Constitutional Law - Criminal Law - Fifth Amendment - Compulsory Self-Incrimination - Custodial Interrogation

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CONSTITUTIONAL LAW—CRIMINAL LAW—FIFTH AMENDMENT—
COMPULSORY SELF-INCrimINATION—CUSTODIAL INTERROGATION—
Creating a specific exception to its 1966 decision in Miranda v. Arizona, the United States Supreme Court has held that there is no constitutional bar to admitting into evidence a custodial suspect’s statements and the evidence subsequently discovered, where the exigencies of the situation demonstrate that the police officer’s failure to recite the Miranda warnings, prior to questioning the suspect, is reasonably prompted by a concern for public safety.


At approximately 12:30 a.m. on September 11, 1980, two policemen, Officer Frank Kraft and Officer Sal Scarring, on road patrol in Queens, New York, encountered a young woman who approached their car and requested assistance. The woman said she had just been raped, and described her assailant as a black male, approximately six feet tall, wearing a black jacket with the name “Big Ben” printed in yellow letters on the back. She stated that she had last seen the man entering a nearby supermarket, and that he was carrying a gun.

Arriving at the supermarket, Officer Kraft entered the store and quickly spotted Benjamin Quarles, who matched the woman’s description of her attacker, approaching a check-out counter. Upon spotting the officer, Quarles fled toward the rear of the store. Officer Kraft, with drawn revolver, pursued the suspect but momentarily lost sight of Quarles when he turned a corner at the end of an aisle. Seconds later, regaining sight of the suspect, Kraft ordered him to stop and put his hands over his head. Surrounded by other officers who had arrived on the scene, Officer Kraft frisked the suspect and, upon discovering an empty shoulder holster, handcuffed Quarles’ hands behind his back and asked him where the gun was. Quarles nodded toward a stack of empty cartons and said, “the gun is over there.” After retrieving a loaded revolver

2. Id. at 2629.
3. Id.
4. Id.
5. Id. at 2629-30.
6. Id. at 2630, 2642.
from one of the cartons, Officer Kraft formally arrested Quarles and advised him of his rights, reading the *Miranda* warnings from a printed card.\(^7\) Having expressed a willingness to answer questions without an attorney present, Quarles was then asked by Kraft if he owned the revolver and where he had purchased it. Quarles answered that he owned the revolver and had purchased it in Miami, Florida.\(^9\)

Quarles was charged with criminal possession of a weapon.\(^10\) Prior to trial, the defense filed a motion to suppress the gun and statements made by Quarles at the time of the arrest, asserting that their admission was precluded by their unlawful acquisition by the police prior to advising him of his *Miranda* rights. Quarles further maintained that statements made subsequent to the pre-interrogation warnings should be similarly excluded as evidence tainted by the initial *Miranda* violation.\(^11\) At the close of the suppression hearing, the trial judge declared that the gun and the statements were inadmissable.\(^2\) The New York State Supreme Court, Appellate Division, affirmed the order without opinion,\(^1\) and the state appealed by permission to the court of appeals where the determination of the appellate division was affirmed by a 4-3 vote.\(^14\)

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7. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court concluded that in absence of proper safeguards, the process of in-custody interrogation manifested such inherently compelling pressures as to seriously jeopardize the fifth amendment privilege against self-incrimination. *Id.* at 467. Accordingly, the Court held that:

Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Id.* at 478-79.

8. 104 S. Ct. at 2630.

9. *Id.*

10. *Id.* Quarles had originally been indicted for rape, but the record is devoid of any explanation for the state's failure to pursue that charge. *Id.* at 2630 n.2.

11. *Id.* See *Wong Sun v. United States*, 371 U.S. 471 (1963). In *Wong Sun*, the Court overturned the defendant's conviction for transportation and concealment of heroin because the sources of information leading to the arrest were too vague and untested to establish probable cause for the issuance of an arrest warrant. Accordingly, the Court barred subsequent verbal statements by the accused, concluding that the statements constituted tainted "fruit" resulting from the prior illegal police conduct. This posture eventually came to be known as the "fruit of the poisonous tree" doctrine. *See id.* at 481-87.


In a memorandum opinion supporting the affirmation, the New York Court of Appeals concluded that Quarles was “in custody” during the pre-warning questioning by Officer Kraft, and was therefore deprived of the protection of the prophylactic *Miranda* requirements. Rejecting the State’s contention that this failure on the part of Officer Kraft was justified by the nature of the exigent circumstances, the majority refused to recognize an emergency exception to the requirements of *Miranda*, stating that the record as advanced by lower courts was devoid of any evidence of a potential threat to safety or that the questioning of the suspect was motivated by any such concern.

Based on the decision of the court of appeals, the State petitioned the United States Supreme Court for certiorari. The Supreme Court granted certiorari and reversed, concluding that, on the facts of the instant case, there was a “public safety” exception to the requirements that a custodial suspect be informed of, and freely waive, his *Miranda* rights before any of his statements could be admitted into evidence, and that the applicability of that exception was not contingent upon the subjective motivation of the interrogating officers involved. Applying the exception to the case at hand, the Court held that the court of appeals erred in ordering the suppression of Quarles’ unwarned statement and the gun, and in excluding his post-warning statements on the grounds that they constituted tainted fruits of the interrogating officer’s initial failure.

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

16. *Id.* Testimony at the suppression hearing revealed that at the time Quarles was asked where the gun was, he had already been frisked and handcuffed, and was surrounded by four police officers who had reholstered their firearms. As Officer Kraft testified, “the situation was under control.” *Id.* See also N.Y. Const. art. 6, § 3 (McKinney 1969) (limiting the jurisdiction of the court of appeals to the review of questions of law). See, e.g., People v. Cosme, 48 N.Y.2d 286, 422 N.Y.S.2d 652, 397 N.E.2d 1319 (1979) (the court of appeals is not empowered to review the factual determinations of the lower courts except where a claim of evidentiary insufficiency or other error of law is raised).

Of additional note is the dissenting opinion of Judge Wachtler in the New York Court of Appeals disposition of the Quarles case, in which he states his belief that the officer’s failure to inform Quarles of his *Miranda* rights was entirely reasonable under the circumstances. In Judge Wachtler’s opinion, the questioning of Quarles manifested a “compelling noninvestigatory purpose” which precluded its exclusion as custodial interrogation designed to elicit an incriminating response from the suspect. As such, the dissent viewed the questioning at issue as falling outside the area of concern addressed by the United States Supreme Court in *Miranda*, and argued that the order of the supreme court should have been reversed. People v. Quarles, 58 N.Y.2d at 667, 669, 671, 458 N.Y.S.2d at 522-24, 444 N.E.2d at 986-88 (1982) (Wachtler, J., dissenting).


to warn the suspect.  

Justice Rehnquist, writing for the Court, prefaced his analysis with the announcement that the creation of a "public safety" exception to the prophylactic requirements of *Miranda* resulted from the belief on the part of the majority that the circumstances of this case engendered a concern for public safety that exceeded the desirability of "adher[ing] to the literal language" of those requirements.

In his analysis, Justice Rehnquist first examined the fifth amendment privilege against compulsory self-incrimination and the expansion of its application in *Miranda v. Arizona* to individuals subjected to custodial interrogation by police officers. Concluding that not all incriminating admissions by suspects were prohibited by the fifth amendment, he reasoned that the warnings established by *Miranda* were not themselves rights to which the Constitution extends protection, but rather prophylactic measures designed to protect a suspect's right against compulsory self-incrimination. Justice Rehnquist then noted that because no claim had been asserted that Quarles' statements were actually coerced by police conduct, the only issue properly before the court was whether Officer Kraft's failure to advise Quarles of his *Miranda* rights was justified under the circumstances of the interrogation, or whether, as Quarles maintained, the failure to provide those procedural safeguards raised a presumption of compulsion barring the

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19. *Id.* at 2634.
20. *Id.* at 2630.
22. *Id.* See *Miranda*, 384 U.S. 436 (1966). The fifth amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *U.S. Const.* amend. V.
23. 104 S. Ct. at 2630-31. See United States v. Washington, 431 U.S. 181, 187 (1977). In *Washington*, the Court recognized that not all self-incriminating statements, whether prompted by the questions of government officials or offered spontaneously, are necessarily precluded from admission by the fifth amendment. The majority stated that the *Miranda* Court extended the protections available under the fifth amendment because of the inherently coercive environment of the stationhouse interrogation, and concluded that "[a]bsent some officially coerced self-accusation, the Fifth Amendment Privilege is not violated by even the most damning admissions." *Id.* at 186-87.
admissibility of the statements as evidence.  

After expressing agreement with the finding of the New York Court of Appeals that Quarles was "in custody" for the purposes of *Miranda,* Justice Rehnquist rejected Quarles' contention that his statements must be presumed coerced in view of the officer's failure to read him the *Miranda* warnings. He then announced that in "kaleidoscopic situation[s]" such as the one faced by Officer Kraft, there would be a "public safety" exception to the requirement that *Miranda* warnings be provided to the subject of custodial interrogation before his statements could be admitted into evidence, and that the availability of that exception was not contingent upon the subjective motivation of the officer involved. Justice Rehnquist stated that the exercise of this exception should not be regulated by a later determination at a suppression hearing as to the motivation of the arresting officer, since the actions of officers in such situations were prompted by a variety of motives that by their very nature reduced to speculation any endeavor aimed at pinpointing their origins.

In further support of his position, Justice Rehnquist maintained that the doctrinal underpinnings of *Miranda* did not compel the strict application of its requirements in situations such as the one under consideration, where the questions directed at the suspect were "reasonably prompted by a concern for public safety." Justice Rehnquist asserted that though the *Miranda* majority had found the social cost of fewer convictions to be outweighed by the necessity of protecting the fifth amendment privilege against compulsory self-incrimination, the potential dangers resulting from a

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25. 104 S. Ct. at 2631 & n.5.
26. 104 S. Ct. at 2631.
27. Id. at 2631 & n.5.
28. Id. at 2632.
29. Id. The Court stated: "Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect." Id.
30. Id. In Justice Rehnquist's opinion, the questioning of Quarles was prompted by such reasonable concern: "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it." Id.
31. Id. See Miranda v. Arizona, 384 U.S. 436, 481, 489 (1966). In *Miranda*, the Court posited that the limits it was imposing on the interrogation process should not unduly interfere with law enforcement, and that the "conditions of law enforcement in our country [demonstrate] that lawlessness will not result from warning an individual of his rights or allowing him to exercise them." Id.
concealed gun in a public area tipped the scales of reason in the opposite direction.\textsuperscript{32} To assume a contrary position, he continued, would place police officers in the undesirable position of having to balance the societal interest in asking warningless questions directed at securing the public safety against preservation of the admissibility of the evidence.\textsuperscript{33}

In creating this “narrow exception” to the requirements of \textit{Miranda}, Justice Rehnquist acknowledged that the clarity of those requirements would be diminished to some extent, and recognized the importance of providing a rule that was workable within the practical limitations of police investigation.\textsuperscript{34} He concluded, however, that the exception the Court was creating lessened the need for “on-the-scene balancing,” and predicted that since the availability of the exception would be determined by the exigencies of each situation, and because police officers would “distinguish almost instinctively” between questions necessary to assure safety and those directed at acquiring incriminating evidence, the exception, rather than impede law enforcement, would enable police officers to act instinctively when faced with situations posing an imminent threat to public safety.\textsuperscript{35}

In the portion of her opinion which dissented from the majority, Justice O’Connor criticized the establishment of a “public safety” exception to the requirements of \textit{Miranda} as an unjustified departure from precedent and an undesirable “blurring” of its previously clear strictures.\textsuperscript{36} Justice O’Connor observed that since \textit{Miranda}, the Court had consistently prohibited the use at trial of statements derived from custodial questioning not preceded by an explanation of the suspect’s privilege against self-incrimination.\textsuperscript{37} Similarly, she noted, the Court had also staunchly resisted any attempt to broaden the scope of the \textit{Miranda} rules or to increase

\begin{footnotesize}
\begin{enumerate}
\item[32.] 104 S. Ct. at 2632-33.
\item[33.] \textit{Id.} at 2633.
\item[34.] \textit{Id.} Citing Dunaway v. New York, 442 U.S. 200, 213-14 (1979), the Court stated: “As we have in other contexts, we recognize here the importance of a workable rule ‘to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.’” 104 S. Ct. at 2633.
\item[35.] \textit{Id.}
\item[36.] \textit{Id.} at 2634 (O’Connor, J., concurring in part and dissenting in part).
\item[37.] \textit{Id.} at 2634-35. Justice O’Connor stated: “the \textit{Miranda} Court [itself] would not accept any suggestion ‘that society’s need for interrogation [could] outweig[h] the privilege’[;] \textit{[i]t}o that Court, the privilege against self-incrimination was absolute and therefore could not be ‘abridged.’” \textit{Id.} at 2635.
\end{enumerate}
\end{footnotesize}
their burden on the administration of law enforcement.\textsuperscript{38} As a result of the Court's well established posture in this regard, Justice O'Connor maintained that "the meaning of Miranda had become reasonably clear and law enforcement practices had adjusted to its strictures."\textsuperscript{39}

This desirable clarity, warned Justice O'Connor, would inevitably become blurred by the "public safety" exception advocated by the majority, making Miranda's requirements more difficult to comprehend and impeding the facility of their application.\textsuperscript{40} Moreover, she maintained that the rationale proffered by the majority in vindication of this departure from established precedent—that police officers should not be compelled to weigh the interest in public safety against the suspect's privilege of freedom from self-incrimination—evaded the more essential question of whether the accused or the state should "bear the cost of securing the public safety when such questions were asked and answered."\textsuperscript{41}

According to Justice O'Connor, the Court in Miranda had answered this question when it established that statements obtained in custodial interrogation, not preceded by the required warnings, were to be held inadmissible, thus squarely placing the burden on the state.\textsuperscript{42} Justice O'Connor concluded that since there appeared to be no rational basis for finding that questions prompted by the exigencies of circumstance were any less compelling than those arising from custodial interrogation, "a principled application of Miranda" required that Quarles' pre-warning statement be suppressed.\textsuperscript{43}

In the concurring portion of her opinion, Justice O'Connor agreed with the majority that the lower court's suppression of the gun was erroneous.\textsuperscript{44} The rationale of Justice O'Connor's position relied upon the distinction between testimonial and non-testimonial evidence, and did not rely on the "public safety" exception

\begin{itemize}
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id. at 2636 (O'Connor, J., concurring in part and dissenting in part).
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id. Justice O'Connor maintained that the question of "who should bear the burden" was the quintessential question addressed by the Court's holding in Miranda, which, she asserted, "had never been read to prohibit the police from asking questions to secure the public safety [but rather] require[d] that the answers received be presumed compelled and that they be excluded from evidence at trial." Id.
  \item \textsuperscript{42} Id. See Orozco v. Texas, 394 U.S. 324, 326 (1969) (use at trial of uncounseled statements of accused held violative of self-incrimination clause of the fifth amendment).
  \item \textsuperscript{43} 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part).
  \item \textsuperscript{44} Id. at 2636-37 (O'Connor, J., concurring in part and dissenting in part).
\end{itemize}
created by the majority.\textsuperscript{45} Citing the exploration of this distinction in \textit{Schmerber v. California},\textsuperscript{46} Justice O'Connor maintained that the protection arising from the fifth amendment privilege against self-incrimination extended only to a suspect's personal testimony, and did not mandate the exclusion of non-testimonial evidence, in this case a gun, which was "derived not from actual compulsion but from a statement taken in the absence of \textit{Miranda} warnings."\textsuperscript{47}

Justice Marshall filed a dissenting opinion in which he strongly criticized the majority's departure from the clear guidelines of \textit{Miranda} and the Court's firmly established views on the mandate of the fifth amendment.\textsuperscript{48} Justice Marshall also denounced as a trans-

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\item \textsuperscript{45} \textit{Id.} at 2637 (O'Connor, J., concurring in part and dissenting in part).
\item \textsuperscript{46} 384 U.S. 757 (1966). \textit{In Schmerber}, decided within a week of \textit{Miranda}, the petitioner had been hospitalized following an automobile accident involving the vehicle he was driving. Suspecting intoxication, a blood test, which later confirmed that suspicion, was administered at the direction of an investigating police officer. The petitioner argued that the admission of the results of this test as evidence in the subsequent prosecution violated his privilege against self-incrimination. The Court rejected this argument, holding that the fifth amendment privilege protected the "accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." \textit{Id.} at 758-59, 761.
\item \textsuperscript{47} 104 S. Ct. at 2639-40. Justice O'Connor acknowledged that the Court had, in similar cases, suggested that a violation of the privilege against self-incrimination required exclusion of not only coerced statements, but the derivative evidence as well. Justice O'Connor distinguished these cases, however, as situations in which witnesses, asserting their fifth amendment privilege before a tribunal vested with contempt power, were confronted with the perilous alternatives of perjury, self-incrimination, or contempt of court. In such cases, noted Justice O'Connor, the concern was to protect the witness against the use of the coerced answers and derivative evidence in a subsequent proceeding against that person. In contrast, Justice O'Connor maintained that suspects in Quarles' position, being subjected to comparatively informal custodial interrogation, are not compelled to testify before "a court, grand jury, or other such formal tribunal." Where probable cause arising from independent police investigation justifies placing a suspect in custody, she asserted, if the suspect fails to introduce his privilege against self-incrimination, a complaint that the police failed to inform him of his \textit{Miranda} rights serves only to raise the irrebuttable presumption that his statements were coerced, and does not demonstrate that he was "actually or overtly coerced . . . to provide testimony and other evidence to be used against him at trial." \textit{Id.} at 2639 (O'Connor, J., concurring in part and dissenting in part).
\item \textsuperscript{48} \textit{Id.} at 2641 (Marshall, J., dissenting).
\end{itemize}
parent attempt to "slip away" from the clear and well supported factual findings of the lower court, the majority conclusion that the unwarned interrogation of Quarles was justified by the threat to public safety inherent in the "objective" circumstances surrounding the arrest. According to Justice Marshall, the record as perfected by the lower court established that the officers involved had no reasonable basis for questioning the suspect prior to informing him of his Miranda rights, since the situation was fully under control and Quarles had been rendered physically helpless.

Echoing the concerns expressed by Justice O'Connor in the dissenting portion of her opinion, Justice Marshall assailed the majority's deviation from cases spanning the last eighteen years in support of Miranda v. Arizona. He predicted that this departure from "doctrinal tranquility" could only act to cloud the prior lucidity of Miranda for both law enforcement officers and members of the judiciary. Like Justice O'Connor, Justice Marshall found lacking the justification supplied by the majority of freeing law enforcement officers from being forced to choose between preserving incriminatory evidence and securing public safety. Most disturbing, in Justice Marshall's view, was the majority's neglect of the clear mandate of the constitutional prohibition against compulsory self-incrimination as extended by Miranda to persons subjected to custodial interrogation. Justice Marshall submitted that the majority misunderstood Miranda when it argued that the Miranda Court, while willing to bear the cost of potentially fewer criminal convic-

49. Specifically, Justice Marshall noted that based on the evidence and testimony presented at the suppression hearing, the lower court had unambiguously determined that: 1) neither Quarles nor the missing firearm threatened the public safety, as the suspect had been "reduced to a condition of physical powerlessness" and no customers or employees were walking through the store at such a late hour; 2) Quarles was not thought to have, nor did he in fact have, an accomplice; 3) there was no evidence that Officer Kraft questioned Quarles out of any concern for the safety of the public or for the officers themselves. Justice Marshall dismissed the majority proposal that the extent of the danger presented be measured by the "objective" circumstances rather than the motivation of the officers involved as a poorly disguised attempt to "slip away" from the findings of fact. This tactic, he stated, was in contravention of the recent positions of the Court in Sumner v. Mata, 455 U.S. 591 (1982) (deference must be shown to a state court's findings of fact), and Rushen v. Spain, 104 S. Ct. 453, 456 (1984) ("questions of ... fact must be determined ... by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts."). 50. Id. at 2642-43 (Marshall, J., dissenting).

51. See supra note 7 and accompanying text.

52. 104 S. Ct. at 2644 (Marshall, J., dissenting).

53. Id.

54. Id. at 2645 (Marshall, J., dissenting).
tions in exchange for expanded protection for the fifth amendment privilege, would not be willing to suffer the added burden of threats to the public safety. According to Justice Marshall, the Miranda Court did not employ such "judicial balancing" in reaching its determination. To the contrary, the disposition of Miranda, he asserted, pivoted on a determination of whether the self-incrimination clause of the fifth amendment permitted the government to profit from the admission of statements derived from custodial interrogation.

In ruling that custodial interrogations were inherently coercive, and creating a constitutional presumption that statements derived therefrom were compelled and therefore inadmissible, Justice Marshall observed that Miranda answered this question and imposed upon the government the burden of demonstrating that the suspect's privilege against compelled self-incrimination had not been violated. Justice Marshall maintained that in creating its "public safety" exception to Miranda, the majority had been remiss in failing to address this constitutional presumption.

Noting that the majority had never suggested that questions posed at securing the public safety were any less coercive than those raised in custodial interrogation but directed at other concerns, Justice Marshall observed that the majority's only contention was that the public safety could be more readily assured if Miranda did not inhibit custodial interrogation directed toward that end. Thus, Justice Marshall maintained, in the absence of a showing that public safety interrogations were somehow less coercive than those contemplated by the Miranda Court, the "public safety" exception could only be considered in direct contravention of Miranda and the fifth amendment prohibition against compulsory self-incrimination.

Having concluded that the strictures of Miranda and the protections afforded under the fifth amendment required the exclusion of Quarles' statements, Justice Marshall further maintained that the gun in question should also have been suppressed in accordance with the "fruit of the poisonous tree" doctrine advanced in Wong

55. Id.
56. Id. at 2645.
57. Id. at 2646 (Marshall, J., dissenting).
58. Id. at 2647 (Marshall, J., dissenting).
59. Id.
60. Id.
Sun v. United States. He noted, however, that in view of the Court's recent decision in Nix v. Williams interpreting Wong v. Sun as allowing the admission as evidence of "constitutionally-tainted 'fruits'" that would have been inevitably discovered by the government, it could have been argued that Quarles' gun fell within the scope of this "inevitable discovery rule." Accordingly, Justice Marshall concluded that he would affirm the order of the lower court suppressing Quarles' testimony, and would vacate and remand for reconsideration in light of Nix v. Williams, the order suppressing the gun.

The Quarles Court, by a five to four vote, has set forth the first specific exception to its 1966 decision in Miranda v. Arizona. The creation of this "public safety" exception appears certain to fuel the doctrinal debate about the scope of the protection to be extended the privilege against compulsory self-incrimination that had smoldered and occasionally ignited over the last eighteen years.

Historically, the origin of the privilege can be found in the early resistance of the English to the oath ex officio in the ecclesiastical courts. The oath was utilized to discover suspected violations of church law or custom, or to establish the veracity of charges which were not disclosed to the person questioned. Dissatisfaction with this procedure arose from its requirement that a person who had not been formally charged answer under oath all questions posed by the proper ecclesiastical official.

Opposition to the oath peaked in 1637, when a young, vocal Puritan named John ("Freeborn John") Lilburne defied the Star

63. Id. at 2649 (Marshall, J., dissenting).
64. Id. at 2650 (Marshall, J., dissenting).
66. In old English law, the oath ex officio was the means by which a clergyman charged with a criminal offense was allowed to swear himself to be innocent; it was also the oath by which the compurgators swore that they believed in his innocence. BLACK'S LAW DICTIONARY 967 (5th ed. 1979). For an excellent treatment of the historical development of the privilege, see L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); See generally 8 WIGMORE, EVIDENCE § 2250 (McNaughton rev. 1961); Morgan, The Privilege Against Self-Incrimination, 34 MINN. L. REV. 1 (1949); J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 440 (1883).
67. Morgan, supra note 66, at 1.
68. Lilburne was known as "Freeborn John" because of his persistent outcries in defense of the rights of every freeborn Englishman; he once described himself as "an honest true-bred, freeborn Englishman that never in his life loved a tyrant nor feared an oppressor." LEVY, supra note 66, at 272.
by refusing to answer questions under oath regarding an alleged importation of heretical and seditious books. For his defiance, Lilburne was fined, imprisoned on several occasions and publicly tortured. Relief from the oppressive oath came in the form of legislative action in 1641, when the Long Parliament passed a bill abolishing the administration of the oath ex officio. That same year, the House of Commons voted that the sentence of John Lilburne was illegal and ordered reparation; four years later, the House of Lords concurred that the sentence was illegal and was to be vacated. In the words of Dean Griswold, “It seems quite clear that we owe the privilege [against compulsory self-incrimination] of today primarily to ‘Freeborn John’ Lilburne.”

While the utility of the English origins of the privilege in explaining its current function is debatable, it is clear that the priv-

69. As early as 1348, the Privy Council sat at Westminster in a room with a ceiling embossed with stars. This “Sterred Chambre” later housed the Court of Star Chamber, which was nothing more than the Privy Council sitting judicially to hear cases involving disobedience to royal orders, riots, contempt, libel, forgery, counterfeiting, and fraud. Id. at 49. As a prerogative court with practically discretionary jurisdiction, it could try virtually any act it chose to regard as an offense, and could prescribe punishment ranging from fine and imprisonment to torture. Id. at 100-101.

While its sessions were public, secret preliminary examination of defendants was routine. Such examination involved:

putting the accused to the oath ex officio and then administer[ing] a set of interrogatories which would expose the guilty. Sometimes the oath was not used; sometimes it was required but there were no set interrogatories, the accused being let alone to tell his story in his own way and then answer questions. The Star Chamber could use any procedure it wished and dispense with its usual procedure when it wished.

Id. at 101.

70. Id. at 272-73.

71. Lilburne wrote, “I was condemned because I would not accuse myself.” The Star Chamber fined him five-hundred pounds, and sentenced him to the pillory and imprisonment until he would agree to take the oath. As additional punishment, the court instructed that he was to be whipped through the streets on the two-mile walk from the Fleet prison to the pillory. Id. at 276.


73. Id.


The privilege has always been responsive to the particular needs and problems of the time. While no one could sustain the thesis that in 1789 the privilege was limited to political and religious crimes, neither can anyone demonstrate that it would ever have
ilege against self-incrimination evolved in America through the co-
nominal adoption of the common law's accusatorial system of
criminal procedure.\textsuperscript{76} The prohibition against self-incrimination
had been a common-law right since the middle of the seventeenth
century, but whether the right was known and respected at the
time of its colonial inheritance is an unanswered question.\textsuperscript{77} The
paucity of colonial history regarding the privilege sheds little light
in illuminating the precise intent of the framers of the Constitu-
tion, or the evil at which the provision was aimed.\textsuperscript{78}

There does exist, however, evidence of the availability of the
privilege in early colonial America. The freemen of the Massachu-
setts Bay Colony pioneered legislation among the New England
settlements,\textsuperscript{79} recognizing a legal guarantee of certain "civil liber-
ties," which included the right to be free of torture for the purpose
of compelling a man to incriminate himself.\textsuperscript{80} The privilege became
well established in the New England colonies before 1650, and was
incorporated into the constitutions or bills of rights of seven Amer-
ican states before 1789.\textsuperscript{81} During the ratification of the federal con-
stitution, a number of states proposed amendments specifically
mentioning the privilege against self-incrimination. As a result, the
privilege found expression in the proposals made by Congress
which became the fifth amendment in 1791.\textsuperscript{82}

At early common law, there were no judicial restrictions imposed
upon the admissibility of confessions at trial.\textsuperscript{83} However, by the

\begin{quote}
\textsuperscript{1}It would be ludicrous to attempt to fix the proper
scope of the privilege in light of what was appropriate under the Stuarts or Cromwell.
\textit{Id.} at 679.
\textsuperscript{76} \textsc{Levy}, supra note 66, at 333.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 334.
\textsuperscript{79} \textsc{Riesenfeld}, Law-Making and Legislative Precedent in American Legal History, 33
MINN. L. REV. 103, 111 (1949). \textit{See also} \textsc{Levy}, supra note 66 at 339-57. \textit{See generally} \textsc{Hall},
(1951).
\textsuperscript{80} The guarantees were incorporated into the Ward Code of 1641, and read, in perti-
nent part: "No man shall be forced by torture to confess any crime against himself nor any
other unless it be in some capital case, where he is first fully convicted by clear and suffi-
cient evidence to be guilty . . . ." \textsc{Riesenfeld}, supra note 79, at 116.
\textsuperscript{81} The states adopting the privilege were: Virginia (1776), Pennsylvania (1776), Ma-
ryland (1776), North Carolina (1776), Vermont (1777), Massachusetts (1780), and New
Hampshire (1784). \textsc{McCormick}, supra note 72, at 282 n.6.
\textsuperscript{82} \textsc{Griswold}, supra note 74, at 6-7. \textit{See also} \textsc{Levy}, supra note 66, at 405-32.
\textsuperscript{83} \textit{Developments in the Law - Confessions}, 79 HARV. L. REV. 935, 954 (1966) [herein-
after cited as \textit{Developments}]. Exclusion was not required even when the confessions were
the product of torture. \textsc{Morgan}, supra note 66, at 14-16.
\end{quote}
time the framers began drafting constitutional provisions in America, the principle had emerged in England that to "a confession forced from the mind by the flattery of hope, or by the torture of fear . . . no credit ought to be given." This principle, with its emphasis on the inducement to which a suspect was subjected, evolved more than a century after the last instance of torture was recorded in English law.

At common law, however, scrutiny of the circumstances surrounding the elicitation of a confession was primarily directed at ascertaining the probative value of the statement. There were no requirements that the confession-inducing interrogation should adhere to a rule of procedural regularity, or that institutional safeguards be provided during interrogation, as they had been at trial. Nor was there any perception that the absence of such safeguards impacted upon the voluntariness of a confession.

In early confessions cases before the United States Supreme Court, the decisions reflected the common-law concern with the probative value of the evidence, and with the grave potential for unjust conviction if the admitted confession proved false. At the same time, the Court rejected the growing trend toward closer scrutiny of voluntariness in nineteenth century English decisions.

The Court's approach to the admissibility of confessions began to change in 1896, when Chief Justice Fuller stated in Wilson v. United States, "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or

84. Developments, supra note 83, at 954 (citing The King v. Warickshall, 1 Leach C.L. 263-64, 168 Eng. Rep. 234-35 (K.B. 1783)).
86. Developments, supra note 83, at 961.
87. Id. at 962. Of course there is good reason for the lack of traditional consideration of the coercive potential for police interrogation. At the time the common law rules developed, organized police forces had just begun to come into existence and systematic custodial interrogation was unknown. See Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 YALE L.J. 1000, 1034-35 (1964). After the creation of police forces, the early American courts gave no consideration to the status of being in custody and subject to questioning in determining the admissibility of a confession. However, the jury could consider those factors in ascertaining the weight to be attributed the defendant's statement. Developments, supra note 83, at 956-57.
88. See, e.g., Hopt v. Utah, 110 U.S. 574, 584 (1884), wherein the Court stated: "the rule against . . . admissibility has been sometimes carried too far, and in its application justice and common sense have too frequently been sacrificed at the shrine of mercy. A confession, if freely and voluntarily made, is evidence of the most satisfactory character." Id. See also Pierce v. United States, 160 U.S. 355 (1896); Sparf v. United States, 156 U.S. 51 (1895).
Recent Decisions

Inducement of any sort."\(^9\) A year later, in *Bram v. United States*, the Court, speaking through Justice White declared:

In criminal trials, in the courts of the United States, whereever [sic] a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."\(^9\)

These cases marked a significant departure from the common-law test of direct inquiry into reliability and search for improper inducement, and added the requirement that the inherent coercion of official questioning be considered in the determination of voluntariness.\(^9\)

In *Brown v. Mississippi*,\(^9\) the Supreme Court held for the first time that the due process clause prohibited the states from using the accused's coerced confessions against him, and radically changed the law regarding admissibility. However, constrained by the Court's holding in *Twining v. New Jersey*\(^9\) that the fifth amendment's exception from compulsory self-incrimination was not protected by the fourteenth amendment against abridgement by the states,\(^9\) the Court in *Brown* was compelled to state that its conclusion did not involve the fifth amendment privilege.\(^9\) In subsequent cases, torn by the competing interests of effective crime detection and fairness to the accused, the Court, while unwilling to impair law enforcement with institutional safeguards at interrogation, was unable to articulate the purposes underlying its due process voluntariness standard sufficient to enable the lower courts to determine when the standard was satisfied.\(^9\)

89. 162 U.S. 613, 623 (1896).
90. 168 U.S. 532, 542 (1897).
91. *Developments, supra* note 83, at 961. See also Ziang Sung Wan v. United States, 266 U.S. 1, 14 (1924), wherein Justice Brandeis stated: "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made." Id.
92. 297 U.S. 278 (1936). In *Brown*, the Court reversed a conviction of three black defendants resting on confessions dictated by police and signed by the accused after they had been hanged and whipped. The conviction was reversed on due process grounds.
93. 211 U.S. 78 (1908).
94. *Twining* and *Adamson v. California*, 332 U.S. 46 (1947) were overruled by *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the privilege against self-incrimination is safeguarded against state action by the fourteenth amendment).
95. The Court in *Brown* stated: "Compulsion by torture to extort a confession is a different matter." 297 U.S. at 285.
96. *See generally Ritz, Twenty-Five Years of State Criminal Confession Cases in the United States Supreme Court*, 19 WASH. & LEE L. REV. 35, 68-69 (1962); Comment, *The
The due process voluntariness standard, which came to be known as the "coerced confession doctrine," ultimately proved inadequate to protect the rights of suspects. The standard was inherently subjective, and courts determined the admissibility of confessions through case-by-case evaluation of the "totality of the circumstances" surrounding the interrogation process. As the facts of each state confession case differed, so too did the results of appellate review before the Supreme Court. This lack of discernible trend rendered appellate courts unable to adequately supervise trial court and law enforcement policies, and left substantial latitude for coercive interrogation tactics.

As an alternative to the case-by-case analysis and the subjective evaluation of a suspect's state of mind and ability to withstand coercion was first developed in *Ashcraft v. Tennessee*. In *Ashcraft*, the fact that the trial court had found that the petitioner, when he confessed, had been in control of himself and showed no signs of fatigue after thirty-six hours of interrogation, did not inform the court's conclusion that the confession was coerced. Instead, the Court relied on a "police practices analysis," concluding that the situation was "so inherently coercive that its very existence [was]

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The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First there is the business of finding the crude historical facts, the external "phenomenological" occurrences and events surrounding the confession. Second, because the concept of "voluntariness" is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, "psychological" fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances.

*Id.* at 603.


98. *Id.*


101. 322 U.S. 143 (1944).

102. *Developments*, *supra* note 83, at 969.
irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force [was] brought to bear.\textsuperscript{103}

While the "inherently coercive" analysis enunciated by Justice Black in \textit{Ashcraft} marked a significant departure from the Court's earlier requirement of "actual" coercion, the \textit{Ashcraft} Court's failure to establish an attendant policy posture weakened any impetus toward doctrinal revision that may have been initiated. As a result, the Court soon returned to case-by-case evaluation of the circumstances surrounding each interrogation and assessment of the "individual's state of mind and capacity for effective choice."\textsuperscript{104}

After more than thirty years of doctrinal uncertainty, the confessions cases of the early 1960's hinted that change was imminent.\textsuperscript{105}

103. \textit{Ashcraft} v. Tennessee, 322 U.S. at 154.

While the voluntariness rubric was repeated in many instances, e.g., Lyons v. Oklahoma, 322 U.S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. . . . [T]here was an initial emphasis on reliability, e.g., \textit{Ward} v. Texas, 316 U.S. 547, supplemented by concern over the legality and fairness of the police practices, e.g., \textit{Ashcraft} v. Tennessee, 322 U.S. 143, in an "accusatorial" system of law enforcement, \textit{Watts} v. Indiana, 338 U.S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, e.g., \textit{Gallegos} v. \textit{Colorado}, 370 U.S. 49. The outcome was a continuing reevaluation of the facts of each case of how much pressure on the suspect was permissible . . . . [A]part from direct physical coercion, however, no single default or fixed combination of defaults guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility.

384 U.S. at 507-08 (Harlan, J., dissenting).

In his dissent, Justice Harlan had drawn approvingly from an article by Bator and Vorenberg. In a paragraph not quoted by the dissenting Justices in \textit{Miranda}, the authors observed:

Judicial decisions speak in terms of the "voluntariness" of a confession, but the term itself provides little guidance. To the extent "voluntariness" has made a determination of the state of an individual's will the crucial question, it has not assisted analysis. Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are "voluntary" in the sense of representing a choice of alternatives. On the other hand, if "voluntariness incorporates notions of "but for" cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.

105. See, e.g., Haynes v. Washington, 373 U.S. 503 (1963) (confession held inadmissible where defendant was interrogated for sixteen hours during which he was permitted to eat and sleep but was denied permission to call his wife).

See also Rogers v. Richmond, 365 U.S. 534 (1961) (confession obtained from suspect after
After holding in *Malloy v. Hogan* that the fifth amendment privilege against self-incrimination applied to state as well as federal governmental action through the fourteenth amendment, the Supreme Court finally "jumped the rails" of voluntariness in *Escobedo v. Illinois*, recognizing the sixth amendment right to counsel during custodial interrogation, and cleared new ground for uniformity in confession law.

The Court granted certiorari in *Miranda v. Arizona* "to explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." Toward that end, the Court reviewed police interrogation manuals and other accounts of modern, psycho-

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six hours of interrogation, and falsely being told police were bringing in his wife for interrogation held inadmissible). The following statement of the majority in *Rogers* is noteworthy:

"[I]nvoluntary confessions are inadmissible 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.


108. 378 U.S. 478 (1964). In *Escobedo*, the petitioner, after a second arrest on suspicion of murder, confessed after four hours of interrogation, during which he had repeatedly requested and been denied access to his attorney. In holding the confession inadmissible, the Court stated:

"Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his *absolute constitutional right to remain silent*, the accused has been denied, "the Assistance of Counsel" in violation of the Sixth Amendment . . . and . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial."

*Id.* (emphasis added).

As one commentator has observed, the right to remain "absolutely silent" recognized by the Court in *Escobedo*, suggested a "significant extension of the fifth amendment privilege against self-incrimination" since prior to *Escobedo*, the Constitution had been interpreted as only entitling a suspect to refrain from incriminating himself, not to refrain from answering any questions whatsoever. See *Gardner*, supra note 75, at 447-48 n.125.


110. 384 U.S. at 441-42.
logically oriented police interrogation practices, and concluded that the very atmosphere attendant to custodial interrogation "car-rie[d] its own badge of intimidation," and manifested such "inherently compelling pressures" as to "undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." The *Miranda* Court reasoned that even in the absence of brutality and the oppression of "third degree" interrogation, "the very fact of custodial interrogation exact[ed] a heavy toll on individual liberty and trade[d] on the weakness of individuals."

Accordingly, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Custodial interrogation, the Court declared, was meant to encompass questioning initiated by police officers "after a person ha[d] been taken into custody or otherwise deprived of his freedom of action in any significant way," leaving no doubt that the availability of the fifth amendment privilege extended outside the criminal courtroom and protected persons in all settings in which their freedom of action was curtailed in the above manner.

In order to lessen the inherently coercive atmosphere of custodial interrogation and ensure that the accused was afforded full opportunity to exercise the right against self-incrimination, the *Miranda* Court declared that the accused must be "adequately and effectively apprised of his rights" and that the exercise of those rights must be scrupulously honored. Thus, the now-familiar *Miranda* warnings were laid down as required procedural safeguards. Prior to any questioning, the Court instructed, a suspect must be warned that he has a right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to the presence of counsel, either retained or appointed. The Court stated further that while the suspect may waive these rights, provided such waiver is made voluntarily, knowingly and intelli-

111. Id. at 457.
112. Id. at 467.
113. Id. at 455.
114. Id. at 444.
115. Id.
116. Id. at 467.
117. Id.
gently, if the suspect indicates in any manner at any stage of the process that he wishes to consult an attorney or not to be questioned, the interrogation must terminate.\textsuperscript{118}

Finally, the Court recognized that there was no express constitutional imperative requiring adherence to any particular method of safeguarding the privilege, and while inviting Congress and the states to pursue sound efforts at reform, declared that unless "shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," the Miranda safeguards must be observed.\textsuperscript{119}

While it was the express intention of the Miranda majority to promote greater stability and uniformity in the law regarding confessions by establishing "concrete constitutional guidelines for law enforcement agencies and courts to follow,"\textsuperscript{120} the decision became one of the most controversial criminal procedure decisions of its era.\textsuperscript{121} The decision almost immediately gave rise to a plethora of scholarly commentaries, spirited debates, and complex questions about history, policy, legislative reaction, law enforcement and judicial interpretation,\textsuperscript{122} lending credence to the observation that

\textsuperscript{118} Id. at 444-45. At the time Miranda was decided, the Court's concept of waiver was viewed by some commentators as a potentially major loophole in the protections created. Accepting the Court's premise that the nature of custodial interrogation in the absence of a lawyer is inherently coercive, it seemed difficult to perceive how a decision to waive the right to advice of counsel could be any more voluntary under the same circumstances. See Bator, Criminal Justice in the Mid-Sixties: Escobedo Revisited, in Proceedings of the Twenty-Ninth Annual Judicial Conference Third Judicial Circuit of the United States, September 8, 1966, 42 F.R.D. 437, 471-72 (1968). See generally Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Tex. L. Rev. 193 (1977).

\textsuperscript{119} Id. at 467.

\textsuperscript{120} 384 U.S. at 441-42.

\textsuperscript{121} As suggested in a more recent commentary, questions about the impact and policy implications of Miranda that arose immediately in its wake, as well as the doctrinal uncertainty currently springing from the Burger Court's ambivalence and apparent disenchanted with the decision, are perhaps traceable to the Miranda opinion itself, and the Miranda Court's failure to clearly articulate the fifth amendment analysis underlying its holding. See Schrock, Welsh & Collins, Interrogation Rights: Reflections on Miranda v. Arizona, 52 S. Cal. L. Rev. 1 (1978).


"[r]hetoric flowers when the judgments to be made are founded on values too deep for resolution by logic alone."

Though Chief Justice Warren's opinion in *Miranda* may have been somewhat vague in enunciating the constitutional underpinnings of the required warnings, the prohibition of compulsory self-incrimination was clearly one of constitutional magnitude, and emphatically underscored the importance of ensuring governmental respect for the "dignity and integrity of its citizens," maintaining our accusatorial system of criminal justice, and guaranteeing a citizen's absolute right to "remain silent unless he chooses to speak in the unfettered exercise of his own will." Whatever its arguable doctrinal deficiencies, the decision in *Miranda v. Arizona* undeniably created a constitutional presumption that statements derived from inherently coercive custodial interrogation, in the absence of a voluntary, knowing and intelligent waiver on the part of the accused, were coerced, in violation of the fifth amendment, and therefore inadmissible in criminal prosecutions.

For the next several years, the scope of *Miranda* remained unchanged, the decisions of the Supreme Court limited to resolving questions concerning the immediate impact of the case. However, with the changing face of the Court, beginning with the appointment of Warren Burger as successor to Chief Justice Earl Warren, the constitutional principles enunciated in *Miranda*

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126. *Id.* (quoting *Malloy v. Hogan*, 378 U.S. 1, 8 (1964)).
129. Warren Burger became Chief Justice on June 23, 1969, following the resignation of Chief Justice Earl Warren. At present, only Justices Brennan and Marshall remain of the Justices joining in the majority opinion in *Miranda*. For an interesting account of the years
would soon be subjected to strict construction and substantive change.\textsuperscript{130}

The Burger Court's first confrontation with the \textit{Miranda} doctrine occurred in the 1971 case of \textit{Harris v. New York},\textsuperscript{131} in which the Court held that statements elicited from a defendant in derogation of the \textit{Miranda} safeguards could nonetheless be used to impeach the credibility of the defendant when he testified at trial.\textsuperscript{132} Harris had made several incriminating statements during interrogation at a police station, without being informed of his right to appointed counsel.\textsuperscript{133} When he testified in his own defense at trial, the trial judge permitted the prosecution to use Harris' prior statements during cross-examination, instructing the jury that it could consider the statements only in assessing the defendant's credibility. Despite the Court's express prohibition in \textit{Miranda} of the use for impeachment purposes of statements obtained in violation of its dictates,\textsuperscript{134} Chief Justice Burger, speaking for the \textit{Harris} Court, maintained that the \textit{Miranda} Court's discussion of the impeachment question "was not at all necessary to the Court's holding and [could not] be regarded as controlling."\textsuperscript{135} He further reasoned that "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief," and accordingly affirmed Harris' conviction, finding no reason to deprive the factfinder of the benefit of the impeachment process in passing on the defendant's credibility.\textsuperscript{136}


\textsuperscript{131} 401 U.S. 222 (1971).

\textsuperscript{132} Id. at 226. Accord Oregon \textit{v.} Hass, 420 U.S. 714 (1975).

\textsuperscript{133} Although the interrogation of Harris occurred before the Court's decision in \textit{Miranda}, the trial ensued after the \textit{Miranda} decision was handed down. \textit{Miranda} was thus applicable under Johnson \textit{v.} New Jersey, 384 U.S. 719 (1966).

\textsuperscript{134} See \textit{Miranda}, 384 U.S. at 476 ("The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination."). See also id. at 477 ("[S]tate decisions merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."); Dershowitz & Ely, \textit{Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority}, 80 Yale L.J. 1198 (1971).

\textsuperscript{135} 401 U.S. at 224.

\textsuperscript{136} Id. at 225.
The *Harris* Court's departure from the tenets of *Miranda*, and its unprecedented emphasis on deterrence as the predominant if not exclusive goal underlying the fifth amendment exclusionary rule,\(^{137}\) paved the way for the suggestion in subsequent decisions, most notably of Justice Rehnquist and Chief Justice Burger, that the "good faith" of interrogating officers could justify an exception to *Miranda*.\(^{138}\) Ultimately, these significant departures from the

137. See Gardner, *supra* note 75, at 455-75. The fifth amendment interests that informed the *Miranda* decision: ensuring the continued accusatorial nature of the criminal justice system and protecting the accused's right to remain silent and to a free and rational choice of expressions, were completely ignored by the *Harris* majority. As the *Harris* dissenters observed:

The prosecution's use of that tainted statement "cuts down on the privileged by making its assertion costly." . . . Thus, the accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. . . . [T]oday's holding will seriously undermine the achievement of that objective.

401 U.S. at 230-32 (Brennan, J., dissenting). See Gardner, *supra* note 75, at 456, wherein the author observes that rather than deterring police misconduct, *Harris* provides the police with further incentive not to "Mirandize" suspects. Citing Stone, *supra* note 130, at 112, the author notes that by not administering the *Miranda* warnings, the possibility that the suspect will confess is increased. Thereafter, should the suspect testify at trial, the confession can be used for impeachment purposes; given the general ineffectiveness of limiting instructions, the jury is likely to view the confession as evidence of guilt. Conversely, should the suspect decide not to testify, the jury may quite possibly interpret his silence as evidence of guilt. Gardner, *supra* note 75, at 456 n.176.

Significantly, a number of state courts, in interpreting their own constitutions, have rejected the result in *Harris*. See, e.g., People v. Disbrow, 16 Cal. 3d 101, 127 Cal. Rptr. 360, 545 P.2d 272 (1976); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971).

138. In Michigan v. Tucker, 417 U.S. 433 (1974), the defendant, who had been questioned by police prior to the Court's decision in *Miranda*, had not been apprised of his right to counsel. The identity of a witness (who later testified against the defendant) then unknown to the police, was revealed during the course of the interrogation. While finding the defendant's statements inadmissible under *Johnson v. New Jersey*, 394 U.S. 719 (1966), the Court held that the in-court testimony of the witness was admissible, despite the fact that it was the direct product of the defendant's excluded statements. Writing for the Court, Justice Rehnquist maintained that the police's pre-*Miranda* failure to advise the defendant of his right to counsel involved no bad faith, and therefore exclusion of the witness's testimony could not possibly serve to advance the deterrent purpose of the exclusionary rule. In effect, Justice Rehnquist was suggesting that the good faith of the officers could justify an exception to *Miranda*. 417 U.S. at 447.

Of equal significance was Justice Rehnquist's conclusion that the police conduct in question had not directly violated the defendant's privilege against compulsory self-incrimination, but had "departed only from the prophylactic standards later laid down . . . in *Miranda* to safeguard that privilege." *Id.* at 445-46. In arriving at this conclusion, Justice Rehnquist relied upon the statement of the majority in *Miranda* that the Constitution did
doctrinal foundations of *Miranda* would enable the Burger Court to carve out a "public safety" exception to the fifth amendment privilege against compulsory self-incrimination in *New York v. Quarles*.  

In retrospect, the Court's departures in *Harris* and *Tucker*, and not necessarily require adherence to a particular solution to the pressures of custodial interrogation. *Id.* at 444. He neglected to mention that the *Miranda* Court had added that the *Miranda* safeguards *must* be obeyed "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467. As one commentator has noted, the conclusion that there is no constitutional basis for the *Miranda* safeguards raises an interesting question: "If these safeguards are not derived from the Constitution, whence do they spring?" Stone, *supra* note 130, at 119. As Justice Douglas noted in his dissenting opinion in *Tucker*, "The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis." 417 U.S. at 462. For a further critique of the conclusion that the *Miranda* warnings have no constitutional basis, see generally Schrock, Welsh & Collins, *supra* note 121.

With no violation of a "core" constitutional right at issue, the question of admissibility was answered in the government's favor after Justice Rehnquist engaged in balancing the government's interest in using the evidence against the proffered interests served by exclusion: deterrence of police misconduct (which, as discussed was rendered impotent by the officer's good faith), and protecting the courts from unreliable evidence (which in *Tucker* was ensured by the witness' presence in the courtroom and availability for veracity-testing cross examination).

As a result of *Tucker*, the Burger Court would no longer have to confront the previously clear mandate of *Miranda* that evidence acquired in violation of its dictates was per se inadmissible. The Court was now "free to balance at will." Stone, *supra* note 130, at 123.

In a later case, *Brewer v. Williams*, 430 U.S. 387 (1977), Chief Justice Burger utilized the "good faith-minimal deterrence" rationale in challenging the majority holding that statements of the defendant Williams, elicited by interrogation in the absence of counsel were inadmissible as violative of the sixth amendment right to counsel. *Id.* at 415 (Burger, C.J., dissenting). In *Brewer*, while police were driving the murder suspect from Davenport to Des Moines, Iowa, one of the officers, knowing that the defendant was deeply religious and had only recently been released from a mental hospital, appealed to Williams with what has come to be termed the "Christian burial speech" in an effort to acquire information as to the location of the body of the ten year old female victim. The speech, in part:

> Since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after the snow storm and possibly not being able to find it at all.

*Id.* at 392-93. Williams, responding to the speech, led the police to the victim's body. *Id.* In his dissent, the Chief Justice argued, "*Miranda's* safeguards are premised on presumed unreliability long associated with confessions extorted by brutality or threats; they are not personal constitutional rights, but are simply judicially created prophylactic measures." *Id.* at 423. Since Williams' incriminating disclosures were not "infected with any element of compulsion" that violated the fifth amendment, and since they did not present any danger of unreliability, Chief Justice Burger maintained that a balancing of the attendant interests of admission and exclusion tipped decisively toward the former. *Id.* at 424.

the “pseudoscientific[ally] precise” constitutional juggling in Chief Justice Burger’s dissent in *Brewer v. Williams* constitute slight deviations from *Miranda*; nonetheless, their utility as building blocks for the construction of the *Quarles* majority’s “public safety” exception cannot be overstated.

Writing for the Court in *Quarles*, Justice Rehnquist did not expressly emphasize the good faith/minimal deterrence rationale unveiled in *Harris*; however, traces of that reasoning are certainly present when police officers follow, as Justice Rehnquist maintained Officer Kraft did in this case, “their legitimate instincts when confronting situations presenting a danger to the public safety.” In addition, the premise of Justice Rehnquist’s earlier majority opinion in *Tucker*, that the *Miranda* warnings are not themselves derived from the Constitution, but rather are judicially-created measures designed to protect the privilege against compulsory self-incrimination, was craftily used in an attempt to isolate the *Quarles* majority’s exception to the heretofore clearly required warnings from constitutional scrutiny. Moreover, it freed the Court to engage in the “pseudoscientific[ally] precise” balancing of interests utilized by Chief Justice Burger in his dissent in *Brewer*.

Not only did the *Quarles* Court feel free to engage in balancing in the instant case, concluding 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,” the Court implied that the *Miranda* majority had done likewise. The *Quarles* Court then returned to the alleged 1966 “scales of social utility,” which had supposedly weighed the benefits of “enlarged protection for the Fifth Amendment privilege” against “the cost to society in

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140. *Id.* at 2645.
142. 104 S. Ct. at 2633.
143. *See supra* note 138.
144. 104 S. Ct. at 2631. Whether the *Miranda* warnings are of constitutional magnitude remains the subject of heated debate. While the Burger Court has maintained they are not, since its decision in *Michigan v. Tucker*, the *Miranda* majority, the dissenters in *Quarles*, and some commentators have insisted that constitutional protection does extend to the warnings. A careful reading of *Miranda* would seem to indicate that the latter is the more cogent point of view. *See supra* note 138.
145. *Id.* (discussion of *Michigan v. Tucker*).
146. 104 S. Ct. at 2633.
147. *Id.* at 2645 (Marshall, J., dissenting).
terms of fewer convictions of guilty suspects," and concluded that even the *Miranda* Court would not have deemed its "prophylactic" rule cost-effective with threats to the public safety added to the balance.\(^{149}\)

In light of the threat to the public safety allegedly inherent in the factual setting surrounding Quarles' custodial interrogation,\(^{150}\) the Court concluded that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence and that the availability of that exception does not depend upon the motivation of the individual officer involved."\(^{151}\) This conclusion of course, as noted by Justice Marshall in his dissent,\(^{152}\) presupposes that the circumstances were in fact such as to give rise to "an objectively reasonable need" to ask warningless questions directed at protecting the police or the public from an immediate danger associated with the missing gun.\(^{153}\) Justice Rehnquist asserted that the instant facts objectively manifested such an immediate danger, in that "[s]o long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it."\(^{154}\)

As the dissent pointed out, however, this assertion is in direct

\(^{148}\) *Id.* at 2632.

\(^{149}\) *Id.* at 2632-33. However, as Justice Marshall pointed out in his dissenting opinion, the *Miranda* majority clearly eschewed such an approach when dealing with unassailable constitutional rights. Citing *Miranda*, 384 U.S. at 479:

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. (citations omitted). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. *That right cannot be abridged.*

\(^{104}\) S. Ct. at 2645 (Marshall, J., dissenting) (emphasis added).

\(^{150}\) The majority agreed with the New York Court of Appeals finding that Quarles was "in custody" for the purposes of *Miranda*. "We agree that respondent was in police custody because . . . 'the ultimate inquiry is simply whether there is a ['formal arrest or restraint on freedom of movement'] of the degree associated with a formal arrest.' " (citations omitted). *Id.* at 2631.

In the instant case, the evidence was uncontroverted that before Quarles was interrogated, he was surrounded by at least four police officers who had reholstered their firearms, had his hands shackled behind his back, and had been "reduced to a condition of physical powerlessness." *Id.* at 2630, 2631, 2641, 2642.

\(^{151}\) *Id.* at 2632.

\(^{152}\) *Id.* at 2642-43 (Marshall, J., dissenting).

\(^{153}\) *Id.* at 2633-34 n.8.

\(^{154}\) *Id.* at 2632.
conflict with the record as perfected by New York's highest court.\textsuperscript{155} Prior to being asked "Where's the gun?", Quarles had been "reduced to a condition of physical powerlessness,"\textsuperscript{156} and was not believed to have, nor did he in fact have, an accomplice. As Officer Kraft testified at Quarles' suppression hearing, "the situation was under control," prompting the New York Court of Appeals to find that there was no evidence to suggest that the interrogation arose from concern on the part of the arresting officers for either their own safety or that of the public.\textsuperscript{157} Justice Rehnquist's transparent attempt to "slip away"\textsuperscript{158} from these unambiguous findings of fact in proposing that the exception-activating danger be measured by the objective facts rather than the subjective motivation of interrogating officers,\textsuperscript{159} is similarly refuted by the statement of the New York Court of Appeals that "there is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety . . . ."\textsuperscript{160} Certainly, if concern for the public safety is to override the rights traditionally afforded the suspect, the factual basis for such action should be supported by the record.

In holding that there is no constitutional bar to the admission into evidence of Quarles' statements and the gun recovered as a direct result thereof, the majority has clearly departed from both the spirit and the express mandate of \textit{Miranda} and its progeny.\textsuperscript{161}

\textsuperscript{155} \textit{Id.} at 2642 (Marshall, J., dissenting) (citing People v. Quarles, 58 N.Y.2d at 666-67, 458 N.Y.S.2d at 521-22, 444 N.E.2d at 985-86 (1982)).

\textsuperscript{156} \textit{Id.} See supra note 149.

\textsuperscript{157} \textit{Id.} Of further interest, the arrest took place after midnight, and, although the grocery store was open to the public, it was deserted except for the clerks at the checkout counter. As Justice Marshall suggested, it would have been a simple task to secure the store and find the weapon, as the officers knew with a high degree of certainty that the gun was within the immediate vicinity. 104 S. Ct. at 2642-43 (Marshall, J., dissenting). See supra note 49.

\textsuperscript{158} 104 S. Ct. at 2642 (Marshall, J., dissenting).

\textsuperscript{159} \textit{Id.} at 2632.

\textsuperscript{160} \textit{Id.} at 2642.

\textsuperscript{161} See, e.g., the factually similar case of Orozco v. Texas, 394 U.S. 324 (1969), where the murder suspect's incriminating admissions were excluded for failure to administer \textit{Miranda} warnings before several officers arrested the suspect in a bedroom of his boarding house at 4 a.m. and questioned him regarding the location of a missing gun. \textit{Id.} at 325.

While the \textit{Quarles} Court attempted to distinguish \textit{Orozco} on the grounds that Quarles' interrogation immediately followed his arrest, whereas \textit{Orozco} was question four hours after the crime, thus rendering the interrogation investigatory in nature, this distinction seems questionable at best. See 104 S. Ct. at 2633 n.8, 2643 n.2 (Marshall, J., dissenting).

Of further note, while stating that she could agree with the majority holding, were they "writing from a clean slate," Justice O'Connor observed: "[b]ut \textit{Miranda} is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for
Perhaps aware that the highly controversial reception that greeted the Court’s decision in *Miranda* had not yet faded with the memory of things long past, and that *Miranda*’s mandates had become firmly imbedded in the administration of the criminal justice system, Justice Rehnquist candidly acknowledged that the recognition of this “narrow” exception would “to some degree lessen the desirable clarity” of the rule.\(^\text{162}\) He proposed, however, that this departure is justified by the public safety exception’s proffered effect of freeing police from the “untenable position” of being forced to balance considerations of public safety against the individual’s rights under the self-incrimination clause of the fifth amendment.\(^\text{163}\)

blurring its now clear strictures.” Id. at 2634. Accordingly, Justice O’Connor stated that she would suppress Quarles’ initial statement, and admit the gun as “non-testimonial” in nature and thus, she argued, not violative of either *Miranda* or the fifth amendment privilege. As to Quarles’ post-warning statements, Justice O’Connor maintained that their admissibility pivoted on passing due process “voluntariness” muster, since whether or not failure to “Mirandize” can “taint” subsequent admissions remains an open question. (On that same point, Justice Marshall would have vacated the order suppressing Quarles’ gun and subsequent statements, and remanded for consideration in light of the Court’s recent creation of the “inevitable discovery” exception in *Nix v. Williams*, 104 S. Ct 2501 (1984). See 104 S. Ct. at 2649-50 (Marshall, J., dissenting)). Id. at 2634 & n.1 (O’Connor, J., concurring in part and dissenting in part).  

\(^{162}\) Id. at 2633. Of note is Justice Rehnquist’s statement in an earlier case that in establishing rules relating to police efforts to elicit incriminating statements, “rigidity” is a “core virtue”. *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., on application for stay).

Similarly, in *Rhode Island v. Innis*, 446 U.S. 291 (1980), Chief Justice Burger described the state of the law regarding *Miranda*, and cautioned against the introduction of “new elements of uncertainty.” Id. at 304 (Burger, C.J., concurring): “The meaning of *Miranda* has become reasonably clear and law enforcement practice have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.” Id. See also *Harryman v. Estelle*, 616 F.2d 870, 873-74 (5th Cir. 1980) (“The rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision’s greatest strength.”).

\(^{163}\) 104 S. Ct. at 2633. Interestingly, the potential for a “public safety” exception arising from these conflicting interests was predicted shortly after *Miranda* was decided, by Professor Paul M. Bator, in an address before the Third Judicial Circuit:

Now, it seems to me that *Miranda* creates a difficult situation in these circumstances where the preventive and the restorative functions of the police do call for some questioning. Of course on paper the problem is easily solved. We can say, “All right, if what we want is information leading to a kidnapped child or to stolen property or to a dangerous accomplice, go ahead and make the inquiry without a warning, without waiting for counsel, but the price we pay is simply to forego using the results to incriminate the man who has given us that information.” I think on paper that is a perfectly acceptable solution, and I think that it is a solution which can be justified on acceptable theoretical grounds.

Nevertheless, to me it is a troublesome solution, because what we are saying to the police is that here are situations where we do want you to question somebody; we do want you to get information without going through the elaborate protective devices created by *Miranda*; this is what we actually want you to do, and this is lawful for
As Justice O'Connor asserted in the dissenting portion of her opinion, this rationalization would hardly justify the majority's unwarranted departure from precedent and "blurring" of the previously clear strictures on custodial interrogation enunciated by the Court in *Miranda*. Moreover, Justice O'Connor properly added, the "on the scene" balancing deemed so undesirable by the majority has no basis in law or fact, as *Miranda* has never been interpreted to bar police from asking questions aimed at securing the public safety. Rather, *Miranda* concerned the more fundamental question, unaddressed by the *Quarles* majority, of exactly "who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State[?]" It would seem inescapably clear, as Justice O'Connor concluded, that *Miranda* interpreted the mandate of the self-incrimination clause as placing the burden upon the government.

Much more certain that the doctrinal underpinnings of the policy rationale of the public safety exception, is the chaotic effect it is likely to have on the criminal justice system. Justice Rehnquist urged that the exception is a "narrow" one that will be circumscribed in each case by the nature of the surrounding circumstances, and easily applied in view of the ability of police officers to "distinguish almost instinctively" between questions aimed at securing safety and those designed to elicit testimonial evidence. However, in the "kaleidoscopic" unfolding of an arrest scenario, particularly one involving an immediate threat to public safety, the ability of a police officer to make such a distinction is doubtful. As Justice Marshall observed in his dissent, police officers will not only have to decide whether the objective facts justify an unwarned interrogation, they will also be compelled to remember to cease the questioning and "mirandize" the suspect once the inquiry shifts from protecting the public safety to acquiring incrimi-

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164. 104 S. Ct. at 2634 (O'Connor, J., concurring in part and dissenting in part). See also supra note 161.
165. 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part).
166. "When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial." Id. (citing Michigan v. Tucker, 417 U.S. at 445, 447-48, 451, 452 & n.26; Orozco v. Texas, 394 U.S. at 326). See also supra note 149.
167. 104 S. Ct. at 2633.
nating evidence.\textsuperscript{168}

Given the paucity of evidence demonstrating an immediate threat to safety in \textit{Quarles}, it strains the imagination to conceive of a scenario which might not be held sufficient to have given rise to a public safety concern justifying an uninformed interrogation. It would therefore appear unlikely that the "public safety" exception will be as "narrow" as Justice Rehnquist suggests. Confusion over its scope and inconsistency in its application seems inevitable.\textsuperscript{169}

Whatever the plausible justifications for the exception, the inevitable result, as predicted by Justice O'Connor, "will be a fine-spun new doctrine on public safety exigencies incident to custodial interrogation complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."\textsuperscript{170} This was precisely the evil \textit{Miranda} sought to eradicate. The \textit{Quarles} Court has returned the American judiciary to the case-by-case "totality of the circumstances" analysis that crippled the coerced confession doctrine until that doctrine was finally put to rest with \textit{Miranda}.

It would seem unwise to launch the courts on a course fraught with meaningless semantic disputes and the shallow calculus of balancing a perceived social cost against the constitutional mandate of the fifth amendment that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."\textsuperscript{171} In

\begin{enumerate}
\item[168.] \textit{Id.} at 2644 (Marshall, J., dissenting). For example, when does concern for safety end and incriminating interrogation begin if the question in \textit{Quarles} had been, "Where's the gun you used in the rape?".
\item[169.] \textit{See}, e.g., United States v. McCain, 556 F.2d 253 (5th Cir. 1977), in which the defendant, suspected of drug smuggling, was detained in an airport and held in a supervisor's office while a customs inspector talked to her, telling her that she could seriously harm or kill herself by carrying narcotics in her body. While the Fifth Circuit found that the inspector's purpose "was to persuade the defendant to confess", 556 F.2d at 255, the court could have easily found, as was urged by the dissent, that the purpose of the inspector's talk was merely to warn the suspect "of the risk she was running by carrying drugs internally," and perhaps fitting within the concern for public safety. 556 F.2d at 256 (Gee, J., dissenting).
\item[170.] 104 S. Ct. at 2636 (O'Connor, J., concurring in part and dissenting in part).
\item[171.] U.S. Const. amend V. Justice Black's comments in the last hour of oral argument in \textit{Miranda} are worth noting:
\textit{The Court held a long time ago that what that means is that the Government shall not compel a defendant to give evidence against himself anywhere or under any circumstances. . . . The words of the Amendment are very simple, and they've been construed as meaning that that means the Government musn't compel a man to give evidence against him anywhere, at any time.}
\end{enumerate}

\textit{Baker, supra} note 129, at 169.

Also of interest:

The Constitution of the United States is the law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all
order to "preserve, protect and defend" the clear import of these words, the Court must meet its obligation to provide reasonably explicit and workable guidelines rather than an amorphous cost-benefit analysis that finds social value in exploiting the uninformed individual, and ignores the traditional interests lying at the heart of our fifth amendment jurisprudence: ensuring the suspect's right to make a free and rational choice, avoiding the "taint" of governmental lawlessness, and maintaining our adversarial system of criminal justice.\textsuperscript{172}

The \textit{Miranda} Court held that statements stemming from custodial interrogation may not be used by the government in a criminal prosecution, absent a showing of adherence to the procedural safeguards enunciated by that Court. The "public safety" exception established by the \textit{Quarles} majority will permit police to interrogate suspects regarding such exigencies before the suspects have been advised of their constitutional rights. By eliminating the "deterrent" effect of being informed of their absolute right to silence, the likelihood that the suspect will respond is enhanced. Should their responses be incriminating, the government would nevertheless be free to utilize them as evidence in criminal prosecutions.\textsuperscript{173}

If there is a cost to society in respecting the privilege of an accused to invoke his constitutional right of silence, it is a cost arising from the very existence of that right under the Constitution. If the Burger Court's growing dissatisfaction with the \textit{Miranda} doc-

\begin{thebibliography}{99}
\item Ex \textit{parte} Milligan, 71 U.S. (4 Wall.) 119-21 (1886).
\item Many of the problems with the Supreme Court's public safety departure could be mitigated by state court decisions interpreting parallel state law provisions in light of \textit{Michigan v. Long}, 103 S. Ct. 3469 (1983) (if the state court decision indicates clearly and expressly that it is alternatively based on a \textit{bona fide} separate, adequate, and independent grounds, the United States Supreme Court will not undertake to review the decision). \textit{Id.} at 3476.
\item 172. One commentator, perhaps prophetically, has suggested that the general welfare justifies such exploitation: "If coerced confessions were particularly effective in reducing crime and thereby increasing personal security \textit{ex ante}, we might say that by joining in a civilized society a person really does waive any right to refuse to cooperate in his own destruction." Posner, \textit{Excessive Sanctions for Governmental Misconduct in Criminal Cases}, 57 Wash. L. Rev. 635, 641-43 (1982).
\item 173. The counter-deterrent effect of this admissibility is readily apparent as arresting officers would have every incentive to question a suspect regarding the location of derivative evidence before warning the suspect, particularly where there was reason to believe that such evidence, because of its location or characteristics, would readily be connected with the suspect.
\end{thebibliography}
trine and the exclusionary rule is indicative of a growing dependence of our criminal justice system upon the unwitting or powerless abdication of individual rights for its continued effectiveness,

174. This apparent "dissatisfaction" has recently manifested itself in both the fourth and fifth amendment context. In New Jersey v. T.L.O., 53 U.S.L.W. 4083 (U.S. Jan. 15, 1985) (No. 83-712), writing the opinion for a divided Court, Justice White performed a balancing test of his own, weighing a student's legitimate privacy interests against the "substantial" interest of teachers and administrators in maintaining discipline. Though finding that the fourth amendment's prohibition against unreasonable searches and seizures applied to searches of students by public school officials, the Court concluded that such searches could be conducted without a warrant or probable cause as long as the search was "reasonable under all the circumstances." Id.

Most recently, writing for the Court in Oregon v. Elstad, 53 U.S.L.W. 4244 (U.S. March 4, 1985) (No. 83-773), Justice O'Connor reasoned that the fifth amendment guarantee against compulsory self-incrimination did not mandate the exclusion of a confession, made after a proper administration of the Miranda warnings, simply because the suspect had made earlier incriminating statements in response to custodial interrogation without the benefit of Miranda warnings. Id. at 4245. Uninformed of his rights, the defendant in Elstad admitted being present at the burglary. Although the investigating officers had testified that Elstad was then in custody, Justice O'Connor speculated that the failure of the officer to adhere to the dictates of Miranda, prior to interviewing the suspect in his home, may have stemmed from "confusion as to whether the brief exchange qualified as 'custodial interrogation' or . . . reluctance to initiate an alarming police procedure before the other investigating officer had spoken with respondent's mother. Whatever the reason for his oversight," she concluded, "the incident had none of the earmarks of coercion." Id. (emphasis added). In view of the Miranda Court's determination that by its very nature, police interrogation of a suspect who has been taken into custody is inherently coercive, Justice O'Connor's conclusion seems questionable at best.

While the Oregon Court of Appeals had agreed with the respondent's argument that his subsequent statement was "fruit of the poisonous tree" and was coerced since his earlier unwarned statement had let "the cat out of the bag," Justice O'Connor disagreed, maintaining that such analysis erroneously assumed the existence of a constitutional violation. Citing Quarles and Michigan v. Tucker, 417 U.S. 433 (1974), see supra note 138, Justice O'Connor argued to the contrary that no "taint" could inure to the later statements since the Miranda warnings were actually prophylactic measures and not constitutionally protected rights. As a result, she concluded, while "poisonous tree" analysis excluded tainted evidence based upon constitutional violation, failure to administer Miranda warnings merely gave rise to a presumption of coercion, and therefore did not compel the suppression of the statements as inherently tainted. Id. at 4246-47.

Dissenting, Justice Brennan, joined by Justice Marshall, vehemently criticized the Court's ruling as "delivering a potentially crippling blow to Miranda and the ability of courts to safeguard the rights of persons accused of crime. Id. at 4250 (Brennan, J., with whom Marshall, J., joined, dissenting). In a separate dissenting opinion, Justice Stevens discussed the necessity of the Miranda safeguards in protecting the citizenry from the "kind of custodial interrogation once employed by the Star Chamber . . . ," see supra note 69 and accompanying text, "and by some of our own police departments only a few decades ago." In Justice Stevens' view, the Court's ruling marked a departure from a long line of precedent, and he predicted that the Court's ambivalence as to whether there was a constitutional violation, and its "opaque characterization of the police misconduct" in the case, would result in confusion in the administration of the criminal justice system. Id. at 4262-64 (Stevens, J., dissenting).
perhaps it is time to consider whether the price of such effectiveness is too high.

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