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An Exception to Administering Miranda Warnings Exists Where Police Questioning is Promptd by Concern for Public Safety.

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CRIMINAL LAW—Fifth Amendment *Miranda* Warnings—An Exception to Administering *Miranda* Warnings Exists Where Police Questioning is Prompted by Concern for Public Safety

New York v. Quarles,
__ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

Officer Frank Kraft entered an all-night supermarket in pursuit of an armed suspect and immediately identified Benjamin Quarles as that suspect.[1] When Quarles fled, Officer Kraft followed and apprehended him in the rear of the supermarket.[2] As three other officers arrived with guns drawn, Kraft frisked Quarles and discovered an empty gun holster.[3] Without administering *Miranda* warnings,[4] Kraft asked the handcuffed Quarles where the gun was.[5] Quarles gestured toward a nearby stack of cartons and replied, "the gun is over there."[6] Kraft retrieved a loaded .38 caliber handgun from the cartons and then placed Quarles under formal arrest.[7]

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1. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2629, 81 L. Ed. 2d 550, 554 (1984). Officer Kraft and his partner were responding to a recently reported sexual assault. *See id.* at __, 104 S. Ct. at 2629, 81 L. Ed. 2d at 554. The rape victim described her assailant as an armed, black male, approximately six feet in height, wearing a black jacket with "Big Ben" emblazoned on the back. *See id.* at __, 104 S. Ct. at 2629, 81 L. Ed. 2d at 554. Officer Kraft used this description to identify Benjamin Quarles. *See id.* at __, 104 S. Ct. at 2629, 81 L. Ed. 2d at 554.

2. *See id.* at __, 104 S. Ct. at 2629-30, 81 L. Ed. 2d at 554. During the brief pursuit, Officer Kraft lost sight of Quarles for a few seconds as Quarles turned at the end of an aisle. *See id.* at __, 104 S. Ct. at 2629-30, 81 L. Ed. 2d at 554. Kraft had his gun drawn throughout the pursuit and apprehension. *See id.* at __, 104 S. Ct. at 2629, 81 L. Ed. 2d at 554.

3. *See id.* at __, 104 S. Ct. at 2630, 81 L. Ed. 2d at 554; *see also* Terry v. Ohio, 392 U.S. 1, 30 (1968) (patdown of suspect's person to ensure officer's safety permissible).

4. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966). The *Miranda* Court stated "[a person] 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 479.

5. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2630, 2631, 81 L. Ed. 2d 550, 554 (1984).

6. *See id.* at __, 104 S. Ct. at 2630, 81 L. Ed. 2d at 554.

7. *See id.* at __, 104 S. Ct. at 2630, 81 L. Ed. 2d at 554. After the formal arrest, Quarles was given *Miranda* warnings; he waived his rights to silence and an attorney's presence and, in response to further police interrogation, he claimed ownership of the gun. *See id.* at __, 104 S. Ct. at 2630, 81 L. Ed. 2d at 554.

During Quarles' prosecution for criminal possession of a weapon,[8] Quarles' motion to suppress the gun and all statements concerning the gun was granted because of the failure to observe *Miranda*.[9] The Supreme Court of New York, Appellate Division, affirmed the suppression order without opinion.[10] The New York Court of Appeals also affirmed, stating that there had been a clear violation of *Miranda* and declining to recognize any exigency exception to *Miranda*'s requirements.[11] The United States Supreme Court granted certiorari[12] to determine whether the rule of *Miranda* is subject to an exigency exception.[13] Held—*Reversed and remanded.* An exception to administering *Miranda* warnings exists where police questioning is prompted by concern for public safety.[14]

The fifth amendment guarantees that incriminating statements obtained through governmental coercion shall not be used against the defendant in a criminal proceeding.[15] As a necessary requirement of the fifth amendment's language, the United States Supreme Court has recognized an ex-

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8. *See* N.Y. PENAL LAW § 265.02(4) (McKinney 1980) (person guilty of criminal possession of gun if he carries loaded gun away from home or business). Charges against Quarles for rape were not pursued by the state. *See* New York v. Quarles, __ U.S. __, __ n.2, 104 S. Ct. 2626, 2630 n.2, 81 L. Ed. 2d 550, 555 n.2 (1984).

9. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2630, 81 L. Ed. 2d 550, 555 (1984).

10. *See* People v. Quarles, 447 N.Y.S.2d 84, 84 (App. Div. 1981), *aff'd,* 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1982), *rev'd and remanded sub nom.* New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

11. *See* People v. Quarles, 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1982), *rev'd and remanded sub nom.* New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The court of appeals found no evidence in the record that there was a risk posed to the police officers or to the general public under the circumstances or that the interrogation was prompted by such concerns on Kraft's part. *See id.* at 985, 485 N.Y.S.2d at 521-22.

12. *See* New York v. Quarles, __ U.S. __, 103 S. Ct. 2118, 77 L. Ed. 2d 1299 (1983).

13. *See id.* at __, 104 S. Ct. at 2630, 81 L. Ed. 2d at 555.

14. *See id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 557.

15. *See* U.S. CONST. amend. V. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." *Id.* The self-incrimination privilege of the fifth amendment is applicable to state as well as federal action. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964). The privilege against self-incrimination is enjoyed only by an individual as a basic civil right. *Compare* United States v. White, 322 U.S. 694, 698 (1944) (privilege enjoyed only by human being as citizen of U.S.) *with* Wilson v. United States, 221 U.S. 361, 365 (1911) (corporate entity does not possess privilege against self-incrimination). The fifth amendment's self-incrimination clause is the result of several centuries of struggle against arbitrary procedures by governmental authorities. *See* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7, 30 (1955). For an extensive discussion of the origins and development of the self-incrimination privilege, see generally M. BERGER, TAKING THE FIFTH: THE SUPREME COURT AND THE PRIVILEGE AGAINST SELF-INCRIMINATION 1-41 (1980). *See also* Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond,* 15 WAKE FOREST L. REV. 171, 178-88 (1979) (tracing fifth amendment from English origin to American constitutional provision).

clusionary mandate for all incriminating testimonial evidence obtained by governmental compulsion.[16] The privilege has been described as an essential bulwark in protecting an accused from an arbitrary, inquisitional government prosecution.[17] Four basic purposes of the privilege have been enunciated: (1) preservation of the criminal accusatorial system,[18] (2) protection of the individual against the power of the government,[19] (3) achieving reliable and voluntary evidence,[20] and (4) protection of privacy rights.[21] While the fifth amendment applies directly to federal authorities,

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16. *See* Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (fifth amendment established absolute constitutional exclusionary rule for coerced testimonial evidence); *see also* Fisher v. United States, 425 U.S. 391, 400 (1976) (fifth amendment is itself a constitutional exclusionary rule). Non-testimonial evidence is not protected by the privilege. *See, e.g.,* United States v. Dionisio, 410 U.S. 1, 5-7 (1973) (voice recordings are not testimonial evidence excluded by privilege); Gilbert v. California, 388 U.S. 263, 265-66 (1967) (handwriting samples not excluded because nontestimonial in nature); Schmerber v. California, 384 U.S. 757, 765 (1966) (blood sample not testimonial evidence protected by privilege); *see also* Fisher v. United States, 425 U.S. 391, 408 (1976) (fifth amendment's absolute mandate does not exclude non-testimonial evidence). *See generally* Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 949 (1965) (fruits of interrogations should not necessarily be suppressed in all situations).

17. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("[T]he privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' "). For a similar view, see Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 384-86 (1977), which discusses the fifth amendment's basic purpose. *But see* Berger, *The Underprivileged Status of the Fifth Amendment Privilege,* 15 AM. CRIM. L. REV. 191, 194-96 (1978) (questioning whether underlying rationales of fifth amendment have been truly enunciated by Supreme Court).

18. *See* Garner v. United States, 424 U.S. 648, 655 (1976) (fifth amendment's privilege works to guarantee adversarial nature of criminal justice system); *see also* Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., joined by Douglas, J., and Marshall, J., dissenting) (privilege's objective is to safeguard adversarial system of justice). *See generally* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 156-57 (fifth amendment protects integrity of judicial system).

19. *See* Malloy v. Hogan, 378 U.S. 1, 8-9 (1964) (purpose of self-incrimination clause to protect individuals when confronted by all-powerful state); *accord* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (privilege requires fair balance between the individual and the state). For a discussion on this purpose of the privilege, see generally Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671, 723 (1968). For a similar view, see E. GRISWOLD, THE FIFTH AMENDMENT TODAY 30 (1955), which asserts that the privilege protects individual dignity regardless of guilt.

20. *See In re* Gault, 387 U.S. 1, 47-48 (1967) (privilege prevents use of coerced, unreliable statements); *see also* McKay, *Self-Incrimination and the New Privacy,* 1967 SUP. CT. REV. 193, 205-07 (privilege prevents use of coerced statements because coercion creates unreliable confessions); Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond,* 15 WAKE FOREST L. REV. 171, 187 (1979) (coercive techniques produce unreliable statements and privilege justifies exclusion).

21. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415-16 (1966) (basis for privilege is respect for individual's privacy); *see also* Berger, *The Underprivileged Status of*

the Supreme Court initially addressed the use of self-incriminating statements obtained by state coercion through the requirements of the fourteenth amendment.[22]

Prior to 1966, the Supreme Court utilized the due process clause[23] of the fourteenth amendment to exclude incriminating statements obtained by police through methods "revolting to the sense of justice."[24] The Court developed the coerced confession doctrine to exclude statements thought to be unreliable or involuntary due to questionable police tactics.[25] The doctrine, operating on a case-by-case determination, excluded only those statements shown to be the result of actual coercion by the police.[26] The

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the Fifth Amendment Privilege, 15 AM. CRIM. L. REV. 191, 213 (1978) (privilege intended to protect individual privacy and dignity). *But see* Friendly, *The Fifth Amendment Tomorrow, The Case for Constitutional Change,* 37 U. CIN. L. REV. 671, 687-88 (1968) (protecting privacy not primary purpose of privilege against self-incrimination). For a complete summary of the privilege's underlying purposes, see Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 443-45 (1984).

22. *Compare* Bram v. United States, 168 U.S. 532, 564 (1897) (fifth amendment applies to exclude statements obtained through federal coercion) *with* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (due process governs coerced statements obtained by state officials). *See also* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 101-04 (due process requires discussion of initial suppression of coerced statements).

23. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936). The fourteenth amendment provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." *See* U.S. CONST. amend. XIV, § 1. In *Brown,* the police physically beat the suspect to obtain a signed confession to a murder. *See* Brown v. Mississippi, 297 U.S. 278, 281-83 (1936).

24. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936) (standard for excluding statements established in Court's first coerced confession case).

25. *See, e.g.,* Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (coerced confession excluded as offensive to the accusatorial system); Rochin v. California, 342 U.S. 165, 173 (1952) (statements obtained by physical violence offend public's sense of fair play embodied in due process clause); Chambers v. Florida, 309 U.S. 227, 238-42 (1940) (physical torture violates all notions of due process; statements obtained accordingly excluded). *See generally* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 7.4, at 580-86 (1984) (coerced confessions excluded because due process prohibits use of untrustworthy testimony). The Court created both a subjective and objective test to determine whether the testimony must be excluded for due process violations. *Compare* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (subjective test utilized to determine if suspect gave voluntary statement even though coerced) *and* Fikes v. Alabama, 352 U.S. 191, 197-98 (1957) (suspect's personal qualities critical considerations in determining voluntariness of statement) *with* Malinski v. New York, 324 U.S. 401, 404-06 (1945) (objective standards determine standards of fairness when accused physically abused) *and* Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (certain coercive techniques violate fundamental fairness regardless of individual's propensity to be affected). *See generally* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 U. CHI. L. REV. 313, 315-25 (1964) (reviewed rationales of coerced confession doctrine).

26. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936); *see also* Ward v. Texas, 316 U.S. 547, 554-55 (1942) (actual coercion must be present to warrant due process exclusion). Actual coercion was determined from the totality of the circumstances, but contradictory deci-

inadequacy of the coercive confession doctrine to effectively protect a suspect's privilege against self-incrimination, to protect the integrity of the judicial system, and to deter the police from overzealous interrogation methods prompted the Supreme Court to address the problem indirectly first,[27] and then directly in *Miranda v. Arizona.*[28]

In *Miranda v. Arizona,*[29] the Supreme Court recognized an absolute exclusionary rule, based upon the fifth amendment, for statements obtained during official custodial interrogation without prior administration of specific warnings.[30] The Court created a constitutional presumption of inher-

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sions emerged from this approach. *Compare* Lisenba v. California, 314 U.S. 219, 230-38 (1941) (physical slapping of suspect to elicit statement did not violate due process) *with* Chambers v. Florida, 309 U.S. 227, 238-43 (1940) (physical beating violated due process standards). The due process approach has been criticized as ineffective. *See* Irvine v. California, 347 U.S. 128, 138-39 (1954) (Clark, J., concurring) (case-by-case due process approach to incriminating statements has little or no effect in curbing police or prosecutorial zeal in obtaining those statements); *see also* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 7.4, at 580-92 (1984) (voluntariness test inadequate and ill-defined standard for protecting suspect's interests); Kamisar, *What is an "Involuntary" Confession?—Some Comment on Inbau and Reid's "Criminal Interrogation and Confessions,"* 17 RUTGERS L. REV. 728, 746-47 (1963) (due process, voluntariness approach offers little protection for accused).

27. *See* Massiah v. United States, 377 U.S. 201, 206 (1964) (statements obtained through interrogation after accusatory stage of judicial process excluded by sixth amendment). The *Massiah* decision did not apply to the majority of police interrogation circumstances; therefore, the Court next addressed the problem in Escobedo v. Illinois, 378 U.S. 478, 490-92 (1964). In *Escobedo,* while the Court suppressed the statement on sixth amendment grounds, the right to remain silent was recognized and intimated as arising from the fifth amendment's privilege against self-incrimination. *See id.* at 491-92. The *Escobedo* decision raised as many problems about the status of the self-incrimination clause as it solved, but it did indicate the Court's concern over the coerced confession area. *See* Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 408-410 (1982) (*Escobedo* predecessor to *Miranda); see also* Comment, *The Curious Confusion Surrounding Escobedo v. Illinois,* 32 U. CHI. L. REV. 560, 561 (1965) (*Escobedo* imprecise attempt to deal with incriminating statements). The Court's final piece of groundwork for the *Miranda* decision was the incorporation of the fifth amendment's self-incrimination clause into the due process clause. *See* Malloy v. Hogan, 378 U.S. 1, 7-8 (1964) (fifth amendment's standards governing self-incrimination apply to state actions and prosecutions).

28. *See* 384 U.S. 436, 455 (1966). For a discussion on the Court's motivation in deciding *Miranda,* see generally Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 66-69 (1966); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 33-41 (1978). The due process approach to self-incriminating statements did survive the *Miranda* decision and is the sole governing standard when *Miranda* is inapplicable. *See* Mincey v. Arizona, 437 U.S. 385, 397-98 (1978) (due process considerations apply when statements are to be used for impeachment); *see also* Hoffa v. United States, 385 U.S. 293, 303-04 (1966) (interrogations conducted outside of custody are governed by due process standards).

29. 384 U.S. 436 (1966).

30. *See id.* at 444. The Court stated the general exclusionary rule that "the prosecution

ent coercion for all custodial interrogation situations.[31] Only administration of the warnings followed by a knowing and voluntary waiver of the suspect's rights could effectively rebut this presumption and allow use of statements obtained by police interrogation.[32] The Court's

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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." *Id.* at 444. The exclusionary rule was to apply to all custodial interrogation situations and to all statements obtained therefrom, rejecting the case-by-case adjudication of the coerced confession doctrine. *See id.* at 468. The specific warnings were enunciated as "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of any attorney, either retained or appointed." *Id.* at 444; *accord* California v. Prysock, 453 U.S. 355, 360-61 (1981) (*Miranda* warnings required but need not be word-for-word incantation so long as rights adequately conveyed to suspect). The Court reaffirmed that the privilege against self-incrimination applies outside of the judicial context so as to include coerced confessions. *See* Miranda v. Arizona, 384 U.S. 436, 460-65 (1966); *see also* Bram v. United States, 168 U.S. 532, 540-41 (1897) (privilege extends beyond incrimination in trial court). *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 102-04 (1966) (defending Court for extending privilege to extrajudicial context).

31. *See* Miranda v. Arizona, 384 U.S. 436, 457, 467 (1966); *see also* Michigan v. Tucker, 417 U.S. 433, 445-48 (1974) (statements obtained in custodial interrogation presumed compelled without warnings); Orozco v. Texas, 394 U.S. 324, 326-27 (1969) (custodial interrogation brings full threat of police against individual). The *Miranda* decision defined custodial interrogation as questioning initiated by the police in any setting in which a suspect is not free to go. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). The precise definition of "custodial interrogation" has been a fertile field of controversy. *See, e.g.,* Edwards v. Arizona, 451 U.S. 477, 484-87 (1981) (suspect in custody subject to renewed questioning by police); Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (interrogation determined by objective considerations); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (question of custody centers upon restraint of freedom and need not be formal arrest). *See generally* Comment, *Rhode Island v. Innis, Custodial Interrogation Defined,* 9 HOFSTRA L. REV. 691, 696-708 (1981) (discussing what constitutes custodial interrogation); Comment, *Rhode Island v. Innis: A Workable Definition of "Interrogation"?,* 15 U. RICH. L. REV. 385, 399-404 (1981) (gives several examples of custodial interrogation situations).

32. *See* Miranda v. Arizona, 384 U.S. 436, 478-81 (1966). *Miranda* allows use of incriminating statements obtained after the suspect has intelligently and voluntarily waived his rights as expressed in the warnings, or when the person is not in custody, or when the suspect is not subject to interrogation. *See id.* at 475; *see also* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (statements not result of interrogation by police not excluded by fifth amendment as interpreted in *Miranda);* North Carolina v. Butler, 441 U.S. 369, 374 (1979) (sufficient waiver allows use of incriminating statements). The state bears the burden in establishing that the suspect did in fact waive his rights before the statement can be used. *See* North Carolina v. Butler, 441 U.S. 369, 374 (1979) (waiver must be established but express waiver not required); *accord* Edwards v. Arizona, 451 U.S. 477, 482-84 (1981) (waiver of rights essential for use of incriminating statements obtained by police interrogation). *See generally* Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 411, 432 (1982) (discussing necessity and establishment of waiver).

primary purpose in the decision was to provide "concrete constitutional guidelines for law enforcement agencies and courts to follow" in the area of interrogations and confessions.[33] Utilizing the *Miranda* exclusionary rule, the Court sought, first, to protect the integrity of the accusatorial judicial system and, second, to protect the individual's dignity and free will.[34] The Court eschewed a case-by-case determination of coercion by prohibiting the balancing of society's need for interrogation in some situations against the suspect's constitutional privilege.[35] Furthermore, the *Miranda* warnings were created as constitutional requirements of the fifth amend-

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33. *See* Miranda v. Arizona, 384 U.S. 436, 441-42 (1966). The guidelines established in *Miranda* have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogations, and of informing courts under what circumstances statements obtained during such interrogations are not admissible." *See* Fare v. Michael C., 442 U.S. 707, 718 (1979); *see also* Harryman v. Estelle, 616 F.2d 870, 873-74 (5th Cir.) (*Miranda* established bright line), *cert. denied,* 449 U.S. 860 (1980). *See generally* Grano, *Voluntariness, Free Will, and the Laws of Confessions,* 65 VA. L. REV. 859, 863-64 (1979) (Court sought to establish a "bright line" rule for police and courts).

34. *See* Miranda v. Arizona, 384 U.S. 436, 448-50, 475-77 (1966). Informing a suspect of his constitutional rights would protect the person from coercive trickery or persuasion and allow a rational choice in waiving these rights. *See* Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 53 (1978). Deterrence of improper police methods was not a primary purpose of *Miranda* but merely a result of other goals. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966); *see also* Berger, *The Underprivileged Status of the Fifth Amendment Privilege,* 15 AM. CRIM. L. REV. 191, 201-03 (1978) (deterrence secondary purpose of *Miranda*); Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions,* 1975 WASH. U.L.Q. 275, 295 (*Miranda* signalled change in concern from blatant police activities to presumption of inherent coerciveness in any police interrogation). *But see* Brewer v. Williams, 430 U.S. 387, 421 (1977) (Burger, C.J., dissenting) (deterrence of unlawful police conduct is the only purpose of *Miranda*'s exclusionary rule); George, *The Fruits of Miranda: The Scope of the Exclusionary Rule,* 39 U. COLO. L. REV. 478, 489 (1967) (deterrence of improper police activities Court's social goal in *Miranda).*

35. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966); *see also* Orozco v. Texas, 394 U.S. 324, 325-27 (1969) (*Miranda* not to be put on scale of utilitarianism to determine its applicability). The Court anticipated a utilitarian application of *Miranda* and rejected it, stating:

> 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. 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.

Miranda v. Arizona, 384 U.S. 436, 479 (1966). *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 70-75 (1966) (*Miranda* concluded that fifth amendment required rejection of utilitarian application of exclusionary rule); Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 414 (1982) (discussing *Miranda*'s conclusive rejection of balancing approach to fifth amendment's privilege).

ment,[36] and the use of statements obtained in violation of *Miranda* was absolutely prohibited.[37]

With its emergence in the early 1970s, the Burger Court[38] began to modify the *Miranda* decision.[39] An emphasis was placed on deterrence of unlawful police conduct as the primary purpose underlying the *Miranda* exclusionary rule.[40] The Burger Court has reasoned that *Miranda*'s exclu-

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36. *See* Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("[T]he requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."). For a discussion of the constitutional basis for the *Miranda* warnings, see Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1208-10 (1971).

37. *See* Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (*Miranda* and fifth amendment violated only when statements used by prosecution at trial). The fifth amendment's exclusionary rule is activated in a two step process: (1) a *Miranda* violation in obtaining a statement, and (2) the use of that statement by the prosecution. *See* Gardner, *The Emerging Good Faith Exception to The Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 452 n.156 (1984); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 413 (1977) (fifth amendment not violated until incriminating statement used at trial).

38. *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1198-99 (1971) (discussing coalescing of "Burger Court" in criminal procedure cases); *see also* Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court,* 75 MICH. L. REV. 1320, 1374-87 (1977) (modification of *Miranda* began as Burger majority asserted itself). Much criticism of the *Miranda* decision preceded the Burger Court's ascendancy, including congressional attempts to undercut *Miranda*'s influence. *See* 18 U.S.C. §§ 3501-3502 (1982) (Title II of Omnibus Crime Control and Safe Streets Act of 1968 requires *Miranda* be considered but not controlling in determining admissibility of statements in federal prosecutions). Lower courts and prosecutors have generally refused to test the constitutionality of the sections, and the Court has never ruled on the issue. *See* Gandara, *Admissibility of Confessions in Federal Prosecutions: Implementation of Section 3501 by Law Enforcement Officials and the Courts,* 63 GEO. L.J. 305, 313-14 (1974). For a criticism of the *Miranda* decision, see Sunderland, *Self-Incrimination and Constitutional Principle: Miranda v. Arizona and Beyond,* 15 WAKE FOREST L. REV. 171, 188-197 (1979).

39. *See* Harris v. New York, 401 U.S. 222, 224 (1971) (Burger Court's first treatment of *Miranda* allowed use of statement obtained without *Miranda* warnings to impeach testimony). The "Burger majority," in criminal procedure cases, has centered upon Chief Justice Burger, Justices Rehnquist, Blackmun, Powell, White, and retired Justice Stewart, whose position Justice O'Connor is expected to fill. *See* Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 406 (1982) (Burger majority is identifiable on *Miranda* cases); Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 100-01 (Burger majority not sympathetic to basic assumptions of *Miranda* decision).

40. *See* Michigan v. Tucker, 417 U.S. 433, 446-48 (1974) (exclusionary rule in self-incriminating cases based upon deterrence of police misconduct); Harris v. New York, 401 U.S. 222, 225 (1971) (excluding statements from impeachment use would not carry out deterrence purpose of *Miranda*); *accord* Brewer v. Williams, 430 U.S. 387, 421 (1977) (Burger, C.J., dissenting) (Chief Justice Burger argued deterrence of illegal police conduct sole justifi-

sionary rule should be applied only if it would deter unlawful police conduct and for no other reason.[41] Relying upon this interpretation of *Miranda,* the Court has held that statements obtained without sufficient *Miranda* warnings could be used to impeach the defendant's testimony.[42] The Court next decided that the *Miranda* warnings were not constitutional requirements of the fifth amendment,[43] but were merely judicially-created safeguards.[44] By refining the definition of custodial interrogation to allow

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cation for excluding incriminating statements). *But see* Orozco v. Texas, 394 U.S. 324, 326 (1969) (deterrence is at best a secondary purpose of *Miranda* rule); Miranda v. Arizona, 384 U.S. 436, 460 (1966) (deterrence of police conduct secondary purpose of *Miranda* strictures). The Burger Court has been criticized for its deterrence interpretation of Miranda. *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1212-30 (1971); Comment, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues,* 36 WASH. & LEE L. REV. 259, 260-65 (1979) (discusses Burger Court's desire to return to due process approach to incriminating statements).

41. *See* Harris v. New York, 401 U.S. 222, 225 (1971) (exclusionary rule should only be applied if deterrence results); *accord* Michigan v. Tucker, 417 U.S. 433, 446-48 (1974) (*Miranda*'s exclusionary rule loses its efficacy when deterrence will not result from its application). *See generally* Berger, *The Underprivileged Status of the Fifth Amendment Privilege,* 15 AM. CRIM. L. REV. 191, 203 (1978) (Burger Court's narrowing of *Miranda*'s scope based on deterrence interpretation of its rule); Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 455 (1984) (Burger Court's treatment of *Miranda* cases premised on deterrence interpretation of exclusionary rule).

42. *See, e.g.,* Oregon v. Hass, 420 U.S. 714, 722 (1975) (*Miranda* does not preclude use of coerced statements for impeachment purposes); Michigan v. Tucker, 417 U.S. 433, 451-52 (1974) (statements obtained in violation of *Miranda* may be used to impeach); Harris v. New York, 401 U.S. 222, 226 (1971) (*Miranda* does not apply to exclude statements from impeachment use). *But see* Miranda v. Arizona, 384 U.S. 436, 477 (1966) (statements obtained without benefit of warnings and waiver cannot be used to impeach defendant's testimony). The Court, in *Harris,* dismissed *Miranda*'s treatment of the impeachment question as dicta. *See* Harris v. New York, 401 U.S. 222, 224 (1971) (*Miranda* decision does not speak directly to impeachment question; therefore, any language within opinion on that point not binding). The *Harris* decision has been criticized for its factual mischaracterization, its misuse of precedent, and its misreading of *Miranda. See* Harris v. New York, 401 U.S. 222, 230 (1971) (Brennan, J., joined by Douglas, J., and Marshall, J., dissenting); *see also* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1225-26 (1971) (*Harris* decision encourages police to ignore *Miranda*). Not only did the *Harris* decision elevate the deterrence rationale, it also marked the Court's return to balancing the *Miranda* rules against the benefits of using the incriminating statements. *See* Harris v. New York, 401 U.S. 222, 225 (1971) ("[T]he benefits of [the impeachment] process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.").

43. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974). The Court relied heavily upon a deterrence interpretation of *Miranda* to conclude that the warnings were not constitutional rights. *See id.* at 448-50. *But see* Miranda v. Arizona, 384 U.S. 436, 476 (1966) (statements obtained in absence of warnings do not meet standards of fifth amendment; therefore, warnings are constitutional requirements of fifth amendment).

44. *See* Michigan v. Tucker, 417 U.S. 433, 444-46 (1974). The Court described the

the use of incriminating statements obtained through indirect, unintentional police questioning, the Court has limited *Miranda*'s effect.[45] While the Burger Court has maintained the absolute ban on using statements obtained in violation of *Miranda*'s requirements to prove the defendant's guilt,[46] there have been suggestions to implement certain exceptions to this rule.[47]

Chief Justice Burger and Justice Rehnquist have suggested that an exi-

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Miranda warnings as "prophylactic standards . . . to safeguard that privilege." *See id.* at 446. The Court analogized the *Miranda* strictures to the fourth amendment's exclusionary rule. *See id.* at 446. For a discussion of the *Miranda* warnings as merely "prophylactic standards," see Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 57 (1978) (critique of conclusions in *Tucker).* The Court, in *Tucker,* did reaffirm *Miranda*'s prohibition on using statements obtained in violation of *Miranda* in the prosecution's case-in-chief. *See* Michigan v. Tucker, 417 U.S. 433, 445 (1974); *see also* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 463 (1984) (discussing inner conflict in *Tucker* decision).

45. *See* Rhode Island v. Innis, 446 U.S. 291, 301-02 (1980) (conversation between police which was not meant to elicit response from suspect not interrogation for *Miranda* purposes); *see also* Comment, *The Supreme Court Narrows Definition of Interrogation to Allow Admissions of Some Custodial Confessions—Rhode Island v. Innis,* 32 S.C.L. REV. 611, 618-21 (1981) (new definition undercuts *Miranda* conclusions by ignoring effectiveness of indirect police tactics); Comment, *Rhode Island v. Innis: A Workable Definition of "Interrogation"?,* 15 U. RICH. L. REV. 385, 394-95 (1981) (questioning whether definition of interrogation consistent with *Miranda*'s basic presumptions). The Burger Court has also modified the definition of waiver in the *Miranda* context to allow both express and implied waiver of the warnings. *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979).

46. *See, e.g.,* Edwards v. Arizona, 451 U.S. 477, 485 (1981) (requestioning of suspect violated *Miranda* and must be excluded from prosecution's case-in-chief); Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (statements obtained without *Miranda* warnings in court-ordered psychiatric examination cannot be introduced in punishment phase of trial); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (statements that might be used for impeachment cannot be used to establish guilt). *See generally* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 169 (Court has remained true to core with regard to *Miranda* prohibition on use of incriminating evidence in prosecution's case-in-chief). Several commentators have discussed the Burger Court's approach to exclusionary rules and *Miranda* cases. *Compare* Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections,* 52 N.Y.U. L. REV. 518, 520, 555-61 (1977) (asserts that the Court uses factual guilt of defendant to apply exclusionary rules) *with* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure,* 80 COLUM. L. REV. 436, 437 (1980) (asserts that Burger Court's decisions seek to ensure crime control).

47. *See* Brewer v. Williams, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (fourth and fifth amendments' exclusionary rules serve same deterrence purpose; therefore, same exceptions should apply); *see also* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (*Miranda* rule, based upon deterrence, should be subject to reasonable exceptions when deterrence would not be served). *See generally* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 455-75 (1984) (questioning propriety of an exception to *Miranda).*

gency or good faith exception to the *Miranda* rule should exist.[48] Relying heavily upon their previous interpretation of *Miranda,* Chief Justice Burger and Justice Rehnquist both analogize the *Miranda* fifth amendment exclusionary rule to the fourth amendment's exclusionary rule.[49] Utilizing this approach, both conclude that the exigency and good faith exceptions to the fourth amendment exclusionary rule should also apply to the *Miranda* fifth amendment rule.[50] Chief Justice Burger and Justice Rehnquist also urge a return to an individual showing of actual coercion in each case

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48. See Brewer v. Williams, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (exception should exist to *Miranda* rule when police act in good faith since no deterrence of illegal police conduct accomplished by excluding relevant evidence); Michigan v. Tucker, 417 U.S. 433, 447-50 (1974) (Justice Rehnquist stated that an exception to *Miranda* should exist when police act reasonably in custodial interrogation situations). For an examination of the Burger-Rehnquist approaches to an exigency or good faith exception to the *Miranda* rule, see Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 456-66 (1984).

49. *Compare* Brewer v. Williams, 430 U.S. 387, 420-23 (1977) (Burger, C.J., dissenting) (fourth and fifth amendment analogy is justified method of applying both exclusionary rules) *with* Michigan v. Tucker, 417 U.S. 433, 447 (1974) ("Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."). For a discussion on the propriety of analogizing the fourth and fifth amendments' exclusionary rules, see Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 417 n.168 (1977) (analogy between fourth and fifth amendments cannot be logically justified). The Supreme Court first recognized the fourth amendment's exclusionary rule in Weeks v. United States, 232 U.S. 383, 398 (1914) (evidence obtained in violation of fourth amendment cannot be used in federal prosecutions). The Court later applied the exclusionary rule to state prosecutions. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence obtained through unconstitutional search and seizure cannot be used in state proceeding). *See generally* Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle,* 69 J. CRIM. L. & CRIMONOLOGY 141, 158 (1978) (discussion of creation and expansion of fourth amendment exclusionary rule).

50. *See* Brewer v. Williams, 430 U.S. 387, 422-25 (1977) (Burger, C.J., dissenting) (reasonable, good faith actions by officers in certain situations justify exception to both fourth and fifth amendments' exclusionary rules); Michigan v. Tucker, 417 U.S. 433, 446-47 (1974) (Justice Rehnquist states that reasonable, good faith actions by police should justify exception to both fourth and fifth amendments' exclusionary rules). The Court has long recognized an exigency exception to the fourth amendment exclusionary rule. *See, e.g.,* Michigan v. Tyler, 436 U.S. 499, 509 (1978) (reasonable exigency justifies warrantless search and seizure); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit of suspect justified warrantless entry); Schmerber v. California, 384 U.S. 757, 765 (1966) (exigency of retrieving alcohol evidence in bloodstream allows seizure without warrant). The Court has only recently recognized a good faith exception to the fourth amendment's exclusionary rule by utilizing a cost-benefit analysis. *See* United States v. Leon, __ U.S. __, __, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677, 698 (1984); *see also* Massachusetts v. Sheppard, __ U.S. __, __, 104 S. Ct. 3424, 3429, 82 L. Ed. 2d 737, 744 (1984) (good faith reliance on faulty warrant allows use of evidence obtained with warrant). *See generally* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 335-61 (1982) (discussing "good faith" exception and its validity).

before the fifth amendment would apply to require suppression of the incriminating evidence.[51] A few lower courts have also broached the subject of an exigency exception to the *Miranda* requirements through an application of the rescue doctrine to custodial interrogations.[52] The majority of courts, however, have refused to engraft an exigency exception on *Miranda*'s strict requirements.[53]

In *New York v. Quarles,*[54] the Supreme Court, following in part the suggestions of Chief Justice Burger and Justice Rehnquist, explicitly adopted a "public safety" exception to the *Miranda* fifth amendment exclusionary rule.[55] The existence of the "public safety" exception was not dependent

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51. *See* Brewer v. Williams, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (case-by-case determination of unlawful police conduct should be made before evidence suppressed); *see also* Michigan v. Tucker, 417 U.S. 433, 444-46 (1974) (deterrence purpose of *Miranda* requires determining whether purpose would be met, in that case, by excluding evidence).

52. *See* People v. Riddle, 148 Cal. Rptr. 170, 173 (Ct. App. 1978), *cert. denied,* 440 U.S. 937 (1979). An emergency exception to *Miranda* exists if there is "(1) [u]rgency of need in that no other course of action promises relief; (2) [t]he possibility of saving human life by rescuing a person whose life is in danger; (3) [r]escue as the primary purpose and motive of the interrogators." *See id.* at 173; *see also* People v. Modesto, 427 P.2d 788, 795, 59 Cal. Rptr. 124, 127 (1967) (rescue doctrine allows inquiry when person's life in danger without violating suspect's privilege against self-incrimination), *cert. denied,* 389 U.S. 1009 (1965); People v. Dean, 114 Cal. Rptr. 555, 561 (Ct. App. 1974) (rescue of missing person justified interrogation without *Miranda* warnings). *See generally* Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial,* 33 U. CHI. L. REV. 657, 675-77 (1966) (discussing need for flexibility in self-incrimination area to avoid arbitrary rules). Other courts have also discussed an emergency exception to *Miranda* if human life was at peril. *See* Cronk v. State, 443 N.E. 2d 882, 884-86 (Ind. Ct. App. 1983) (questioning about bomb might be permissible even without *Miranda* warnings); Commonwealth v. Hawkins, 439 A.2d 142, 144-45 (Pa. Super. Ct. 1981) (hostage situation justified questioning about situation without *Miranda* warnings). Questioning by police in emergency situations has also been interpreted as outside the definition of "interrogation" for *Miranda* purposes so as to allow use of incriminating evidence. *See* United States v. Castellana, 500 F.2d 325, 326 (5th Cir. 1974).

53. *See, e.g.,* Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir. 1980) (en banc) (exigency does not affect presumption that custodial interrogation inherently coercive; no exception to *Miranda* recognized), *cert. denied,* 449 U.S. 860 (1981); People v. Manning, 672 P.2d 499, 510-11 (Colo. 1983) (no exigency exception to *Miranda* recognized because analogy to fourth amendment unfounded); Whitfield v. State, 411 A.2d 415, 419-22 (Md. 1980) (no exigency exception to *Miranda* exists). A suspect's statement about a missing gun obtained without *Miranda* warnings being administered "must" be suppressed under state law even though police had just apprehended the suspect. *See* Scott v. State, 571 S.W.2d 893, 896 (Tex. Crim. App. 1978). *See generally* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 455-75 (1984) (exigency exception to *Miranda* constitutionally unjustified).

54. __ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984).

55. *See id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 557. The majority sanctions the use of incriminating statements in the prosecution's case-in-chief which were obtained without the administering of *Miranda* warnings if the exception is shown to exist. *See id.* at __, 104

upon the subjective motivations of an officer, but was determined by the reasonableness of the inquiry in light of the exigency and factual circumstances presented.[56] In creating the "public safety" exception, the majority began by stating that the *Miranda* warnings are not constitutional rights but merely procedural safeguards to enforce the fifth amendment.[57] The majority concluded, from this premise, that a failure to administer *Miranda* warnings does not result in a constitutional violation; therefore, statements obtained without *Miranda* warnings are not automatically excluded by constitutional proscription.[58] Finding that the fifth amendment itself did not preclude the use of Quarles' statement, the majority balanced the costs of strict adherence to *Miranda*'s procedural rules against the benefits of engrafting a "public safety" exception onto *Miranda*.[59] The

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S. Ct. at 2634, 81 L. Ed. 2d at 559. The majority accepted that Quarles was in custody and was interrogated by police. *See id.* at __, 104 S. Ct. at 2629, 81 L. Ed. 2d at 554-55. In creating this exigent exception to *Miranda,* the majority analogized the exception to the exigency exception to the fourth amendment exclusionary rule. *See id.* at __ n.3, 104 S. Ct. at 2629 n.3, 81 L. Ed. at 555 n.3.

56. *See id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 557. While the majority emphasizes the objective nature of the public safety exception, the exception's recognition is based upon an individual officer's experience and instincts in such a situation. *Compare id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 557 ("[T]he availability of that exception does not depend upon the motivation of the individual officers involved.") *with id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 559 ("We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.").

57. *See id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 556. *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *See id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 556 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

58. *See id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 555. The majority interpreted the fifth amendment's absolute exclusionary mandate as excluding only statements obtained through official coercion. *See id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 555. The majority then rejected any presumption of coercion merely because *Miranda* warnings were not administered. *See id.* at __ n.5, 104 S. Ct. at 2631 n.5, 81 L. Ed. 2d at 556 n.5. The majority concluded that, lacking other evidence of coercion, statements obtained without benefit of the prophylactic safeguards of *Miranda* were not automatically excluded by the fifth amendment, because no violation of the fifth amendment had occurred. *See id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 556. On remand, the majority would allow Quarles to argue that his statement was obtained through actual coercion in violation of due process. *See id.* at __ n.5, 104 S. Ct. at 2631 n.5, 81 L. Ed. 2d at 556 n.5.

59. *See id.* at __, 104 S. Ct. at 2632-33, 81 L. Ed. 2d at 558. The majority stated that not only would strict adherence to *Miranda* "cost" society fewer convictions of obviously guilty persons because of the exclusion of relevant statements, but in many situations it would mean prolonging a serious threat to public safety by precluding questioning. *See id.* at __, 104 S. Ct. at 2632-33, 81 L. Ed. 2d at 558. The Court also recognized a "cost" in requiring officers to choose between eliminating the dangerous situation through quick questioning or obeying *Miranda*'s requirements and possibly deterring Quarles' response. *See id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 558. On the "benefit" side of the scale, the majority stated that

Quarles majority struck the balance in favor of the benefits of the "public safety" exception and accepted a lessening of *Miranda*'s recognized clarity.[60] The majority concluded a "public safety" exigency did exist[61] and that Quarles' statement could be used to establish his guilt.[62]

A strong dissent[63] rejected the "public safety" exception to *Miranda* because through it, the dissent argued, the majority condoned the use of coerced self-incriminating statements in violation of the fifth amendment.[64] Initially, the dissent challenged the majority's characterization of the facts in creating its new exception, especially in light of the contradictory findings of the lower courts.[65] The dissent next asserted that, in creating the exception, the majority inexplicably abandoned the constitutional presumption of coercion established in *Miranda* for custodial interrogations.[66]

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elimination of the danger through immediate questioning, and limiting the questioning to effectuate only this goal, was accomplished by the public safety exception to *Miranda*. *See id.* at __, 104 S. Ct. at 2632-33, 81 L. Ed. 2d at 558.

60. *See id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 558-59. While the majority recognized a lessening of *Miranda*'s absolute requirements, it also maintained that the public safety exception was a workable standard to guide police officers in exigent circumstances without unreasonably sacrificing fifth amendment protection. *See id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 559.

61. *See id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 558 ("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 . . . .").

62. *See id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 559. The Court remanded, sanctioning the use of all statements concerning the gun and the gun itself against the defendant. *See id.* at __, 104 S. Ct. at 2634, 81 L. Ed. 2d at 559. The majority refused to consider an inevitable discovery argument or a derivative non-testimonial argument. *See id.* at __ n.9, 104 S. Ct. at 2634 n.9, 81 L. Ed. 2d at 559 n.9.

63. *See id.* __, 104 S. Ct. at 2641-42, 81 L. Ed. 2d at 569 (Marshall, J., joined by Brennan, J., and Stevens, J., dissenting); *see also id.* at __, 104 S. Ct. at 2634, 81 L. Ed. 2d at 560 (O'Connor, J., dissenting in part and concurring in part).

64. *See id.* at __, 104 S. Ct. at 2641-42, 81 L. Ed. 2d at 569 (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2634, 81 L. Ed. 2d at 560 (O'Connor, J., dissenting in part and concurring in part).

65. *See id.* at __, 104 S. Ct. at 2642, 81 L. Ed. 2d at 570 (Marshall, J., dissenting). The dissent asserted that the questionable factual analysis by the majority, in light of the lower courts' findings, illustrated an underlying weakness of the exception—the police will be unable to determine when the exception exists in light of later *ad hoc* judicial determinations. *See id.* at __, 104 S. Ct. at 2644, 81 L. Ed. 2d at 572-73 (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2635, 81 L. Ed. 2d at 562 (O'Connor, J., dissenting in part and concurring in part) (later *ad hoc* determinations will undermine exception).

66. *See id.* at __, 104 S. Ct. at 2647, 81 L. Ed. 2d at 575 (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2636, 81 L. Ed. 2d at 563 (O'Connor, J., dissenting in part and concurring in part). Both dissents argue that the majority *sub silentio* abandoned *Miranda*'s coercion presumption and furthermore failed to explain how exigent circumstances lessen the coerciveness present in custodial interrogations. *See id.* at __, 104 S. Ct. at 2647, 81 L. Ed. 2d at 575 (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2636, 81 L. Ed. 2d at 563 (O'Connor, J., dissenting in part and concurring in part).

Third, the dissent argued that the "public safety" exception will encourage the active coercion of suspects and justify the use of those coerced statements to convict the accused.[67] Finally, the dissent asserted that the "public safety" exception undermines both the *Miranda* precedent and the fifth amendment's effectiveness.[68] Justice O'Connor, in a separate opinion, joined in the dissent's rejection of the "public safety" exception to *Miranda,*[69] but supported the use of the gun against Quarles because of its non-testimonial nature.[70]

The *Quarles* decision is consistent with the Burger Court's past treatment of *Miranda* self-incrimination cases.[71] The "public safety" exception is primarily based upon the Court's previous deterrence interpretation and application of *Miranda,*[72] a rationale justifying the Court's cost-benefit ap-

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67. *See id.* at __, 104 S. Ct. at 2647, 81 L. Ed. 2d at 576 (Marshall, J., dissenting) ("The public safety exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements."); *see also id.* at __, 104 S. Ct. at 2631, 81 L. Ed. 2d at 563 (O'Connor, J., dissenting in part and concurring in part).

68. *See id.* at __, 104 S. Ct. at 2649, 81 L. Ed. 2d at 578 (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2636, 81 L. Ed. 2d at 563 (O'Connor, J., dissenting in part and concurring in part). While Justice Marshall would affirm the order suppressing all of Quarles' statements, he would remand to allow consideration on the admissibility of the gun under the "inevitable discovery" rule of Nix v. Williams, __ U.S. __, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2650, 81 L. Ed. 2d 550, 579 (1984) (Marshall, J., dissenting).

69. *See id.* at __, 104 S. Ct. at 2634, 81 L. Ed. 2d at 560 (O'Connor, J., dissenting in part and concurring in part). Justice O'Connor argued that no justification for the exigency exception had been sufficiently advanced; therefore, rejection of *Miranda*'s clear requirements should not occur. *See id.* __, 104 S. Ct. at 2634, 81 L. Ed. 2d at 560 (O'Connor, J., dissenting in part and concurring in part).

70. *See id.* at __, 104 S. Ct. at 2640, 81 L. Ed. 2d at 567 (O'Connor, J., dissenting in part and concurring in part). Justice O'Connor argued that *Miranda* prohibited use of only testimonial evidence; therefore, use of the gun was not prohibited by *Miranda*'s strictures or the fifth amendment exclusionary mandate. *See id.* at __, 104 S. Ct. at 2639-40, 81 L. Ed. 2d at 564-65 (O'Connor, J., dissenting in part and concurring in part). Justice O'Connor cited Schmerber v. California, 384 U.S. 757 (1966), and United States v. Wade, 388 U.S. 218 (1967), to support this non-testimonial, derivative evidence argument. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2637-38, 81 L. Ed. 2d 550, 564 (1984) (O'Connor, J., dissenting in part and concurring in part).

71. *Compare* New York v. Quarles, __ U.S. __, __ 104 S. Ct. 2626, 2632, 81 L. Ed. 2d 550, 557 (1984) (public safety exception allows use of coerced self-incriminating statements to prove defendant's guilt) *with* Harris v. New York, 401 U.S. 222, 225 (1971) (use of coerced self-incriminating statements to impeach defendant allowed). *See generally* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 168-69 (entire approach of Burger Court to *Miranda* characterized by narrowing decision's scope and effect).

72. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2632, 81 L. Ed. 2d 550, 557 (1984) (no deterrence purpose served by excluding statements obtained when police acted reasonably in questioning Quarles about hidden gun); *see also* Michigan v. Tucker, 417 U.S. 433, 446 (1974) (deterrence prime justification of *Miranda* exclusionary rule); Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J.

proach to *Miranda* and the fifth amendment.[73] The "public safety" exception is also consistent with prior suggestions of an analogy between the fourth amendment exclusionary rule and the *Miranda* fifth amendment rule and the conclusion that the exigency exception does apply to both rules.[74] Furthermore, the decision reflects the Court's past desire to return to an actual coercion standard, determined on a case-by-case basis, for the exclusion of relevant, testimonial evidence.[75] By ignoring a contradictory lower court determination that no threat to the public safety actually existed at the time of the questioning,[76] the *Quarles* majority also continues the Court's trend of independent fact-finding, employed in prior *Miranda*

405, 421, 427 (1982) (Burger Court's treatment of *Miranda* cases premised upon deterrence theory of *Miranda*).

73. *See* Michigan v. Tucker, 417 U.S. 433, 447-50 (1974) (deterrence theory allows balancing of interests to determine if deterrence of police conduct served); *see also* Rhode Island v. Innis, 446 U.S. 291, 302-03 (1980) (statements obtained through unintentional police conversation not suppressed because cost of exclusion outweighs deterrence of any police misconduct); Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court,* 75 MICH. L. REV. 1320, 1378-80 (1977) (Burger Court's adoption of deterrence purpose of *Miranda* allows balancing approach to determine necessity of suppression).

74. *Compare* New York v. Quarles, __ U.S. __, __ n.3, 104 S. Ct. 2626, 2630 n.3, 81 L. Ed. 2d 550, 555 n.3 (1984) (fourth amendment exigency exception based on reasonableness; exception to *Miranda* requires reasonableness of exigency) *with* Brewer v. Williams, 430 U.S. 387, 421-23 (1977) (Burger, C.J., dissenting) (both rules serve some deterrence purposes; therefore, when deterrence of illegal police conduct does not occur through suppression of evidence, exception should exist). *See also* Michigan v. Tucker, 417 U.S. 433, 446-47 (1974) (underlying deterrence rationales justify analogy between fourth and fifth amendments' exclusionary rules). *See generally* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 124-25 (Burger Court may utilize fourth-fifth amendment analogy to modify *Miranda*'s strictures).

75. *See* New York v. Quarles, __ U.S. __, __ n.5, __, 104 S. Ct. 2626, 2631 n.5, 2632, 81 L. Ed. 2d 550, 556 n.5, 557 (1984) (exigency exception determined by circumstances of individual case; due process approach may also be utilized to gain suppression); *see also* North Carolina v. Butler, 441 U.S. 369, 375 (1979) (case-by-case determination of waiver of *Miranda* rights permissible); Brewer v. Williams, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (*Miranda*'s exclusionary requirement should not be automatic, but utilized only after determination of necessity in that case); Michigan v. Tucker, 417 U.S. 433, 446-50 (1974) (case-by-case approach to use of self-incriminating statements would better serve fifth amendment and society's needs). *See generally* Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 435 (1982) (Burger Court continually attempts to revive case-by-case due process approach to incriminating statements).

76. *See* People v. Quarles, 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1982) ("[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to public safety or that the police interrogation was prompted by any such concern."), *rev'd and remanded sub nom.* New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *see also* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2642-43, 81 L. Ed. 2d 550, 570-71 (1984) (Marshall, J., dissenting) (majority ignores lower court's fact determination).

cases, to support its conclusion.[77] While the *Quarles* decision embodies many of the Court's recent modifications of *Miranda,* it also contains practical and constitutional inconsistencies resulting from the Burger Court's interpretation and application of *Miranda.*[78]

In creating a "public safety" exception to *Miranda*'s clear dictates,[79] the *Quarles* majority fails to establish similar clear standards to aid police in

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77. *See, e.g.,* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2632, 81 L. Ed. 2d 550, 557 (1984) ("We hold that on these facts there is a 'public safety' exception . . . ."); Rhode Island v. Innis, 446 U.S. 291, 302 (1980) (Court determined facts did not establish "interrogation" of suspect even though lower court found police intended to elicit incriminating evidence); Harris v. New York, 401 U.S. 222, 224 (1971) (Court ignores lower court determination of due process violation). The Burger Court's decisions have often been criticized for a lack of acceptance of lower court factual determinations. *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1201-04 (1971); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 414-19 (1977) (factual determinations often ignored in order to facilitate conclusions in *Miranda*-type cases). The Burger Court's independent fact-finding in criminal procedure cases may be a crucial element in its overall treatment and objective in applying exclusionary rules. *See* Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections,* 52 N.Y.U. L. REV. 518, 520-21 (1977) (Court often determines "factual guilt" to ensure evidence is used against accused to convict); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure,* 80 COLUM. L. REV. 436, 448-56 (1980) (Burger Court's social engineering and crime prevention goals often require "factual corrections" to ensure guilty suspects incarcerated).

78. *See, e.g.,* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 465-68 (1984) (Burger Court has misinterpreted *Miranda* and has, in effect, eviscerated the decision without overruling it directly); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 56-60 (1978) (through re-interpretation of *Miranda,* Burger Court has raised fundamental constitutional conflicts in self-incrimination area); Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 123-26, 169 (Burger Court has modified *Miranda* in such ways as to allow for its express overruling). The Court has been criticized for its application of *Miranda* and the resulting lack of clarity in workable guidelines. *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does it Matter?,* 67 GEO. L.J. 1, 19-24 (1978); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 412-19 (1977) (Burger Court has consistently blurred bright line of *Miranda).*

79. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (statements obtained without required warnings cannot be used at trial to prove defendant's guilt); *see also* Harryman v. Estelle, 616 F.2d 870, 873-74 (5th Cir.) (en banc) (*Miranda* procedures have virtue of establishing clear guidelines for police, prosecutors, and courts), *cert. denied,* 449 U.S. 860 (1980). Through strict adherence to *Miranda*'s procedures and prohibitions, the "meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." *See* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring). *See generally* Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements,* 39 TENN. L. REV. 407, 431 (1972) (police aided in complying with *Miranda* because of simplicity and clarity). The *Miranda* rules have been praised for their clarity, and modification of the rules has prompted protest. *See* Fare v.

recognizing and conforming to the new exception.[80] The majority couches its exception in objective terms, but then relies upon the individual officer to recognize the exigency through instincts and experience and to conform his questioning only to the removal of the danger.[81] Such an approach is reminiscent of the Court's refinement of the term "interrogation" in *Rhode Island v. Innis,*[82] in that a supposedly objective test is established and then confused by reliance upon an individual officer's personal perceptions in the situation.[83] Furthermore, the majority fails to enunciate any minimal criteria to aid police or courts in recognizing the existence of the excep-

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Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay). Justice Rehnquist stated:

> [*Miranda*'s] supporters saw . . . rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise. But this core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other courts under the guise of "interpreting" Miranda.

Id. at 1314. *See generally* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 60-61 (1966) (while *Miranda* not perfect, its strictures are clear and workable).

80. *Compare* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2633, 81 L. Ed. 2d 550, 559 (1984) (officers will, through instinct and experience, recognize exception) *with* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (prior to any custodial interrogation, warnings must be given by police).

81. *Compare* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2632, 81 L. Ed. 2d 550, 557 (1984) ("exception does not depend upon the motivation of the individual officers involved") *with id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 559 ("[W]e think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.").

82. *See* 446 U.S. 291, 301-02 (1980). In interpreting *Miranda,* the Burger Court, in *Innis,* sought to clarify lower court conflicts as to indirect questioning methods, but the result was further confusion. *See* White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry,* 78 MICH. L. REV. 1209, 1223 (1980); Comment, *Rhode Island v. Innis, Custodial Interrogation Defined,* 9 HOFSTRA L. REV. 691, 708-15 (1981) (effectiveness of *Innis* test questionable at best).

83. *See* Rhode Island v. Innis, 446 U.S. 291, 301-03 (1980) ("[D]efinition focuses primarily upon the perceptions of the suspect" but depends upon the officer's foreseeable intent on eliciting statements). The lack of clarity in rules like *Innis* or *Quarles* not only jeopardizes constitutional rights, but also requires additional burdensome litigation to gain clarity. *See* Sonenshein, *The Miranda Doctrine and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 439 (1982). The need for clarity in creating criminal procedure rules has long been the Supreme Court's objective. *See, e.g.,* United States v. Ross, 456 U.S. 798, 824 (1982) (bright line in procedure area ensures both individual's rights and governmental concerns); Estelle v. Smith, 451 U.S. 454, 460 (1981) (*Miranda* established clear guidelines for procedural interrogations); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (specific procedural rules necessary to remove ambiguities that would encourage police to test rules at expense of suspect).

tion.[84] In the past, the Court strictly applied *Miranda*'s requirements to situations where the police were questioning a suspect about a missing weapon,[85] but the *Quarles* majority now abandons this precedent in favor of an exception defined and "circumscribed by the exigency which justifies it."[86] The end result of such an exception will be conflicting *ad hoc* judicial interpretations of exigency,[87] confusion among possibly well-intentioned police officers,[88] and imperilment of an accused's constitutional

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84. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2632, 81 L. Ed. 2d 550, 557 (1984) ("[O]n these facts there is a 'public safety' exception."). In the one jurisdiction that has recognized an exigency exception consistently, the following criteria must be present: "(1) Urgency of need in that no other course of action promises relief; (2) The possibility of saving human life by rescuing a person whose life is in danger; (3) Rescue as the primary purpose and motive of the interrogators." *See* People v. Riddle, 148 Cal. Rptr. 170, 177 (Ct. App. 1978), *cert. denied,* 440 U.S. 937 (1979). The failure to enunciate limitations upon the exigency exception could result in the exception becoming the rule and the observance of *Miranda* the exception. *See* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 474-75 (1984); *see also* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 124-25 (reasonableness-based exception to *Miranda* would undermine rule entirely).

85. *See* Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (police required to give *Miranda* warnings to suspect before they could question him about missing shotgun); Orozco v. Texas, 394 U.S. 324, 326 (1969) (suspect entitled to warnings prior to questioning by police about missing handgun); *see also* New York v. Quarles, __ U.S. __, __ n.2, 104 S. Ct. 2626, 2643 n.2, 81 L. Ed. 2d 550, 571 n.2 (1984) (Marshall, J., dissenting) (no distinction between *Orozco* and *Quarles* exists).

86. New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2633, 81 L. Ed. 2d 550, 559 (1984). The majority also fails to explain what facts distinguish its conclusion from a directly contradictory lower court determination. *Compare id.* at __, 104 S. Ct. at 2632, 81 L. Ed. 2d at 557 ("We hold that on these facts there is a 'public safety' exception.") *with* People v. Quarles, 444 N.E.2d 984, 985, 458 N.Y.S.2d 520, 521 (1982) ("[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety."), *rev'd and remanded sub nom.* New York v. Quarles, __ U.S. __, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). The Court's failure to enunciate such distinguishing facts does not aid the subsequent attempts of courts in applying the new exception; this demonstrates an underlying weakness of the exception. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2644, 81 L. Ed. 2d 550, 572-73 (1984) (Marshall, J., dissenting).

87. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2636, 81 L. Ed. 2d 550, 562 (1984) (O'Connor, J., dissenting in part and concurring in part) (*Miranda* reasonably clear rule to both police and judges, but new exigency exception will spawn needless *ad hoc* determinations on admissibility of statements); *see also* Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 417-20 (1977) (*Miranda*'s strict requirements avoid needless *ad hoc* determinations of admissibility; any modification would undermine benefit).

88. *See* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in judgment) (failure to maintain *Miranda*'s specific requirements places officers in precarious position because "few, if any, police officers are competent to make the kind of evaluation seemingly contemplated"). *See generally* Stephens, Flanders & Cannon, *Law Enforcement and the Supreme Court: Police Perceptions of the Miranda Requirements,* 39 TENN. L. REV. 407, 431 (1972) (police have clear guidelines from *Miranda* decision requirements).

privilege against self-incrimination.[89]

The *Quarles* majority also abandons the constitutional presumption of coercion for custodial interrogations established in *Miranda.*[90] This rejection is significant since the presumption of coercion is the core premise of *Miranda*[91] and the primary trigger of the *Miranda* fifth amendment exclusionary rule.[92] In carving out the "public safety" exception, the majority

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89. *See, e.g.,* Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 429-31 (1977) (imprecise modification of *Miranda* threatens privilege against self-incrimination); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 60 (1978) (modification of *Miranda*'s strict requirement may sacrifice the privilege); Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 168-69 (Burger Court's approach to self-incrimination cases threatens not only *Miranda* but privilege itself); *see also* Comment, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues,* 36 WASH. & LEE L. REV. 259, 273-75 (1979) (lessening effect of *Miranda* decision threatens self-incrimination privilege).

90. *Compare* New York v. Quarles, __ U.S. __, __ n.5, 104 S. Ct. 2626, 2631 n.5, 81 L. Ed. 2d 550, 556 n.5 (1984) ("Today we merely reject the only argument that respondent has raised to support the exclusion of his statement, that the statement must be *presumed* compelled because of Officer Kraft's failure to read him his *Miranda* warnings.") *with* Miranda v. Arizona, 384 U.S. 436, 467-68 (1966) (any custodial interrogation inherently coercive and any statement obtained without warnings and waiver presumed compelled). *See generally* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 463 n.228 (1984) (Court has rejected presumption of coercion in "public safety" situations).

91. *See, e.g.,* Rhode Island v. Innis, 446 U.S. 291, 300 (1980) (custodial interrogation inherently coercive in all situations under *Miranda*); Michigan v. Tucker, 417 U.S. 433, 447-48, 452 (1974) (statements obtained without warnings and waiver presumed compelled by *Miranda*); Orozco v. Texas, 394 U.S. 324, 326 (1969) (*Miranda*'s primary purpose to recognize that all custodial interrogations are inherently coercive); *see also* Edwards v. Arizona, 451 U.S. 477, 481-83 (1981) (core premise of *Miranda* is inherent coercion in all custodial interrogations); Harris v. New York, 401 U.S. 222, 224 (1971) (*Miranda* presumes coercion in custodial interrogation unless warnings and waiver are present). The presumption of coercion has been regarded as the most significant element of *Miranda. See, e.g.,* Berger, *The Underprivileged Status of the Fifth Amendment Privilege,* 15 AM. CRIM. L. REV. 191, 202-03 (1978) (presumption of coercion marks a significant advance from due process treatment of self-incriminating statements); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59, 65 (1966) (*Miranda* alters previous treatment of incriminating statements through absolute presumption); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 43 n.176 (1978) (*Miranda*'s presumption of coercion drastically altered treatment of incriminating statements).

92. *See* Baxter v. Palmigiano, 425 U.S. 308, 315 (1976) (violation of *Miranda* raises presumption of coercion; if statements used in criminal prosecution, fifth amendment requires suppression). The fifth amendment exclusionary rule is usually characterized as a two-step conditional process: (1) the statement must be coerced, and (2) the statement must be used against the defendant at trial; *Miranda* is important in satisfying the first condition. *See* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1214 (1971); *see also* Ritchie,

fails to explain how the exigency of the missing gun lessens the presumed coercion of the interrogation of Benjamin Quarles.[93] As argued by the dissent, if this exigency does not eliminate the presumed coercion of Quarles, then the majority sanctions the use of compelled, incriminating statements against Quarles to prove his guilt or, in essence, condones the abandonment of *Miranda* and the violation of the fifth amendment.[94] The majority recognizes that exigency is based upon the reasonableness of an officer's actions in the situation, but the Court fails to explain how a reasonableness-based exception satisfies the absolute requirements of the *Miranda* fifth amendment exclusionary rule.[95] In rejecting the presumption that Quarles' statement was improperly compelled, the majority also encourages a utilitarian determination of coercion, similar to the due process coerced confession approach, and a further withdrawal from the *Miranda* precedent.[96] In the end, the majority's failure to cogently justify the aban-

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Compulsion that Violates the Fifth Amendment: The Burger Court's Definition, 61 MINN. L. REV. 383, 413 (1977) (fifth amendment only excludes use of incriminating statements that are compelled from accused).

93. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2647, 81 L. Ed. 2d 550, 575 (1984) (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2636, 81 L. Ed. 2d at 562-63 (O'Connor, J., dissenting in part and concurring in part) (exigency does not alter presumption of coercion established by *Miranda*); Harryman v. Estelle, 616 F.2d 870, 875 (5th Cir. 1980) (en banc) (exigency does not affect presumption that custodial interrogation inherently coercive), *cert. denied,* 449 U.S. 860 (1981); Whitfield v. State, 411 A.2d 415, 419-22 (Md. 1980) (possible exigency of prison control does not affect *Miranda*'s presumption).

94. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2648, 81 L. Ed. 2d 550, 576-77 (1984) (Marshall, J., dissenting); *see also id.* at __, 104 S. Ct. at 2636, 81 L. Ed. 2d at 563 (O'Connor, J., dissenting in part and concurring in part).

95. *See id.* at __ n.3, 104 S. Ct. at 2630 n.3, 81 L. Ed. 2d at 555 n.3. The requirements to satisfy the fourth and fifth amendments have always been of a different nature; reasonableness satisfies the fourth amendment while it does not satisfy the fifth amendment. *See, e.g.,* United States v. Janis, 428 U.S. 433, 458 (1976) (fourth and fifth amendments protect different rights and satisfied by different standards); Fisher v. United States, 425 U.S. 391, 400 (1976) ("Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness"); Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (fourth and fifth amendments' rights are "of a wholly different order"; therefore, different standards exist to satisfy each amendment).

96. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2630-32, 81 L. Ed. 2d 550, 555-57 (1984). The Burger Court has never fully accepted the *Miranda* precedent and prefers the due process approach to incriminating statements. *See, e.g.,* Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1226-27 (1971) (Burger Court approach encourages case-by-case determinations of coercion in lieu of *Miranda*'s presumption); Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 434-35 (1982) (Court's emphasis upon cost-benefit analysis in *Miranda* area reminiscent of case-by-case due process approach which Court prefers); Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 168-69 (*Miranda* slowly being abandoned by Burger Court in favor of due process approach). The *Miranda* decision sought to correct the inadequacies of

donment of the coercion presumption undermines the constitutional position of the "public safety" exception and jeopardizes the vitality of *Miranda*.[97]

The *Quarles* majority also incorrectly utilizes an analogy between the fourth amendment's exclusionary rule and the *Miranda* fifth amendment exclusionary rule to justify a cost-benefit treatment of the latter, the result of which is the exigent "public safety" exception.[98] In the fourth amendment area, the cost-benefit analysis is employed because the fourth amendment's exclusionary rule is not constitutionally essential[99] and is satisfied by reasonable official conduct.[100] In contrast, the *Miranda* fifth amend-

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the due process approach by precluding case-by-case determinations of coercion and utilitarian approaches to the fifth amendment. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966). *But see* Brewer v. Williams, 430 U.S. 387, 424 (1977) (Burger, C.J., dissenting) (encouraged case-by-case application of *Miranda* rule in all custodial interrogation situations).

97. *See* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 474-75 (1984) (Court's failure to address *Miranda* precedent squarely places vitality of that precedent in question and jeopardizes constitutional rights); Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definitions,* 61 MINN. L. REV. 383, 416-17, 431 (1977) ("re-interpretation" of *Miranda* is, in effect, slow, confusing method of overruling *Miranda*).

98. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2633, 81 L. Ed. 2d 550, 558 (1984). The majority stated: "[w]e conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *See id.* at __, 104 S. Ct. at 2633, 81 L. Ed. 2d at 558. An analogy between the fourth and fifth amendments' exclusionary rules has been suggested in previous *Miranda*-type cases. *See* Brewer v. Williams, 430 U.S. 387, 421-22 (1977) (Burger, C.J., dissenting) (*Miranda*-fifth amendment exclusionary rule and fourth amendment exclusionary rule both "judicially remedial devices"); Michigan v. Tucker, 417 U.S. 433, 447-50 (1974) (fourth and fifth amendments' rules serve similar purposes). *See generally* Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition,* 61 MINN. L. REV. 383, 417 n.168 (1977) (Burger Court analogizes fourth and fifth amendments' exclusionary rules). The Court's analogy is based upon its deterrence interpretation of both the fourth amendment exclusionary and the *Miranda* rules. *Compare* United States v. Calandra, 414 U.S. 338, 348 (1974) (judicially-created fourth amendment exclusionary rule based primarily on deterrence effect) *with* Harris v. New York, 401 U.S. 222, 224-25 (1971) (deterrence primary motivation behind *Miranda*'s strictures on custodial interrogation).

99. *See, e.g.,* United States v. Janis, 428 U.S. 433, 446 (1976) (fourth amendment's exclusionary rule not required by Constitution); Stone v. Powell, 428 U.S. 465, 482 (1976) (fourth amendment exclusionary rule creation of judicial discretion); United States v. Calandra, 414 U.S. 338, 348 (1974) (fourth amendment rule "judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect"); *see also* LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 317-20 (1982) (fourth amendment exclusionary rule, delegated to subconstitutional status, subject to cost-benefit treatment).

100. *See* Mincey v. Arizona, 437 U.S. 385, 394 (1978); *see also* Fisher v. United States, 425 U.S. 391, 400 (1976) (fourth amendment satisfied by reasonableness). The Court has routinely approached the fourth amendment exclusionary rule with a cost-benefit analysis,

ment exclusionary rule is a constitutional necessity not satisfied by reasonableness;[101] therefore, a balancing approach is inapplicable because it threatens the constitutional mandate itself.[102] A cost-benefit analysis is also inappropriate in the fifth amendment area because the *Miranda* fifth amendment exclusionary rule is not based primarily upon a deterrence theory, the justification for the balancing approach in the fourth amendment area,[103] but is premised upon protection of the individual and ensuring the integrity of the adversarial system.[104] As evidenced by the

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most recently in recognizing a "good faith" exception to the warrant requirement. *See* United States v. Leon, __ U.S. __, __, 104 S. Ct. 3405, 3421, 82 L. Ed. 2d 677, 698 (1984) (good faith of police negates strict application of exclusionary rule); Massachusetts v. Sheppard, __ U.S. __, __, 104 S. Ct. 3424, 3429, 82 L. Ed. 2d 737, 744 (1984) (cost of strict adherence to warrant requirement outweighed by need to utilize evidence obtained through good faith reliance on faulty warrant). *See generally* Ball, *Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule,* 69 J. CRIM. L. & CRIMINOLOGY 635, 649-57 (1978) (cost-benefit tool employed to restrict or expand fourth amendment's exclusionary rule).

101. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself."); *see also* United States v. Janis, 428 U.S. 433, 443 (1976) (fifth amendment's exclusionary rule absolute constitutional requirement in contrast to fourth amendment's exclusionary rule); Miranda v. Arizona, 384 U.S. 436, 491 (1966) ("Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."). The *Miranda* decision emphasized that the *Miranda* warnings were constitutional requirements not subject to judicial modification. *See id.* at 476 ("The requirement of warnings and waiver of rights is fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."); *see also* Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 110-11 (balancing approach to *Miranda*-fifth amendment exclusionary rule prohibited). The Burger Court has often characterized *Miranda* rules as "prophylactic safeguards" similar to the judicially created fourth amendment safeguards, but such an interpretation has been criticized as inconsistent with *Miranda* and the fifth amendment. *See* Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 38-41 (1978).

102. *See* New York v. Quarles, __ U.S. __, __, 104 S. Ct. 2626, 2649, 81 L. Ed. 2d 550, 578 (1984) (Marshall, J., dissenting); *accord* Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 434-35 (1982) (constitutional exclusionary rule cannot be subject to *ad hoc* application or it loses all effectiveness).

103. *See* United States v. Leon, __ U.S. __, __, 104 S. Ct. 3405, 3419-21, 82 L. Ed. 2d 677, 696-98 (1984) (fourth amendment exclusionary rule primarily based upon deterrence; therefore, balancing costs and benefits justified); United States v. Calandra, 414 U.S. 338, 348 (1974) (judicially-created safeguard subject to balancing in application).

104. *See* Garner v. United States, 424 U.S. 648, 655 (1976) (fifth amendment's privilege works to protect integrity of judicial system); Malloy v. Hogan, 378 U.S. 1, 15 (1964) (fifth amendment privilege protects individual when confronted by all-powerful state). The Burger Court's deterrence interpretation of *Miranda* conflicts with the basic analysis provided in *Miranda.* *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966); *see also* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 474-75 (1984) (deterrence interpretation of *Miranda* based upon misinterpretation of fifth amendment and

reasoning employed to create the "public safety" exception, the majority's reliance on deterrence necessity and cost-benefit balancing threatens to reduce the protection of the self-incrimination privilege[105] and may also portend a continuing retreat from the *Miranda* precedent.[106]

The "public safety" exception to the requirements of *Miranda v. Arizona* marks a substantial alteration in the confrontation between police and citizen in a custodial interrogation. By recognizing the exception, the Court apparently frees police from the constraints of *Miranda* in order to ensure public safety. The Court's decision, however, fails to adequately define or justify the exception so that it may consistently be recognized without needlessly sacrificing an individual's constitutional privilege against self-incrimination. Even more confusing and threatening is the Court's treatment of the *Miranda* precedent. The majority's casual rejection of the constitutional presumption of coercion for custodial interrogations and its cost-benefit approach to the fifth amendment's exclusionary rule are simply not consistent with the precedent set forth in *Miranda.* The Court's failure to cogently justify the *Quarles* decision not only threatens the privilege against self-incrimination but also disserves the Court's responsibility to enunciate a constitutionally sound and clear law governing incriminating statements.

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untenable analogy to fourth amendment); Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 168-69 (balancing approach to *Miranda* based upon improper emphasis on deterrence).

105. *See* Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique,* 35 HASTINGS L.J. 429, 474-75 (1984) (creation of reasonable or good faith exception to *Miranda*-fifth amendment exclusionary rule will reduce protection offered accused by privilege against self-incrimination).

106. *See, e.g.,* Berger, *The Underprivileged Status of the Fifth Amendment Privilege,* 15 AM. CRIM. L. REV. 191, 228-30 (1978) (Burger Court has continually moved away from precedent established in *Miranda*); Schrock, Welsh & Collins, *Interrogational Rights: Reflections on Miranda v. Arizona,* 52 S. CAL. L. REV. 1, 56-60 (1978) (Burger Court has withdrawn from *Miranda* throughout its tenure); Sonenshein, *Miranda and the Burger Court: Trends and Countertrends,* 13 LOY. U. CHI. L.J. 405, 407 (1982) (Burger Court has undermined basic assumptions of *Miranda* through its case considerations and applications).