seems much more questionable from both a practical and moral point of view than use immunity in a self-reporting case.

## VI. DUE PROCESS AND THE RESCUE SITUATION

The reason the Court felt compelled to announce an exception to the requirement of *Miranda* warnings in *Quarles* was its concern that in a situation threatening public safety, suspects "might well be deterred from responding"<sup>211</sup> if warnings were administered. In response to this concern, Justice Marshall, in dissent, argued that what the Court really was doing was sanctioning the exploitation of the coercive atmosphere that follows custodial arrest in order to force the suspect to answer the questions asked. In that case, Justice Marshall argued that "[i]t would strain credulity to contend that Officer Kraft's questioning of respondent was not coercive."<sup>212</sup> Justice Marshall pointed out that the suspect was handcuffed and was surrounded in an empty store by four armed officers, one of whose first words were: "Where is the gun?"

The majority in *Quarles* tiptoed by this issue. The Court noted that no issue of compulsion had been raised below.<sup>213</sup> This observation, however, is a bit misleading because the lower courts excluded the subject statement on *Miranda* grounds and never reached the voluntariness issue. The Court then avoided resolving the issue by pointing out in a footnote that *Quarles* "is certainly free on remand to argue that his statement was coerced under traditional due process standards."<sup>214</sup>

Voluntariness often appears to be a determination that lies in the eye of the beholder. Recall *United States v. Mesa*,<sup>215</sup> discussed earlier, where a trained hostage negotiator obtained incriminating statements from a gunman surrounded by police in a motel room over a three-hour period. The negotiator used his training to build a relationship of trust with the suicidal gunman and eventually was able to effect a surrender without violence. The two judges whose opinions controlled the result in *Mesa* both concluded that the state-

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<sup>211</sup> 104 S. Ct. at 2632.

<sup>212</sup> *Id.* at 2647 (Marshall, J., dissenting).

<sup>213</sup> *Id.* at 2631.

<sup>214</sup> *Id.* n.5.

<sup>215</sup> See *supra* notes 52-60 and accompanying text.

ments of Mesa were voluntary.<sup>216</sup> One judge emphasized that because Mesa was not in the physical control of the officers and the officers had no power to handcuff Mesa or otherwise force him to listen to their questioning, the statements were voluntary.<sup>217</sup> In contrast, one just as easily could fasten on other factors, such as the length of the discussion, the techniques used and the instability of the distraught and suicidal suspect, to argue that the statements were involuntary.<sup>218</sup> It was precisely this sort of confusion over "voluntariness" that the Court hoped to avoid by its opinion in *Miranda*, an opinion which, the Court recently declared, "creates a presumption of compulsion"<sup>219</sup> if no warnings are given. After *Quarles*, however, it appears that "voluntariness" will remain the sort of doubtful inquiry that will be necessary in situations like *Mesa* or the kidnapping hypothetical, and one suspects that the concept of "voluntariness" will be stretched near to the breaking point to preserve admissibility.

The problem with many of these decisions again lies in treating incriminating statements elicited in a rescue or emergency situation as a species of confessions that are to be measured by the standards and procedures surrounding confessions. It would be a mistake to follow the majority's proscription in *Quarles* and mechanically apply the "traditional due process standards" to incriminating information elicited in a situation like the kidnapping hypothetical. The standards of due process must be different when the circumstances that led to the statement are so radically different from those of a traditional police investigation. Consider, for example, the hornbook rule that a confession that is the result of a promise violates due process and is inadmissible against a defendant.<sup>220</sup> Suppose the police in *Krom*<sup>221</sup> had promised the kidnapper the \$400,000 that was demanded because they believed it was the only way to assure the

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<sup>216</sup> Chief Judge Seitz's opinion emphasizes his conclusion that the statements police obtained from Mesa in the course of the negotiations were voluntary. In addition, he indicated that if the statements were not voluntary, he would reach a different conclusion on their admissibility. 638 F.2d at 589. Judge Adams also stressed that Mesa's statements "were made of his own volition," and he characterized the exchange between Mesa and the F.B.I. agent as "voluntary revelations made by an admittedly troubled person . . . to a compassionate listener." *Id.* at 590 (Adams, J., concurring).

<sup>217</sup> *Id.* at 588-89.

<sup>218</sup> It has been suggested that Mesa could have made a valid due process argument on the facts of his situation. See Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 878 n.58 (1981).

<sup>219</sup> *Elstad*, 105 S. Ct. at 1292.

<sup>220</sup> This rule goes back to *Braun v. United States*, 168 U.S. 532, 542-43 (1897). See also *Grades v. Boles*, 398 F.2d 409 (4th Cir. 1968); *People v. Jiminez*, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978).

<sup>221</sup> See *supra* notes 17-32 and accompanying text.

victim's rescue. Or suppose, as in *United States v. McBride*,<sup>222</sup> the police promised an extortionist in custody immunity in order to locate bombs that they feared would cause extensive damage and injury. Are the due process rights of the suspects violated because police obtained incriminating information by such promises?

There are, of course, strong reasons to resist the use of false promises or promises the police know to be unenforceable in negotiating with a kidnapper or extortionist, whether the suspect is in custody or not.<sup>223</sup> One reason is that such promises may seriously jeopardize the credibility of the police in the future. Nevertheless, the suggestion that such promises violate suspects' due process rights in such circumstances seems wide of the mark. Assuming the statements are reliable, there is no reason to bar the admissibility of such statements even if they would be involuntary under "traditional due process standards."

The reason why due process is not violated in these examples even though the same conduct in an investigative setting would not be appropriate is that due process is evaluated pursuant to a balancing test. Scholars often explain due process as having two distinct objectives: one is a concern for the fairness of the procedures used to convict a defendant and the other is an insistence that the state treat the defendant in a way that respects his dignity as an individual.<sup>224</sup> The first objective, which is the same type of institutional and procedural fairness that lies at the heart of the privilege against self-incrimination,<sup>225</sup> is inapplicable in a rescue situation for the same reason that the policies of the privilege are inapplicable: investigative limits designed to protect the suspect in the station house by insuring that the equality crucial to the adversary trial is not undercut during the interrogation process are inappropriate in an emergency situation where police have the object of protecting

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<sup>222</sup> See *supra* notes 151-56 and accompanying text.

<sup>223</sup> See *supra* notes 153-56 and accompanying text.

<sup>224</sup> See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1966).

<sup>225</sup> In *Rogers v. Richmond*, 365 U.S. 534 (1961), the Court explained that a conviction based on an involuntary confession violates due process

not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

*Id.* at 540-41. This language was echoed later in *Griffin v. California*, 380 U.S. 609, 614 (1965), where the Court, quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), held that comment on the failure of a defendant to testify at trial violated the fifth amendment because such comment is a "remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws."



the lives of third persons when they are dealing with a suspect. In such a situation, police may have little choice but to put psychological pressure on the gunman or kidnapper in order to rescue the victim.

The second objective, that the state treat its citizens in a way that is consistent with their individual dignity,<sup>226</sup> is also a balance. When life is at stake, conduct is appropriate that would not be permitted in a different setting. It would seem offensive to our notion of fairness for police to wear down a suspect over a period of hours in order to obtain a confession,<sup>227</sup> but a trained hostage negotiator may have to talk to the gunman for hours to secure the safe release of the hostages.<sup>228</sup> It should not make a difference whether or not the suspected kidnapper is surrounded by police or happens to be in custody as long as the direct threat to innocent lives remains. Obviously, there are limits on the conduct of the police in their treatment of suspects even in an emergency situation where life is at stake. In determining those limits, however, the traditional scope of police conduct permitted in a purely investigative context is only a starting point.

## VII. CONCLUSION

Given the historical and philosophical uncertainties that have always surrounded the privilege against self-incrimination, it is perhaps understandable that the Court in *Quarles* felt more comfortable making an exception to the rules that surround the privilege rather than examining and questioning the premise that says that the privilege controls police conduct, even when the police are dealing with a situation posing a danger to others. But *Quarles*, as this article has tried to show, does not solve the privilege problem in rescue situations. It answers only the *Miranda* warnings issue, and it raises a number of other issues that also beg for "public safety" exceptions to earlier Court pronouncements.

More importantly, at a time when studies have urged an appreciation of the complexity and multiplicity of police functions, the Court seems to view the function of the police as primarily the in-

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<sup>226</sup> See *Schmerber v. California*, 384 U.S. 757 (1966); *Rochin v. California*, 342 U.S. 165 (1952).

<sup>227</sup> See *Spano v. New York*, 360 U.S. 315 (1959).

<sup>228</sup> In *Krom*, 61 N.Y.2d 187, 461 N.E.2d 276, 473 N.Y.S.2d 139, the dialogue with the kidnapper began in the morning and continued until the kidnapper led the police to the victim later that evening. For a discussion of *Krom*, see *supra* notes 17-32 and accompanying text.

vestigation of crime and the enforcement of criminal law.<sup>229</sup> The Court's narrow perspective seriously underestimates the importance of other objectives of police conduct, and it leads the Court to a conception of fifth amendment interrogation that is too broad. The Court's sweeping view of fifth amendment interrogation is unable to accommodate other interests, like the concern for a victim's safety in the rescue situation.

In arguing about the scope of the privilege, one has to accept that there is no such thing as a knockout punch in fifth amendment analysis. Indeed, it is quite the opposite: despite powerful criticisms and urgings of caution, the privilege has a strong momentum for expansion.<sup>230</sup> The privilege is flexible enough in wording and in history that it can be interpreted as an absolute protection from state inquiry, even where the information sought is needed to save a life. It also can be interpreted to mean that in any and all contexts, even in life-threatening emergencies, the state must "shoulder the whole load." But such an interpretation seems unfair and distorted in the way it treats those who are at risk.

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<sup>229</sup> This misperception of police is quite graphic in *Quarles* where the Court insisted that the conduct of police in arresting an armed suspect requires "spontaneity rather than adherence to a police manual." 104 S. Ct. at 2632. In the Court's eyes, the mythical police manual is a compendium of investigative rules such as *Miranda* that does not cover the protection of public safety in effecting the arrest of an armed gunman, a fairly common police task.

<sup>230</sup> It has been argued that the solution to the fifth amendment problem in a standoff situation where a surrounded gunman has taken hostages is for the Court simply to rule as a constitutional matter that all conversations in such circumstances are per se inadmissible. This approach, it is argued, would protect the defendant's constitutional rights and remove any temptation by police to give *Miranda* warnings which might threaten loss of life in such a situation. See Note, *supra* note 168, at 356-62.