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Public Safety Exception to Miranda Careening Through the Lower Courts

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I. INTRODUCTION

In Miranda v. Arizona, the United States Supreme Court held that the prosecution must demonstrate the use of procedural safeguards to secure a suspect’s privilege against self incrimination before it could introduce statements elicited from the suspect during

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* Dedicated to the memory of my lovely mother.

The author would like to thank Sharon Sperling and Susan Turner for their help with earlier drafts of this note.

custodial interrogation.\textsuperscript{2} \textit{Miranda} mandated two conditions precedent to admissibility of such statements: appropriate warnings\textsuperscript{3} and a valid waiver.\textsuperscript{4} However, the Court has since narrowed the scope of \textit{Miranda}.

In \textit{New York v. Quarles},\textsuperscript{5} the Court recognized the need for an exception to \textit{Miranda} when police must defuse an immediate threat to public safety.\textsuperscript{6} The Court observed in situations that threaten the public safety, \textit{Miranda} warnings discourage suspects from answering police inquiries necessary to defuse the danger.\textsuperscript{7} Balancing the competing interests, the Court declared 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 privilege against self-incrimination.”\textsuperscript{8}

\textit{Quarles}, therefore, instituted the “public safety exception” to \textit{Miranda}, and that exception has since developed a convoluted history. The Supreme Court has not confronted the exception since it decided \textit{Quarles} in 1984. However, all levels of state courts, and federal district and circuit courts, have addressed the \textit{Quarles} decision. The lower...


\textsuperscript{3} Absent other equivalent means to protect the suspect’s fifth amendment privilege, police must inform the suspect before interrogation of his right to remain silent and that anything he says may be used against him. \textit{Miranda}, 384 U.S. at 467-69. Police must also inform the suspect of the right to counsel, to have counsel present during interrogation, and to have the court appoint counsel if the suspect is indigent. Id. at 469-73; see infra notes 18-19 and accompanying text.


\textsuperscript{5} 467 U.S. 649 (1984).

\textsuperscript{6} Id. at 655-60; \textit{cf}. Van Kessel, \textit{The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches}, 38 Hastings L.J. 1, 52-53 (1986). In England, neither the Judge’s Rules nor the Code contains an explicit public safety exception to the caution requirements. However, the duty to caution a suspect is not as broad as it appears. The type of questioning in \textit{Quarles} would arguably be permitted under the Code, at least when it occurs before formal arrest. Cautions are excused only when “it is impracticable to do so by reason of [the arrestee’s] condition or behavior at the time.” Id. at 53. Certainly the English rules provide enough latitude for a public safety exception similar to our own. Id.

\textsuperscript{7} \textit{Quarles}, 467 U.S. at 657.

\textsuperscript{8} Id. The outcome of this balancing test was the “public safety exception” to \textit{Miranda}. Id.
courts have confronted the public safety exception twenty-seven times with inconsistent results.9

The courts have adopted three approaches to deciding Quarles-type cases.10 First, some courts circumvent the exception for a variety of reasons. Some alternative grounds for decisions are valid, while others are mere pretexts to avoid the confusion of the exception. Other alternative grounds are combined with the exception to achieve a collective basis for admitting incriminating evidence. Second, some courts attempt to confine Quarles factually, establishing conditions precedent such as a missing weapon, a time constraint, or the possibility of an undetected accomplice. Third, some courts simply misapply the exception, either overlooking grounds for admission or exclusion, or extending Quarles to situations that pose no threat to the public safety.

This note reviews the current condition of the fifth amendment privilege. It then surveys the difficulties lower courts have confronted in their recent interpretations of the public safety exception. Finally, this note considers the difficulty of attaining, and the significant need for, judicial consistency that protects both the spirit of Miranda and public safety.


10. A fourth grouping would include cases that fall clearly within the exception. See Padilla, 819 F.2d at 952; Hubbard, 500 So. 2d at 1204; State v. Moore, No. 54-CA-86 (Ohio Ct. App. Sept. 4, 1987) (WESTLAW, OH-CS database); Coburn, 221 N.J. Super. at 588, 535 A.2d at 531; Turner, 716 S.W.2d at 462; Chatman, 122 A.D.2d at 148, 504 N.Y.S.2d at 703.
II. MIRANDA

Miranda revamped the law of confessions in criminal proceedings. Before Miranda, courts excluded incriminating statements made involuntarily or absent a recognized right to counsel. Miranda altered that practice by establishing a per se rule excluding incriminating

11. A brief review of the birth of Miranda may be helpful. Pre-Miranda, the prosecution could admit only voluntary confessions at trial. See Lyons v. Oklahoma, 322 U.S. 596 (1944) (voluntariness of confession determined by suspect’s “mental freedom” while confessing or denying participation in a crime); Ward v. Texas, 316 U.S. 547 (1942) (use of confession obtained after suspect was whipped and burned is fourteenth amendment due process violation); Chambers v. Florida, 309 U.S. 227 (1940) (confession obtained after continued confinement, threats, and physical abuse was involuntary and excluded as due process violation). Because the interrogation procedure was considered part of the conviction process, it was subject to fourteenth amendment due process requirements. However, the Court’s focus on the trustworthiness of confessions in the pre-Miranda days obscured the boundaries of the voluntariness standard. See Note, New York v. Quarles: The Dissolution of Miranda, 30 VILL. L. REV. 441 nn.10-31 (1985). The concept of the fifth amendment as the constitutional basis of excluding coerced confessions is actually nothing new. See Bram v. United States, 168 U.S. 532, 542 (1897) (“[W]hether a confession is incompetent because not voluntary, the issue is controlled by [the] . . . Fifth Amendment . . .”). The Court ignored the constitutional underpinnings of Bram in subsequent decisions, although the Miranda court found it reliable. Miranda, 384 U.S. at 461-62. Bram’s relevance to subsequent decisions was questionable until incorporation of the fifth amendment 67 years later. See Malloy v. Hogan, 378 U.S. 1, 17-18 (1964) (Harlan, J., dissenting). In the years between Brown v. Mississippi, 297 U.S. 278 (1936) and Miranda, psychological coercion joined physical brutality as “involuntary” for fourteenth amendment due process purposes. See Ashcraft v. Tennessee, 322 U.S. 143 (1944) (condemning psychologically coercive practice of prolonged incommunicado detention and interrogation). The Court also began to shift its focus from the unreliability of coerced confessions to the need for fair police practices. See, e.g., Rochin v. California, 342 U.S. 165, 173 (1952). In Rochin, after police forcibly pumped suspect’s stomach to obtain incriminating narcotics, the Court said that although the statements may have been independently established as true, “[c]oerced confessions offend[ed] the community’s sense of fair play and decency.” Ultimately, the Court’s inability to define “voluntariness,” coupled with the inconsistencies of case by case review helped put the voluntariness doctrine out to pasture. See Escobedo v. Illinois, 378 U.S. 478 (1964). For a discussion of the voluntariness doctrine, see Grano, Voluntariness, Free Will, and the Law of Confessions, 65 VA. L. REV. 859 (1979).

12. The sixth amendment provides in part: “In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. CONST. amend. VI. The right to counsel attaches at trial and at “critical stages” before trial, but after initiation of formal proceedings. See, e.g., United States v. Henry, 447 U.S. 264, 274 (1980) (government violated sixth amendment right to counsel by inducing defendant to incriminate himself without assistance of counsel); Escobedo v. Illinois, 378 U.S. 478 (1964) (exclude incriminating statements made during pre-indictment interrogation when defendant is focus of investigation); Massiah v. United States, 377 U.S. 201 (1964) (exclude incriminating statements elicited after indictment in absence of counsel); Powell v. Alabama, 287 U.S. 45 (1932) (trial court’s failure to appoint counsel to provide defense at trial violated defendant’s right to counsel).
statements elicited during custodial interrogation not preceded by police warnings and the suspect’s waiver of fifth amendment rights.\textsuperscript{13}

\textit{Miranda} requires a two-part inquiry to determine whether the requisite procedural safeguards have attached:\textsuperscript{14} first, whether the suspect was in custody; and second, whether the police conduct constituted interrogation.\textsuperscript{15} The modern custody test is whether police have

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13. \textit{Miranda}, 384 U.S. at 476-77. The \textit{Miranda} majority asserted that the fifth amendment applied to police interrogations. \textit{Id.} at 458-65. After considering contemporary interrogation techniques, the Court stated that custodial interrogations were inherently coercive. \textit{Id.} at 455-68. To overcome the inherent compulsion to confess, the Court required procedural safeguards to secure the privilege against self incrimination. The Court then specified the procedures: Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The defendant may waive these rights, provided the waiver is made voluntarily, knowingly, and intelligently. \textit{Id.} at 444; see supra note 4 and accompanying text.

The Court limited its holding to custodial interrogation. \textit{Miranda}, 384 U.S. at 477. It defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” \textit{Id.} at 444. However, \textit{Miranda} did not apply to “general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process . . . .” \textit{Id.} at 477. Therefore, the Court intended \textit{Miranda} only to limit police behavior during custodial interrogation. \textit{Id.}

The \textit{Miranda} majority recognized that custodial interrogation necessarily involves subtle psychological coercion. \textit{Id.} at 457. The Court referred to police interrogation manuals that recommended isolation, persistence, an attitude of presumed guilt, and other techniques to overcome the suspect’s will. \textit{Id.} at 445-58. “An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak.” \textit{Id.} at 461. \textit{Miranda} warnings would reduce the compulsion by making suspects aware of their rights. \textit{Id.} at 467. In addition to overcoming the inherent coercion of the police-dominated environment of the stationhouse, the \textit{Miranda} Court sought to establish a per se rule regarding the admissibility of confessions obtained during custodial interrogation. \textit{Id.} at 441. “We granted certiorari . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” \textit{Id.} Thus, in abandoning the voluntariness test of confessions, the Court elevated warnings or an equivalent safeguard to constitutional status. \textit{Id.} at 479. The majority stated:

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.

\textit{Id.} For a discussion of the old voluntariness test of confessions, see supra note 11.


15. \textit{Miranda} offered the following definition: “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” \textit{Id.}
significantly restrained the suspect's freedom of action. If the custody test is satisfied, the inquiry passes to whether police behavior constituted interrogation. The *Miranda* Court did not specifically define interrogation, but excluded voluntary confessions and "[g]eneral on-the-scene questioning as to facts surrounding a crime" from its holding. After *Miranda*, the Court more narrowly defined interrogation as express questioning or its functional equivalent. According to this definition, interrogation encompasses "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

16. This test has both an objective and subjective application. The subjective test is supported by the logic that the person who actually but unreasonably believes he is under arrest is subject to the same coercion as the person who reasonably believes he is under arrest. To avoid the proof problems of the subjective test, most courts apply the objective test of whether the reasonable man would believe he was under arrest. See LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, & Beyond*, 67 MICH. L. REV. 39, 99 (1968). In *Orozco v. Texas*, 394 U.S. 324, 325 (1969), police entered the defendant's bedroom, woke him, and interrogated him about a crime. The police did not issue *Miranda* warnings before the interrogation. *Id.* at 326. The Supreme Court held that the defendant was in custody because he was "not free to go where he pleased, but was 'under arrest.'" *Id.* at 325. In *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977), however, the defendant voluntarily went to the police station to answer questions about a burglary and confessed to the crime without the benefit of *Miranda* warnings. The Court held that the questioning did not restrict the defendant's freedom in any way. *Id.* at 495. Therefore, the Supreme Court has attempted to resolve the custody issue by considering whether police questioning created the functional equivalent of arrest. For other Supreme Court cases addressing the custody issue, see *Berkemer v. McCarthy*, 488 U.S. 420 (1984) (no custody when defendant questioned at roadside pursuant to routine traffic stop); *Minnesota v. Murphy*, 465 U.S. 420 (1984) (defendant not in custody when he incriminated himself to probation officer); *United States v. Mendenhall*, 446 U.S. 544 (1980) (defendant who consented to non-coercive body search not in custody). But see *Dunaway v. New York*, 442 U.S. 200 (1979) (defendant in custody when taken involuntarily to police station).


18. See *Rhode Island v. Innis*, 446 U.S. 291, 295-96 (1980). The police read Innis his rights after arresting him on suspicion of murder. *Id.* at 293-94. Innis claimed his right to counsel. *Id.* at 294. While driving Innis to the stationhouse, police discussed their concern that nearby school children might find the murder weapon. *Id.* at 294-95. Innis then directed the officers to the murder weapon. *Id.* at 295. At trial, Innis sought to suppress his statements and the weapon because he had not validly waived his right to counsel. *Id.* at 295-96.

19. Because police did not know of Innis's susceptibility to a plea concerning the safety of handicapped children, the Court held that police could not foresee his confession. *Id.* at 302-03. Therefore, the officers' behavior did not constitute interrogation. *Id.* at 297-303. The logic of *Innis* is questionable. Sympathy for handicapped children is not a particular susceptibility. Nothing in *Innis* prevents officers from intentionally trying "the old handicapped children trick" with the sole purpose of eliciting incriminating responses. It is difficult to imagine an inquiry more likely to evoke self incrimination than this. Cf. *Brewer v. Williams*, 430 U.S. 387 (1977) (Christian burial speech violated sixth amendment right to counsel).
III. SEVERING MIRANDA FROM THE CONSTITUTION

Three Supreme Court cases have eroded the constitutional foundations of Miranda. Michigan v. Tucker, a cause celebre in fifth amendment jurisprudence, intimated that the Constitution does not mandate Miranda protections. In Tucker, the Court admitted the testimony of a witness discovered through police questioning of the defendant, who had been informed of the right to counsel, but not of the right to appointed counsel if he could not afford representation. Writing for the majority, Justice Rehnquist emphasized a statement by the Miranda Court that the Constitution did not require a particular solution to the inherent compulsions of interrogation.

Although courts and commentators cite Tucker for the proposition that the Constitution does not require Miranda warnings, Tucker, as applied, has produced little impact on the fifth amendment. The Supreme Court has yet to admit unwarned statements at trial based solely on Tucker. However, the decision may have done more to weaken Miranda than the Court intended.

The federal courts have no supervisory power over state court criminal justice. If Miranda is not constitutionally required, then the Court lacks authority to impose Miranda on the states. A prophylactic rule is distinguished from a true constitutional rule by the possibility of violating the former without actually violating the Constitution.

23. Id. at 436.
24. Id. at 444 (quoting Miranda, 384 U.S. at 467). However, in the same paragraph from Miranda quoted by Justice Rehnquist in Tucker, the Court required Miranda warnings "unless we are shown other procedures which are at least as effective in apprising accused persons of their right to silence and in assuring a continuous opportunity to exercise it ...." Miranda, 384 U.S. at 467.
25. Presumably, courts could blatantly ignore Miranda's strictures, then defend their decisions on the basis of Tucker. The Supreme Court Cited Tucker in its Quarles decision, but admitted the improperly obtained evidence under the public safety exception. See Quarles, 467 U.S. at 653. As Justice Marshall pointed out in his Quarles dissent, the Miranda violation in Tucker "was technical and the interrogation itself non-coercive." Id. at 684 n.7 (Marshall, J., dissenting); see also Oregon v. Elstad, 470 U.S. 298, 308 (1985); Edwards v. Arizona, 451 U.S. 477, 492 (1981) (Powell, J., concurring).
28. Grano, supra note 26, at 105.
By severing *Miranda* from the Constitution, *Tucker* placed *Miranda* outside the scope of the federal courts’ Article III rulemaking authority. Absent a constitutional violation, the Supreme Court may not reverse state court decisions. The states may therefore ignore *Miranda*.

In *Oregon v. Elstad*, the Supreme Court echoed *Tucker’s* severance of *Miranda* from the Constitution. In *Elstad*, the defendant argued that the Court should exclude a second confession, preceded by *Miranda* warnings and a knowing waiver, as the “fruit” of an earlier *Miranda* violation. Rejecting that argument, the Supreme Court instead found errors in administering the warnings not to be as severe a violation as direct infringement on fifth amendment rights. This view, like *Tucker*, has yet to justify the admission of unwarned state statements. Nevertheless, these decisions may collectively have eroded *Miranda* to the point that warnings are no longer rights, but mere possibilities.

**IV. THE PUBLIC SAFETY EXCEPTION: QUARLES**

Just after midnight on September 11, 1980, a woman told two policemen, Officers Kraft and Scarring, that an armed man had raped

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29. Y. KAMISAR, supra note 27, at 577.

[This] portrait of science provides a picture suggestive of the way that fundamental legal ideas come into being, live a life, and die out. But an accurate picture of that process is not available in terms as concrete as the core notion of rules. The core of the rule suggests a permanence that is unreal. The core does, however, provide a convenient shorthand, a paradigm, for treating certain kinds of situations in a particular sort of way. As long as satisfaction with the application of accepted values to the situation continues, the paradigm remains useful. But when other factors introduce themselves, the persuasive power of the old paradigm begins to erode. The search for an alternative begins. Eventually, a new one must emerge.

Id. at 326.
her and that the assailant had entered a nearby supermarket. Officer Kraft entered the store and saw the suspect, Quarles, who matched the woman’s description. Kraft chased Quarles to the rear of the store and, after three other officers arrived, frisked him, discovered an empty shoulder holster, and handcuffed him. Kraft then asked Quarles where the gun was. Quarles pointed to some empty cartons and said, “the gun is over there.”

After police retrieved the gun, Quarles agreed to answer questions without an attorney present. He admitted that he owned the revolver. In the prosecution for criminal possession of a weapon, the trial court excluded both the statements and the revolver because the police had not issued Miranda warnings before obtaining the evidence. The Appellate Division of the Supreme Court of New York and the New York Court of Appeals affirmed the trial court’s suppression order.

The Supreme Court reversed. Writing for the majority, Justice Rehnquist articulated a public safety exception to the Miranda requirements. He distinguished prophylactic warnings from the

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34. Quarles, 467 U.S. at 653.
35. Id. at 652.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id. at 652-53. The State dropped the rape charges without explanation and prosecuted Quarles for criminal possession of a weapon. Id. at 652-53 & n.2.
43. Quarles, 467 U.S. at 660. The majority voted to admit the gun and both the initial and subsequent statements. Id. at 659. The initial statement was “the gun is over there.” The subsequent statements referred to Quarles’s ownership of the gun and where he had purchased it. Id. at 652. Justice O’Connor concurred on admitting the gun, but dissented from the Court’s holding on the admissibility of Quarles’s initial statement. Id. at 660 (O’Connor, J., concurring in the judgment in part and dissenting in part). In his dissent, Justice Marshall argued to exclude the gun and the initial statement. Id. at 688-90 (Marshall, J., dissenting). Neither Justice Marshall nor Justice O’Connor addressed the admissibility of the subsequent statements. Presumably, Justice Marshall would vote to exclude the subsequent statements. Justice O’Connor’s feelings on the subsequent statements are less predictable. Her distinction between testimonial and tangible evidence indicates she would vote to exclude the statement. By extending her majority opinion in Elstad, however, it is conceivable that Justice O’Connor would view the subsequent statements as admissible by-products of the validly obtained gun. Cf. Oregon v. Elstad, 470 U.S. 298 (1985) (fruits of the poisonous tree doctrine does not bar evidence derived from warned inquiry when same suspect previously incriminated himself in response to unwarned inquiry).
44. Quarles, 467 U.S. at 653-59.
privilege against self incrimination. On the *Quarles* facts, an accomplice, customer, or store employee finding the gun might threaten public safety, leading Justice Rehnquist to argue that such exigent circumstances do not demand *Miranda* safeguards unless police subject a suspect to "actual coercion." In cases of actual coercion, the privilege against self incrimination would prevent admission of the unwarned statements at trial.

Justice Rehnquist also admitted that the exception would increase the opportunities for police to coerce incriminating statements from suspects, because police can obtain more confessions when suspects remain ignorant of their rights to silence and counsel. Yet, the *Quarles* majority hoped to protect police from instantaneously choosing between risking the public safety by issuing warnings and risking the exclusion of evidence by withholding warnings. The Court adopted an objective test to relieve police of this difficult choice, requiring only that unwarned questions be "reasonably prompted by a concern for the public safety."

Justice O'Connor criticized the majority for misunderstanding the critical issues in *Miranda*. Although *Miranda* allowed police to ask questions to protect the public, the state, not the defendant, must bear the burden of protecting the public. She argued, therefore, to exclude *Quarles*'s unwarned initial statement. Separating testimonial

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45. Id. at 654.
46. Id. at 657.
47. Id. at 658 n.7.
48. Id. at 656.
49. Id. at 657.
50. Id. at 657-58.
51. Id. at 656. The Court relied on the judgment of police to apply the exception consistently. *Id.* at 658-59. Justice Rehnquist noted: "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," and expressly wished to avoid questioning based on an officer's subjective perception of public safety. *Id.* at 655-59.
52. *Id.* at 656. Although the voluntariness test was a prosecution-defendant swearing contest, Justice Rehnquist's suggestion permits officers to swear their way to convictions without a procedural mechanism for defendants' protection. Courts will assess the threat to public safety by relying on officer testimony. Because defense counsel will have difficulty presenting evidence that betrays an officer's true motives, the test is arguably more prosecution-oriented than the voluntariness test. Cf. Goldberg, Escobedo and *Miranda* Revisited, 18 AKRON L. REV. 177, 182 (1984) (juries prefer police testimony to that of criminal defendants who rarely look or talk like law abiding citizens).
53. *Quarles*, 467 U.S. at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part).
54. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part).
55. *Id.* at 664-65 (O'Connor, J., concurring in the judgment in part and dissenting in part).
from tangible evidence, Justice O'Connor distinguished the gun and the suspect's initial statement. Only in cases of actual compulsion would she suppress tangible evidence derived from an unwarned statement.

Although she voted to admit the gun, Justice O'Connor feared that the majority's opinion offended Miranda. She also cautioned that the majority's approach would create uncertainties for police, who depend on courts' differing notions of "objective circumstances" at suppression hearings. The "end result," she believed, "[would] be a finespun new doctrine . . . [of] hair splitting distinctions" similar to the subtleties plaguing the fourth amendment. Her prediction was accurate.

Justice Marshall, writing for the dissent, found that the Quarles facts did not establish a threat to public safety. Because the New York Court of Appeals and the Supreme Court disagreed whether exigent circumstances existed, Justice Marshall questioned police officers' ability to instantaneously determine whether these circumstances were present on the street. He also argued that the majority could not reconcile Miranda with the exception, because Miranda created a "constitutional presumption" that statements made during custodial interrogation are inherently coercive. Securing public safety was no reason to disregard this presumption. In fact, he insisted that because the police subjected Quarles to actual coercion, the exception did not apply even under the majority's standard. Finally, Justice Marshall stated that the majority relied too heavily

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56. Id. at 666-74 (O'Connor, J., concurring in the judgment in part and dissenting in part).
57. Id. at 667-68 (O'Connor, J., concurring in the judgment in part and dissenting in part).
She referred to a previous decision in which the Court held that a forced blood test did not constitute testimonial evidence, and therefore did not violate the fifth amendment. Id. at 666-68 (O'Connor, J., concurring in the judgment in part and dissenting in part) (citing Schmerber v. California, 384 U.S. 757, 765 (1966)).
58. Id. at 663 (O'Connor, J., concurring in the judgment in part and dissenting in part).
59. Id. at 663-64 (O'Connor, J., concurring in the judgment in part and dissenting in part).
60. Id. at 679 (Marshall, J., dissenting).
61. Id. at 679-80 (Marshall, J., dissenting). Quarles did not settle whether the exception applied only to fast-developing, on-the-scene situations. It is possible that suspects may not immediately speak up. Neither did Quarles address whether police could question such suspects later. See Pizzi, The Privilege Against Self-Incrimination in a Rescue Situation, 76 J. CRIM. L. & CRIMINOLOGY 567, 584 (1985).
63. Id. at 683-84 (Marshall, J., dissenting).
64. Id. at 688 (Marshall, J., dissenting).
65. Id. at 684-85 (Marshall, J., dissenting).
66. Id. (Marshall, J., dissenting).
on Tucker, a decision that admitted the fruits of a Miranda violation "only because the violation was technical and the interrogation non-coercive." Under Quarles, he noted, the public safety exception extends beyond such technical Miranda violations.

V. REACTION TO THE QUARLES DECISION

A. Opposition to the Exception

Convinced that this "gaping exception" symbolized the dissolution of Miranda, scholars questioned whether Miranda might become the exception to a system grounded in coerced confessions. Under Miranda, only the presumption of coercion during custodial interrogation could avert the determination of whether a suspect subjectively experienced coercion. Aware of the pitfalls of reading suspects' minds, the Quarles Court sought to avoid the same journey into the minds of police officers.

By refusing to speculate about police motivation, the Court optimistically trusted officers to uphold the spirit of the exception. According to the Court, officers would distinguish "almost instinctively" between questions asked to secure safety and those asked to elicit testimonial evidence from a suspect. But the Court failed to address circumstances in which officers may have more than one motivation. Quarles never resolved whether public safety must be the primary motivation, nor how to avoid the potential for abuse of the dual-purpose question. Because the exception ignored the subjective motivations

67. Id. at 684 n.7 (Marshall, J., dissenting).
70. The Supreme Court, supra note 68, at 148. "[M]ost police officers... would act out of a host of... unverifiable motives — their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence..." Quarles, 467 U.S. at 656.
71. See The Supreme Court, supra note 68, at 148.
72. Quarles, 467 U.S. at 658-59.
73. Id. at 656.
74. See Note, New York v. Quarles, supra note 68, at 1126 (officers may interrogate without issuing Miranda warnings even if their primary motivation is to obtain incriminating evidence);
of police, dual-purpose questions are not reviewable. In effect, therefore, Quarles decided the problem of dual-purpose questions in favor of the police.

Beyond the problem of dual-purpose questions, Quarles and Miranda relied on opposing presumptions. Miranda presumed coercion during custodial interrogation in order to preserve broad protection of a suspect’s fifth amendment rights.75 Quarles, on the other hand, presumed the good faith of police officers in order to preserve broad protection of the public’s safety.76 Quarles thus shifted the burden of proving coercion to the criminal defendant. By creating the good faith defense to Miranda violations, the Court placed a premium on police ignorance of individual susceptibility to coercion.77 In fact, Quarles may provide incentive for the individual officer seeking convictions to misapply the exception.78 The good faith defense thus favors the State, because juries tend to accept police testimony at trial.79

Under the majority’s “good-faith” scheme, only proof of actual compulsion activates the fifth amendment.80 The majority’s approach essentially resurrects the pre-Miranda voluntariness inquiry.81 Yet, the evolution of the voluntariness doctrine leading to Miranda demonstrated the problems inherent in defining “compulsion.”82

Absent actual compulsion, an unwarned statement violates only a prophylactic rule and remains admissible under the exception.83 Therefore, a defendant who made incriminating statements that purportedly fall under the public safety exception must prove that the state over-

Note, supra note 33, at 188 (Quarles permits inquiries under both categories); see also Note, The Supreme Courts Writes Away Rights, supra note 68, at 591 (“Since custodial interrogation may serve both purposes, the Court deceives itself by suggesting that the instincts of officers will render its decision self-executing.”).

75. The Supreme Court, supra note 68, at 148-49.
76. Id. at 149.
77. Id.
78. Stone, The Miranda Doctrine in the Burger Court, 1977 SUP. CT. REV. 122 (P. Kurland & G. Casper eds.); see Note, The Supreme Court Writes Away Rights, supra note 68, at 592 (ambiguity will supply police officers with incentive to misapply Quarles standard since it is impossible to ascertain at trial the officer’s motivation in asking the questions); cf. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J. dissenting) (police officers will take advantage of any ambiguities in constitutional doctrines articulated by the court).
79. See Goldberg, supra note 52.
80. See Quarles, 467 U.S. at 658 n.7.
81. See supra note 11 and accompanying text.
82. See id.
83. Therefore, police may rely on coercion to provoke a response in order to avoid danger to themselves or the public.
came his will in the interrogation. As a result, traditional fifth amendment interests such as individual dignity and autonomy yield to the extraconstitutional concept of public safety — a concept designed to prevent possible future harm to unidentified individuals.

_Quarles_ not only inverted _Miranda_’s rationale, but created ambiguities in the exception itself. Perhaps the Court might have awaited a case with facts more suitable to a clearer exception. First, the threat to public safety was minimal in _Quarles_; police could have found the gun through a brief search of the area. Because the arrest occurred in the middle of the night, the store was empty except for some clerks. Police could have warned the employees about the missing weapon and cordoned off the store from the public. Presumably, this measure would have protected the public safety because the alleged rape victim never said that _Quarles_ had an accomplice. As a signpost for reviewing courts, the _Quarles_ facts are weak. _Quarles_ gives officers carte blanche to aim their guns at an unarmed suspect and, without issuing _Miranda_ warnings, demand to know the location of a gun that arguably posed little threat, because it was missing in an empty store in the middle of the night.

The second problem with _Quarles_ is that it failed to define the boundaries of the exception. Would a knife or a crowbar, or a bag of cocaine hidden in the shelves of the supermarket pose a public danger sufficient to trigger the exception? Would a bag of cocaine threaten public safety if school children were more likely to find it than adults? Would the ongoing danger posed by members of or-

84. _The Supreme Court_, supra note 68, at 150.
85. Casenote, supra note 68, at 748.
86. _Quarles_, 467 U.S. at 676 (Marshall, J., dissenting).
87. Id. (Marshall, J., dissenting).
88. Id. (Marshall, J., dissenting).
89. See id. at 651-52 (statement of alleged rape victim), 675 (Marshall, J., dissenting).
90. Justice Marshall noted that the circumstances of Quarles's arrest were coercive even under the majority's standard:

In the middle of the night and in the back of an empty supermarket, Quarles was surrounded by four armed police officers . . . . Officer Kraft's abrupt and pointed question pressured Quarles in precisely the way that the _Miranda_ Court feared the custodial interrogations would coerce self-incriminating testimony.

*Id.* at 685 (Marshall, J., dissenting).
92. See Note, _New York v. Quarles_, supra note 68, at 1125 & n.78.
93. *Id.*
94. *Id.*
organized crime create a blanket exception to all suspected "mafia" members? Do public places inherently possess greater potential danger than residential areas regardless of the number of people present? Does the exception require the possibility of a missing accomplice or time constraint? Can the police detain a suspect indefinitely to extract information? How many questions are necessary to stabilize a threatening situation? These questions by no means exhaust the gray areas of Quarles. Consequently, Quarles offers the lower courts inadequate guidelines for determining what circumstances justify the admission of unwarned responses.

B. Support for the Exception

Despite its problems, the public safety exception is not without supporters. One scholar described Quarles as a common sense approach to "reconcile the realities of effective law enforcement with the often hypertechnical rules of criminal justice." Others preferred the exception over the spectre of police forced to stand by helplessly while criminal suspects "prowl about." One commentator suggested

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95. Id.
96. Id.
97. See, e.g., United States v. Webb, 755 F.2d 382 (5th Cir. 1985). In Webb, the suspect climbed a communications tower and threatened to commit suicide. Id. at 385. The Fifth Circuit found no custodial interrogation although questioning and negotiations between the suspect, psychiatrist, and negotiator lasted ten hours. Id. at 390-91. Relegating Quarles to a footnote, the court said the lack of interrogation made Quarles analysis unnecessary. Id. at 392 n.14. However, the suspect's safety was of primary concern to the negotiators, making the situation analogous to Quarles. Id. The court expressly declined to force a choice between Miranda and neutralizing a crisis situation. Id.
98. See Comment, supra note 68, at 205.
99. For a general discussion of the impropriety of warnings, see Caplan, Questioning Miranda, 38 VAND. L. REV. 1417 (1985); see also F. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 149 (2d ed. 1948) (criminal suspects must be dealt with "in a somewhat lower moral plane than . . . ethical, law-abiding citizens"); Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929, 949 (1965) (if your child were kidnapped would you really care about lawyers and warnings before questioning?); McCormack, The Scope of Privilege in the Law of Evidence, 24 TEX. L. REV. 239, 241 (1946) (forces of self-interest operate to make confessions probably true); Fizzi, supra note 61, at 591 (state-individual balance less important in rescue situation than routine investigative setting); Comment, supra note 68 (Quarles is culmination of Burger Court's conservatism but is traceable to Miranda itself); cf. infra note 340 (exceptions as presumptions).
that the issue is more properly characterized as one of guilt — not equal information — thus the law accomplishes little by setting one criminal free simply because another one knows more about criminal procedure. In other words, conviction should depend on factual guilt rather than a suspect's awareness of his constitutional rights. Police failure to issue Miranda warnings does not convert a suspect's guilt to innocence.

Others have argued that the exception prevents the anomaly of penalizing officers who act to protect public safety. Requiring mandatory warnings in exigent circumstances would lead to nonresponsive suspects and continuing danger. Allowing officers to forego warnings increases their ability to obtain information necessary to defuse a volatile situation.

C. The Fourth Amendment Analogy

Proponents also have relied on the fourth amendment to justify the public safety exception. The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." This guarantee is not absolute, however, as the Supreme Court has fashioned exceptions to the warrant and probable cause requirements. Similar exceptions could apply to the fifth amendment.

Reliance on the fourth amendment, however, is inapposite to public safety analysis. First, the judiciary created the penalty of exclusion under the fourth amendment; the Constitution mandated exclusion of


103. Id.


105. Quarles, 467 U.S. at 657; see Note, The Supreme Court Writes Away Rights, supra note 68, at 685.


107. U.S. CONST. amend. IV. The modern understanding of the fourth amendment is that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." Terry v. Ohio, 392 U.S. 1, 9 (1968).
compelled testimony under the fifth amendment.\textsuperscript{108} Second, the fourth amendment encompasses tangible evidence whereas the fifth amendment addresses less reliable intangible evidence.\textsuperscript{109} Finally, the fourth amendment prohibits only “unreasonable” searches and seizures.\textsuperscript{110} Reasonableness does not factor into the fifth amendment’s prohibition of compelled self-incrimination.\textsuperscript{111}

Although fourth amendment concerns do not survive fifth amendment analysis, the realities of spontaneous decisionmaking blur the importance of \textit{Miranda} even without the public safety exception. Under exigent circumstances, officers will inevitably, almost reflexively, ask impulsive questions such as the location of a weapon.\textsuperscript{112} They will ask these questions either as an instinctive act of self-preservation,\textsuperscript{113} or as a result of a good faith belief that they are entitled to disregard “legalism” under the circumstances.\textsuperscript{114} Arguably, therefore, the public safety exception merely articulates the implicit demands of on-the-scene police decisionmaking. When a suspect threatens or might threaten the public safety, the need for admonitions fades.\textsuperscript{115} However, the impracticality of \textit{Miranda} under exigent circumstances does not necessarily demand admission of unwarned statements.\textsuperscript{116} The threat of exclusion will not deter instinctive inquiries motivated by

\textsuperscript{108} Note, \textit{The Supreme Court Writes Away Rights}, supra note 68, at 589-90; see also \textit{Weeks}, 232 U.S. at 393 (fourth amendment mandates penalty of exclusion in federal courts).


\textsuperscript{110} See supra note 107.

\textsuperscript{111} See \textit{Fisher}, 425 U.S. at 408.

\textsuperscript{112} \textit{Recent Decisions, New York v. Quarles: The “Public Safety” Exception to Miranda}, 26 ARIZ. L. REV. 967, 972; cf. \textit{Terry v. Ohio}, 392 U.S. 1, 10 (1968) (“[I]n dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.”).

\textsuperscript{113} From the police perspective, arrest does not necessarily end the criminal episode. See \textit{Pizzi}, supra note 61, at 579.

\textsuperscript{114} See \textit{Goldberg}, supra note 79.


\textsuperscript{116} \textit{Quarles}, 467 U.S. at 666 (Marshall, J., dissenting) (\textit{Miranda} does not prohibit emergency questioning, but fifth amendment bars introduction of compelled testimony from trial). Because a fifth amendment violation occurs in the courtroom rather than the street, Justice Marshall saw no conflict between an officer’s need to defuse a situation and a defendant’s privilege against self-incrimination. \textit{Id}. 
self-preservation. Accordingly, courts need not admit improperly obtained evidence to reward police officers for acting instinctively.

Excluding evidence obtained under exigent circumstances might create additional problems. Without the exception, the suspect posing the greatest danger also possesses the greatest odds of suppressing incriminating statements. The possibility of exclusion may also encourage suspects to create their own exigencies.\footnote{Yet, this argument assumes that the suspect has read \textit{New York v. Quarles}. Furthermore, it erroneously assumes that the suspect can induce police to ask questions without \textit{Miranda} warnings. But even without that argument, the public may object to a legal loophole for highly dangerous suspects.}

VI. \textsc{Quarles} in the Lower Courts

The lower courts' \textit{Quarles} decisions fall into three categories.\footnote{The lower courts' \textit{Quarles} decisions fall into three categories.}\footnote{First, some courts circumvent the exception by deciding the case on other grounds. Second, some courts have attempted to limit the exception to a discernible set of circumstances. Finally, some courts simply misapply the exception.}

A. Circumventing the Exception

1. Inevitable Discovery

The lower courts have frequently circumvented the exception by deciding \textit{Quarles}-type cases on other grounds.\footnote{The lower courts have frequently circumvented the exception by deciding \textit{Quarles}-type cases on other grounds.} In \textit{Fiorenza v. Sullivan}

\begin{itemize}
\item \textbf{117.} Pizzi, \textit{supra} note 61, at 597-98.
\item \textbf{118.} But see \textit{supra} note 10.
\item \textbf{119.} For example, in \textit{Edwards v. State}, 515 So. 2d 86 (Ala. Crim. App. 1987), the Alabama Court of Criminal Appeals circumvented the exception while citing \textit{Quarles} to bolster an otherwise questionable finding of no interrogation. The court held that an inquiry about the location of the gun did not constitute interrogation because the officer did not direct his inquiry to appellant. \textit{Id.} at 90-91. If the officer had directed his question to appellant, however, then the court would have applied \textit{Quarles}. \textit{Id.} at 91.
\end{itemize}

The court's distinction between inquiries directed to suspects and those that suspects merely overhear could impair the existing notion of interrogation. This approach by the \textit{Edwards} court leads to the following rule of law: If an officer knows that appellant might overhear a question, then the question constitutes interrogation under \textit{Innis}. Suppression hearings would then become inquiries into the subjective motivations of officers. Courts would examine whether an officer asked a question with the intention of the suspect overhearing it. The Supreme Court has expressly rejected inquiries into the subjective motives of officers in both \textit{Quarles} and \textit{Innis}. \textit{Quarles}, 467 U.S. at 656 & n.6; Rhode Island v. \textit{Innis}, 446 U.S. 291, 301 (1980).

Another court used alternative grounds analysis to admit a suspect's multiple responses to a question. \textit{DeLeon v. State}, No. C14-86-930-CR (Tex. Ct. App. Aug. 25, 1988) (WESTLAW, ALLSTATES database). \textit{DeLeon}, a prison inmate, was suspected of stabbing another inmate to death. When a prison guard asked where the knives were, the suspect answered, then
confessed. *Id.* at 5. The trial court suppressed DeLeon's answer as to the knives' location, but admitted the surprise confession. *Id.* at 6. On appeal, the court held that because DeLeon voluntarily made the statement regarding the location of the knives, it came under *Quarles.*

The subsequent confession, the court held, was not the product of interrogation. *Id.*

In *In re A.S.*, 548 A.2d 202 (N.J. Super. Ct. App. Div. 1988), a New Jersey court used alternative grounds analysis and put a new twist on a recent Supreme Court decision. Officers suspected A.S. of firing shots. *Id.* at 203. An officer chased him into his apartment building, and ordered him to place his hands on the wall. *Id.* at 204. When asked what he had done with the gun, A.S. denied having one. *Id.* After the officers told A.S. that another suspect had identified him, he admitted to having the gun, told the officers where it was, then led them to it. *Id.*

The trial court rejected the state's *Quarles* claim; the appellate court reversed. *Id.* at 204-06. The court constructed a four-part alternative grounds analysis to admit the gun and the statements. First, the officers questioned A.S. pursuant to a valid *Terry* stop. *Id.* at 204-05. Second, *Miranda* permitted the officers' "[g]eneral on the scene questioning." *Id.* at 205. Third, even if A.S. were entitled to *Miranda* warnings, *Quarles* would admit the evidence. *Id.*

The fourth prong of the court's analysis is the most troublesome. The court relied on the Supreme Court's decision in *Elstad* to remove the "taint" from any improperly obtained evidence. *Id.* at 206. Even if the officers had obtained the gun in violation of *Miranda*, the New Jersey court argued, *Elstad* stands for the proposition that the gun was not an inadmissible fruit of the poisonous tree. *Id.* The court insisted that the officers obtained the gun not as a result of A.S.'s telling them where it was, but rather, "by his nontestimonial conduct of leading [them] . . . to the gun." *Id.* In conclusion, the court held that the officers did not coerce the evidence from A.S. *Id.* Because *Miranda* is only a prophylactic rule, the uncoerced testimony did not constitute a fifth amendment violation. *Id.*

The court's "shotgun" approach to admitting evidence obtained in the absence of *Miranda* warnings were clearly result oriented. The "*Terry* stop" was not a pat-down search, but a full-fledged custodial interrogation. When the pat-down produced no evidence, the officers resorted to questioning the suspect. *Id.* at 204. Unsatisfied with his initial response, officers informed him that they had evidence that refuted his on-the-street testimony. *Id.* If *Terry* and its progeny actually legitimized this type of evidence-gathering, then this "reasonable" exception to the fourth amendment exclusionary rule can swallow the fifth amendment privilege.

The court's second assertion, that *Miranda* did not require the officers to warn A.S., was questionable as well. The line *Miranda* drew between on-the-scene factfinding and custodial interrogation is presumptively suspect-oriented. The officers knew what had happened. They had neutralized their suspect. With his hands against the wall, A.S. was not free to leave, therefore he was in custody. Further, the officers never asked A.S. whether he had a gun. See *id.* Instead, they asked him where it was, then advised him that a witness had identified him as possessing the gun. *Id.* This line of questioning was reasonably calculated to elicit incriminating evidence, thus the officers had subjected A.S. to interrogation. In fact, it is difficult to imagine any official motive the police may have had if not to gather evidence of a crime.

The officers might have acted out of concern for the public safety. Ironically, the exception provided the strongest basis available to admit the evidence. Despite the confusion surrounding *Quarles*, one required element of the exception is clear: missing guns threaten the public safety. The only deficiency in A.S. from a *Quarles* perspective is that the officers' questions might have exceeded the bare minimum necessary to defuse the danger. The court's discussion of *Quarles* was brief, however. See *id.* at 205-06. The court apparently had little confidence in the exception, as evidenced by the amalgamation of legal arguments offered to bolster *Quarles*. See *id.* at 204-06.

Although A.S. was a strong *Quarles* case, the court's interpretation of *Elstad* undermined whatever strength that might have flowed from the public safety exception. The *Elstad* Court
the United States District Court for the Southern District of New York reviewed the murder conviction of a man who shot his employer. When police arrived at the Fiorenza shooting, a witness told an officer that the killer remained at the scene. With his gun drawn, the officer asked two men standing over the body, “What happened?” “I shot him,” one responded. “You did what?” “I shot him.” The officer then asked where the gun was. The suspect pointed to a nearby bench. The officer recovered the gun, handcuffed the suspect, and placed him in the police car.

After considering Quarles, the court decided the case on other grounds. The trial court found no custodial interrogation because the officer’s questions were “virtually the first words out of his mouth.” Absent custodial interrogation, Miranda did not apply. On appeal, the court found custody but no interrogation, holding that Miranda permitted the initial question — “What happened?” — as a general on-the-scene question. The court thus recognized that Miranda does not require police officers to administer warnings to everyone they question. Fiorenza would permit unwarned, spontaneous questions prompted by necessity of the circumstances, because these questions are presumptively not tailored to elicit incriminating

refused to exclude a second confession, preceded by Miranda warnings and a valid waiver, as the “fruit” of an earlier Miranda violation. Elstad, 470 U.S. at 318. Elstad was clearly inapplicable to A.S. The distinction between the two cases is blaring: In Elstad, the suspect received Miranda warnings before his second confession, whereas A.S. never received any warnings at all. Additionally, the A.S. court’s distinction between telling officers about the location of a gun and taking them to the gun is specious. The court’s reasoning is reducible to the following assertion: Had A.S. only told the officers the precise location of the gun, but refused to take them there, then the gun would have been an illegally obtained “fruit.” This result oriented interpretation of the fruits of the poisonous tree doctrine not only contorts Elstad, but it makes no sense.


121. Id. at 3.
122. Id.
123. Id.
124. Id.
125. Id. at 17.
126. Id. at 4.
127. Id. at 15-16. The Court used the Innis definition of interrogation. See supra notes 17-19 and accompanying text.
128. Fiorenza, No. 85 Civ. 0592 (LPG) at 16.
responses. Although the officer could not foresee Fiorenza's incriminating response to his initial question,130 the court found that the subsequent question about the location of the gun constituted custodial interrogation and did not satisfy the requirements of Quarles.131 Nevertheless, the court admitted the handgun under the "inevitable discovery" doctrine.132

By relying on the inevitable discovery doctrine rather than the public safety exception, the Fiorenza court demonstrated the legal options available to courts interpreting the exception. Without the inevitable discovery doctrine, the court probably would have suppressed the gun as a "fruit" of improper questioning. However, Quarles and other recent decisions133 have vitiated the "fruits of the poisonous tree" doctrine.134 As a result, Quarles, inevitable discovery, and harmless error135 furnish ambitious prosecutors with a menu of unclear exceptions that admit evidence that would otherwise be considered illegally obtained.

130. Fiorenza, No. 85 Civ. 0592 (LPG) at 16.
131. Id. at 17. This is a curious finding. It is difficult to factually distinguish Fiorenza from Quarles.
132. Id. (citing Nix v. Williams, 467 U.S. 431 (1984)). The "inevitable discovery" doctrine removes the taint from any evidence that the Government would have discovered by constitutional means. Nix v. Williams, 467 U.S. 431, 447-50 (1984). The Court upheld Iowa's contention that if police had not illegally induced Williams to lead them to his murder victim, police would inevitably have discovered the body in essentially the same condition that they found it. Id. at 449-50. Under federal constitutional analysis, the inevitable discovery doctrine requires proof by a preponderance of the evidence that the Government would have discovered the evidence, absent the illegality, by proper and predictable investigatory procedures. See, e.g., United States v. Finucan, 708 F.2d 838 (1st Cir. 1983) (must be certain that evidence would be found — not enough that lawful means of acquiring the evidence existed); United States v. Romero, 682 F.2d 699 (10th Cir. 1982) (warning against resort to speculation). Justices Brennan and Stevens, however, read Williams narrowly. In his dissent, Justice Brennan insisted that the doctrine requires clear and convincing proof rather than the preponderance standard suggested in Chief Justice Burger's majority opinion. Nix, 467 U.S. at 459-60 (Brennan, J., dissenting). In his concurring opinion, Justice Stevens echoed Justice Brennan's belief that the doctrine applies only to investigations already in process when the constitutional violation occurred. Id. at 456-57 (Stevens, J., concurring).
133. See supra notes 18-33 and accompanying text.
134. See supra note 31.
2. The Fourth Amendment and AIDS

In Barlow v. Superior Court, the California Fourth District Court of Appeal openly circumvented the exception. Petitioner Barlow was marching in a Gay Pride Parade when he scuffled with police. Barlow bit one officer on the shoulder and another on the knuckle. Both bites punctured the skin and drew blood. Police arrested Barlow, and took him to the hospital to treat his injuries. Without issuing Miranda warnings, an officer then asked Barlow whether he was a homosexual with AIDS. He replied that he was a homosexual and that "you better take it that I do have AIDS for the officer's sake." Police then took Barlow to the stationhouse where, without a warrant and against his will, they took blood samples for AIDS analysis. In defense of the police action, the People argued that the blood samples were necessary to prove Barlow's intent to kill or seriously harm the officers by passing the AIDS virus through the bite wound.

The court discussed Quarles but declined to determine whether the public safety exception applied to a suspected AIDS carrier who bites another person. Instead, the court decided the case on fourth amendment grounds. According to the court, the police lacked probable cause to believe that the blood tests would reveal Barlow's intent to kill the officers. In reaching that holding, the court engaged in a complicated discussion of probable cause, causation, intent, privacy, and several provisions of the California Administrative Code. The court apparently preferred fourth amendment grounds to deciding whether AIDS carriers threaten public safety under Quarles.

The court's choice to circumvent Quarles is understandable. Although AIDS creates a present danger to the safety of officers and

137. Id. at 136.
138. Id. at 135.
139. Id.
140. Id.
141. Id. Barlow had sustained unspecified injuries in his scuffle with police. He was charged with two counts of battery against a police officer and one count of resisting arrest. Id.
142. Id.
143. Id.
144. Id.
145. Id. at 136.
146. Id.
147. Id. at 137-40.
148. Id. at 137. The opinion does not address whether the officers actually contracted AIDS.
149. Id. at 136-40.
the public, is it sufficient to trigger Quarles?\textsuperscript{150} The need for answers in Barlow was not as urgent as Quarles requires. The officers in Barlow, personally suspicious that Barlow had AIDS, could have found the answers by submitting themselves to testing. But without the prompt results of Barlow's tests, the officers would face a nine-month period of uncertainty while waiting for their own AIDS test results.\textsuperscript{151} In spite of that potentially traumatic waiting period, the possibility of infection, even with a deadly disease, does not require instinctive action to neutralize a volatile situation under Quarles.

Barlow presented the court with the perplexing task of balancing public safety against rights of suspected AIDS carriers. The court openly avoided the task.\textsuperscript{152} Rather than define Quarles in light of AIDS, the court circumvented the exception and decided the case on other grounds.\textsuperscript{153}

3. No Interrogation

In State v. Ruiz, the Florida Third District Court of Appeal also circumvented the public safety exception by finding no custodial interrogation.\textsuperscript{154} In Ruiz, the defendant drove to a house where narcotics officers were preparing to arrest the residents.\textsuperscript{155} With his gun drawn,
an officer ordered Ruiz to get out of the car and to lie on the ground.\textsuperscript{156} Without warnings, the police asked Ruiz whether he had a gun.\textsuperscript{157} Ruiz admitted to having a pistol beneath the car's seat.\textsuperscript{158} The officer retrieved the pistol, then arrested Ruiz for carrying a concealed firearm.\textsuperscript{159} After receiving\textit{ Miranda} warnings, Ruiz confessed to his involvement in the drug transaction and told officers his car contained contraband.\textsuperscript{160}

The trial court suppressed both the gun and the contraband because Ruiz was under the functional equivalent of arrest when asked about the gun.\textsuperscript{161} The appellate court reversed.\textsuperscript{162} Although the State raised the public safety exception at trial, the appellate court expressly circumvented\textit{ Quarles}.\textsuperscript{163} Instead, the court used fourth amendment doctrine to admit both the tangible and testimonial evidence.\textsuperscript{164}

Relying on\textit{ Terry v. Ohio},\textsuperscript{165} the court held that the police had not subjected Ruiz to custodial interrogation, but instead had questioned him pursuant to a valid\textit{ Terry} stop.\textsuperscript{166} The court assembled cases from various jurisdictions that collectively hold that an officer who draws his gun, handcuffs a suspect, or forces a suspect to lie face down on the ground has not made a custodial arrest.\textsuperscript{167} Because Ruiz's presence at the scene of the drug transaction gave police a founded suspicion of his involvement in criminal activity, the court held that\textit{ Terry} permitted the stop, the inquiry, and the seizure of both the gun and contraband.\textsuperscript{168}

If a founded suspicion justifies a\textit{ Terry} stop and frisk, the\textit{ Ruiz} court reasoned, then\textit{ Terry} also allows a "less intrusive" oral inquiry.\textsuperscript{169}

\textsuperscript{155} \textit{Id.} The officer told Ruiz to remain on the ground until police ascertained who the actual suspects were. \textit{Id.}
\textsuperscript{157} \textit{Id.}
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} Officers retrieved cocaine and contraband from Ruiz's car. \textit{Id.}
\textsuperscript{161} \textit{Id.} As a result,\textit{ Miranda} warnings were required before police could interrogate the suspect. \textit{Id.}
\textsuperscript{162} \textit{Id.} at 171-72.
\textsuperscript{163} \textit{Id.} at 172 n.3.
\textsuperscript{164} \textit{Id.} at 172-73. The propriety of gaining testimonial evidence via the fourth amendment is dubious. See\textit{ infra} notes 180 & 276.
\textsuperscript{165} 392 U.S. 1 (1968); see\textit{ infra} notes 239 & 222-83.
\textsuperscript{166}\textit{ Ruiz}, 526 So. 2d at 172.
\textsuperscript{167} \textit{Id.} The court disputed the relevance of whether police had probable cause to arrest Ruiz. \textit{Id.} at 172 n.3.
\textsuperscript{168} \textit{Id.} at 172-73.
\textsuperscript{169} \textit{Id.} at 173; see\textit{ infra} note 276.
To hold otherwise would unreasonably extend *Miranda*. Instead, the court chose to narrow *Miranda*, extend *Terry*, and sidestep *Quarles*. The court also implied that a lawful automobile search would have validated the otherwise improperly obtained evidence, thus implicitly applying the inevitable discovery doctrine.

The court's circumvention confounded the *Miranda* definition of custodial interrogation. Gunpoint interrogation of a suspect while forcing him to lie face down on the street significantly restricts the suspect's freedom and is reasonably calculated to elicit an incriminating response. Although the court cited several cases to support its holding that Ruiz was not under custodial interrogation, none featured police asking a suspect about possession of a gun. To admit this inquiry and its fruits, the court maintained that an inquiry is less intrusive than a pat-down search.

This argument is specious—foreign to both fourth and fifth amendment jurisprudence. Because the fourth amendment's standard of "reasonableness" does not modify the fifth amendment's constitutionally mandated exclusion of coerced self incrimination, the Constitution betrays a heightened interest in penalizing fifth amendment violations. Furthermore, *Ruiz* aptly illustrates the intrusiveness of illegal inquiries. But for the officer's question, a *Terry* search would have yielded no evidence. Investigative techniques, rather than unwarned custodial interrogation, would have been necessary to incriminate Ruiz.

The Florida Third District Court of Appeal avoided the potential obstacle of *Quarles* through a narrow interpretation of *Miranda* that characterized *Ruiz* as outside the fifth amendment. The court ex-
panded the scope of a *Terry* stop by adding *Quarles*-type questions about the location of weapons. The court's confusion over the fifth amendment was most obvious when it asserted that even with warnings the evidence might have been suppressed if Ruiz was in custody. In fact, *Miranda* holds just the opposite; *Miranda* presumes coercion only in the *absence* of warnings.

Had the court not circumvented the exception, *Quarles* might have saved the incriminating statements from exclusion. Under *Quarles*, the state could have ignored the officer's failure to issue warnings if it could have linked his omission to the preservation of public safety. If *Quarles* is to have any utility, then *Ruiz* ought to have been a public safety prototype. Officers were preparing to make a dangerous arrest. Ruiz's arrival made him a logical suspect. To preserve both the arrest and officer safety, police neutralized all suspects. But rather than invoke the public safety exception to admit the evidence derived from unwarned inquiries, the court mistakenly asserted that *Quarles* "might not" save it from exclusion.

The societal cost of excluding unwarned evidence at trial may contribute to the lower courts' reluctance to define the scope of the exception. If the scope remains unclear, courts may invoke *Quarles* simply to admit evidence that arguably was improperly obtained. The prosecution may join the exception with claims of no custody, no interrogation, inevitable discovery, or harmless error, offering a court several grounds to admit statements obtained from unwarned statements. If courts recognize several alternative grounds on which to admit the same evidence, the strength of each individual ground weakens. Al-

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180. *Id.* at 172-73. *Terry* inspired some thoughtful scholarship. For a thorough analysis of the *Terry* line of cases, see LaFave, *supra* note 16. Professor LaFave only briefly recognized the potential danger of the intersection of *Miranda* and *Terry*:

> [T]he only distinction to be made is between those instances in which a general inquiry (for example, "What happened?") is made to witnesses, and those in which an individual is called on to inculpate or exculpate himself (for example, "What are you doing here?" or "Where did you get that property?"). In the latter instances the warnings should be required whether or not there is "custody," a "seizure," or an "arrest." (citations omitted).

*Id.* at 100; see infra note 276; cf. *Miranda Rights in a Terry Stop: The Implications of People v. Johnson*, 63 DEN. U.L. Rev. 109 (1985) (there is a pronounced distinction between *Miranda* and *Terry*).

181. *Ruiz*, 526 So. 2d at 172 n.3.


183. Drug sales presumptively are accompanied by weapons.

184. *Ruiz*, 526 So. 2d at 172 n.3.
though courts may admit the same evidence for several different reasons, this "shotgun" method relieves them of the pressure to clearly define the public safety exception. The greater the uncertainty surrounding the parameters of the exception, the more likely courts will admit evidence on vaguely defined grounds of no custody, no interrogation, inevitable discovery, and harmless error. In hopes of attaining a collective certainty, courts might merely lump together several uncertain grounds.

B. Confining the Exception

1. Volatile Situations

Some courts have circumvented the exception by admitting unwarned statements on alternative grounds. Other courts have refused to apply Quarles in an effort to confine the exception to a discernible set of circumstances. In In re B.R.,¹⁸⁵ a handgun was missing, but the Illinois Appellate Court refused to apply the exception. On a tip, police sought respondent, a fifteen year old youth who allegedly knew of a shooting and the whereabouts of the gun.¹⁸⁶ Once he was inside the police car, three officers questioned him.¹⁸⁷ The police told him that they wanted to find the gun and knew he had participated in the crime.¹⁸⁸ They added that he could only hurt himself by lying.¹⁸⁹ The suspect left to find the gun, and soon returned to lead police to it.¹⁹⁰ He gave the names of four alleged perpetrators, but confessed his own guilt when the police said they would question the four.¹⁹¹

The trial revealed conflicting testimony as to whether the police had threatened the suspect.¹⁹² However, the police admitted lying to the suspect by saying that no serious injuries had occurred in the shooting.¹⁹³ The appellate court affirmed the trial court's finding that the police conducted a custodial interrogation.¹⁹⁴ In addition, the court

186. Id. at 947, 479 N.E.2d at 1085.
187. Id.
188. Id.
189. Id.
190. Id. at 948, 479 N.E.2d at 1085.
191. Id.
192. Id. at 948-49, 479 N.E.2d at 1085-86. Respondent alleged that the officers gave him a choice between "the easy way or the hard way." Id. at 948, 479 N.E.2d at 1085. The officers denied making any threats. Id., 479 N.E.2d at 1085-86.
193. Id.
194. Id. at 949, 479 N.E.2d at 1087.
emphasized that the suspect's age and fear of the police had motivated his confession. The court therefore held that the public safety exception did not apply, because the extremely exigent circumstances of Quarles did not exist on the facts of B.R. The Quarles court found that police had a "limited time" and needed to act "instinctively." But the Quarles facts make this finding questionable. The police had already arrested and handcuffed the unarmed suspect. The situation was not urgent; the choice between searching for a gun in an empty supermarket and eliciting incriminating statements is not an instinctive one.

The Illinois Appellate Court also distinguished Quarles on the basis that it involved a more volatile situation than did B.R., indicating its reluctance to apply the exception. Quarles involved a future danger that the missing weapon might accidentally injure the citizen who found it, or that the finder might use the gun to perpetrate another crime. B.R., on the other hand, involved an actual shooting. The police sought both the gun and the suspect. If police did not stabilize the situation, the suspect could create additional danger of injury. Thus, the danger was immediate and more concrete than in Quarles. A criminal suspect presents a greater likelihood of causing harm with a missing handgun than does an innocent employee or customer. If the exception applied to Quarles, it should have applied to B.R. as well.

2. Aluminum Suitcases

Less than three months after deciding B.R., the same Illinois Appellate Court again confined the exception in People v. Roundtree. In Roundtree, the court refused to extend the exception to questioning about the ownership of an aluminum suitcase. Defendant drove into the back of a police car on the shoulder of the interstate. Exiting

195. Id. at 949-50, 479 N.E.2d at 1086.
196. Id. at 950, 479 N.E.2d at 1087.
197. Id. The court stated that in Quarles "police had . . . 'limited time' to act instinctively to neutralize a 'volatile situation' and so avert immediate danger to the general public. . . ." Id. .
198. Quarles, 467 U.S. at 652.
199. The police faced a situation involving a missing weapon in a limited area of an empty store late at night. In a "limited time," the police in Quarles could have cordoned off the area, warned store management of the problem, conducted a brief search, and found the gun. See supra notes 85-90 and accompanying text.
200. B.R., 133 Ill. App. 3d at 950, 479 N.E.2d at 1087.
202. Id. at 1080, 482 N.E.2d at 697-98.
203. Id. at 1077, 482 N.E.2d at 696.
his car, the officer heard a shot and saw two men struggling over a gun in their front seat. When police back-up arrived, the officers searched and handcuffed the suspects and took the gun. One officer then found an aluminum suitcase on the back seat of the car. Before issuing warnings, the police asked who owned the suitcase. The defendant claimed ownership. The police opened the suitcase and found cocaine and drug paraphernalia.

The appellate court reversed the trial court's finding of no custody, and rejected the State's Quarles argument. The officers had stabilized the situation by handcuffing the suspects and positioning them away from the car before questioning them. Further, the record did not establish that the suitcase posed a threat, real or imaginary, to the public safety.

In effect, the appellate court distinguished the public safety implications of an aluminum suitcase from those of a gun. To apply the public safety exception to the Roundtree facts would convert the "public safety" exception to the "officer curiosity" exception. Unless the officers suspected that the suitcase contained a bomb, they had no reason to perceive a threat to the public safety. The Illinois Appellate Court reasoned that the absence of the requisite threat justified a limiting interpretation of Quarles.

204. Id.
205. Id.
206. Id.
207. Id.
208. Id.
209. Id. at 1077-78, 482 N.E.2d at 696.
210. Id. at 1079-80, 482 N.E.2d at 697-98.
211. Id. at 1080, 482 N.E.2d at 697-98.
212. Id., 482 N.E.2d at 698.
213. Although the Court did not discuss the inevitable discovery doctrine, the officers could have found the evidence through a valid fourth amendment search. See supra note 132. The Supreme Court has held that when conducting warrantless searches incident to arrest, officers may search an arrestee and the area immediately within the arrestee's reach. Chimel v. California, 395 U.S. 752 (1969). The Court reasoned that the search was justified by the need to prevent an arrestee from gaining possession of a weapon or destroying evidence. Id. at 762-63. Twelve years later, the Court extended Chimel to an automobile search where officers searched the automobile after the arrestees were no longer in it. New York v. Belton, 453 U.S. 454 (1981). Finally, in 1983, the Court held that if a suspect is not under arrest, officers may still search the passenger compartment of a car if the officer reasonably believes that the suspect is armed or dangerous. Michigan v. Long, 463 U.S. 1032 (1983). Therefore, the police in Roundtree possessed constitutional means of seizing the suitcase.

The prosecution may have avoided the inevitable discovery doctrine for two reasons. First, Nix v. Williams was a sixth amendment case. Nix v. Williams 467 U.S. 431 (1984). While the rationale may apply to the fourth and fifth amendments as well, reviewing courts may choose
3. Missing Weapons

In another effort to confine the exception, the Appellate Division of the New York Supreme Court refused to extend Quarles to the unwarned confession of an eleven-year-old to a fatal shooting. In In re John C.,\(^\text{214}\) a youth led police to a bedroom where his friend lay dead on the floor.\(^\text{215}\) A woman then brought in her son, the appellant. When an officer asked him if he had shot the victim, he answered “yes.”\(^\text{216}\) The officer then asked why, and where the gun was.\(^\text{217}\) Appellant claimed that the shooting was accidental and that he did not have the weapon.\(^\text{218}\) On continued questioning, appellant said that he left the gun with a friend across the street.\(^\text{219}\) Roughly half of the fourteen officers present questioned appellant for nearly an hour before taking him to the stationhouse and issuing Miranda warnings.\(^\text{220}\)

At the suppression hearing, the court considered the various statements separately.\(^\text{221}\) The court suppressed the questions about why appellant shot the victim and gave the weapon to a friend because the circumstances in which the questions were asked constituted custodial interrogation and did not concern a threat to public safety.\(^\text{222}\) In addition, the police asked “Where is the gun?” during custodial interrogation, but the trial court admitted the response under Quarles.\(^\text{223}\) On appeal, however, the court did not find an “immediate volatile situation” sufficient to trigger the exception,\(^\text{224}\) reasoning that although missing guns endanger the public, it was unwilling to allow every inquiry over the location of a weapon to fall within the exception.\(^\text{225}\) The exception would swallow the rule unless Quarles were more narrowly construed.\(^\text{226}\)

\(^\text{215}\) Id. at 247, 519 N.Y.S.2d at 224.
\(^\text{216}\) Id. at 247-48, 519 N.Y.S.2d at 224.
\(^\text{217}\) Id. at 248, 519 N.Y.S.2d at 224.
\(^\text{218}\) Id.
\(^\text{219}\) Id.
\(^\text{220}\) Id. at 248, 519 N.Y.S.2d at 225. Appellant’s aunt testified that approximately eight uniformed officers and six plainclothes detectives were in the apartment. Id.
\(^\text{221}\) Id. at 249, 519 N.Y.S.2d at 225.
\(^\text{222}\) Id.
\(^\text{223}\) Id.
\(^\text{224}\) Id. at 253, 519 N.Y.S.2d at 228.
\(^\text{225}\) Id. at 252, 519 N.Y.S.2d at 227.
\(^\text{226}\) Id.
In narrowing Quarles, the John C. court rejected any distinction between public and private places; the exception could apply to either.\textsuperscript{227} The danger in a public place may be more obvious, but a weapon in a private residence, the court reasoned, could also endanger a number of people, including the arresting officer.\textsuperscript{228} Furthermore, the court determined that the officer sought to elicit an admission of guilt rather than information that would preserve the safety of others.\textsuperscript{229} The officer asked where the gun was only after arresting the suspect and removing him to the living room.\textsuperscript{230} He interrupted the questioning only to investigate the friend across the street.\textsuperscript{231} Unwarranted delay, the suspect’s youth, and the officer’s improper motives placed the John C. facts outside the ambit of Quarles.\textsuperscript{232}

The court flatly rejected broad application of the exception to all questions about the location of a weapon. Although this appears to be a logical step in the movement to confine the exception, it removes the only element of certainty from Quarles. Stabilizing a volatile situation begins with locating weapons. An armed perpetrator or accomplice probably poses the greatest danger, but if friends or family of a victim find a weapon, they may present a threat. Finally, a missing weapon could harm the bystander who finds it. Therefore, a missing weapon is an important prerequisite to the exception if it is to have any substance. Without prerequisites,\textsuperscript{233} the exception may allow criminal trials to evolve into \textit{pro forma} ratifications of prior police interrogations.\textsuperscript{234}

The John C. court also confined the public safety exception by imposing a time restriction on police inquiries.\textsuperscript{235} According to the John C. court, Quarles required an immediate inquiry by the police to defuse a potential threat to public safety.\textsuperscript{236} In John C., the court

\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 253, 519 N.Y.S.2d at 228.
\textsuperscript{230} Id. at 254, 519 N.Y.S.2d at 228.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} A Minnesota court refused to automatically include missing accomplices within Quarles. Minnesota v. Hazley, 428 N.W.2d 406 (Minn. Ct. App. 1988). Police asked a felony suspect who he was and who was with him. Id. at 408. The suspect answered, then moved at trial to suppress his answer. Id. at 410. Rejecting the State’s Quarles argument, the court declared that “[m]issing accomplices cannot be equated with missing guns [unless] . . . the accomplice [endangers] the public.” Id. at 411.
\textsuperscript{234} Goldberg, \textit{supra} note 52, at 182.
\textsuperscript{235} John C., 130 A.D.2d at 253, 519 N.Y.S.2d at 228.
\textsuperscript{236} Id.
objected to the "unwarranted delay" of the questioning.\textsuperscript{237} John C. questions the temporal scope of the State's interest in stabilizing a volatile situation. Are all questions permitted during the emergency period? Can the authorities intentionally prolong the interrogation to wear down the suspect's will to resist? Even before\textit{Miranda}, courts excluded evidence obtained during extended periods of interrogation.\textsuperscript{238} Furthermore, assuming that an unwarranted delay in questioning activates the exception, the most difficult task remains: defining "unwarranted delay."\textsuperscript{229}

To confine the public safety exception to a discernible set of circumstances, the Illinois Appellate Court twice declined to apply\textit{Quarles}. In\textit{B.R.}, the court rejected the exception when the situation posed a greater threat to public safety than in\textit{Quarles}.\textsuperscript{240} Three months later in\textit{Roundtree}, the same court refused to extend the exception to an automobile search following a shooting.\textsuperscript{241} The Appellate Division

\begin{itemize}
\item \textsuperscript{237} Id.; see supra text accompanying note 220.
\item \textsuperscript{238} See, e.g., Ziang Sung Wan v. United States, 266 U.S. 1, 14-17 (1924) (defendant's admissions made on seventh day of interrogation presumed involuntary).
\item \textsuperscript{239} This determination would fluctuate with individual circumstances. For example, a hostage or hijacking scenario may warrant a greater delay than interrogation in a police-dominated stationhouse. The John C. court also implied that officer safety alone may trigger the exception.\textit{John C.}, 130 A.D.2d at 252, 519 N.Y.S.2d at 226. Arguably, police officers are not members of the public while acting in their official capacity. In addition, police work is inherently dangerous. Accepting this view, however, could make it difficult to attract individuals to police work and would lower the morale of those now serving as police officers. The assertion that officer safety may trigger an exception to\textit{Miranda} is really nothing new. See\textit{Terry} v. Ohio, 392 U.S. 1 (1968) (an officer may detain a person briefly for questioning on suspicion of involvement in criminal activity). The federal courts' attempt to define the scope of\textit{Terry} has led to some inconsistent results. See, e.g., United States v. Hensley, 469 U.S. 221 (1985) (\textit{Terry} permits officer to stop to investigate past crime); Florida v. Royer, 460 U.S. 491 (1983) (investigative methods employed pursuant to\textit{Terry} stop should be least intrusive means reasonably available to verify or dispel officer's suspicion of criminal activity); Adams v. Williams, 407 U.S. 143 (1972) (\textit{Terry} justifies search if officer fears for his own safety); Sibron v. New York, 392 U.S. 40 (1968) (companion case to\textit{Terry} with opposite result); United States v. Ward, 488 F.2d 162 (9th Cir. 1973) (\textit{Terry} cannot be stretched to allow detective stops for generalized criminal inquiries).\textit{Terry} and other fourth amendment decisions have demonstrated that officer safety figures in the Court's understanding of fourth amendment rights. See, e.g., Washington v. Chrisman, 455 U.S. 1 (1982); New York v. Belton, 453 U.S. 454 (1981); Payton v. New York, 445 U.S. 573 (1980); Chimel v. California, 395 U.S. 752 (1969); United States v. Rabinowitz, 339 U.S. 56 (1950). What\textit{Terry} and its progeny did not resolve is whether an officer's safety concerns should insulate the State from the penalty of exclusion for\textit{Miranda} violations. Officers would hesitate to intervene if faced with the threat of exclusion every time they acted to protect themselves. On the other hand, if a situation jeopardizes an officer's safety, self-preservation will dictate the officer's response, not concerns over exclusion of unwarned statements at trial.
\item \textsuperscript{240} In\textit{re B.R.}, 133 Ill. App. 3d 946, 479 N.E.2d 1084 (App. Ct. 1985).
\end{itemize}
of the New York Supreme Court approached the exception differently in In re John C. by declaring that Quarles did not necessarily apply to every inquiry about a missing gun. In these three decisions, the courts found Quarles too confusing to generate an exception clear enough to be justifiably applied.

C. Misapplying the Exception

1. Kitchen Knives

As many scholars predicted, some courts have simply misapplied the exception. In People v. Cole, the California Court of Appeal applied Quarles when appellant burglarized two residences and attempted a kidnapping in another. A victim's mother told police that appellant stole a kitchen knife from her apartment. Appellant forced his way into a stranger's car and demanded a ride, then confessed to the stranger, who later called the police. The police apprehended and searched appellant, but found no weapons. An officer asked where the knife was. Appellant replied that he had discarded it. On these facts, the court invoked Quarles, stating that the missing knife posed a threat that reasonably prompted the officer's question.

In his dissent, Judge White argued that the exception should be confined "to a factual context of a firearm in places of public . . . accommodation similar to that in which the 'exception' was born." He insisted that a lost kitchen knife did not immediately threaten the public safety because such knives are readily accessible in the home. Furthermore, the apartment complex residents, intent on helping police preserve evidence, would probably find the knife if the police search failed to recover it.

243. See supra note 68.
245. Id.
246. Id. at 51, 211 Cal. Rptr. at 247-48.
247. Id., 211 Cal. Rptr. at 248.
248. Id.
249. Id.
250. Id.
251. Id. at 52, 211 Cal. Rptr. at 248-49.
252. Id. at 58, 211 Cal. Rptr. at 253 (White, J., dissenting).
253. Id. (White, J., dissenting).
254. Id. (White, J., dissenting).
255. Id. at 58-59, 211 Cal. Rptr. at 253 (White, J., dissenting).
Judge White's attempt to limit the exception to public accommodations betrays a misunderstanding of *Quarles* analysis. He narrowed the exception to cover only particular types of exigent circumstances while maintaining broad protection of the fifth amendment. While Judge White's exigent circumstances may appear to be a necessary reaction to a potentially overbroad exception, the *Quarles* facts were too narrow, and the danger too remote, to serve as a meaningful standard for the exception. By limiting the exception to *Quarles*-type situations, Judge White ignored other factual scenarios that endanger the public safety: kidnappings, prison takeovers, airline hijackings, and other terrorist acts also threaten public safety without necessarily involving a missing weapon in a public place.

Moreover, other items pose a public danger equal to that posed by a gun. Judge White's argument rests on the ready availability of kitchen knives and the willingness of law-abiding citizens to help police solve crimes. However, ease of access does not distinguish knives from guns. Rather, guns inherently pose a greater danger than knives of causing accidental or intentional harm. Although a gun poses less danger than a bomb, guns frequently cause accidental injuries and fatalities. On a comparative scale of danger, how would Judge White treat a stash of cocaine? His definition of the exception excludes the potential danger to those who find drugs.

The dissent properly excluded knives from the ambit of the exception, but for the wrong reasons. Stabbings and other assaults do not often occur accidentally, nor do they often involve instruments found in public places. The real threat of a gun, then, is its potential for spontaneous danger. But because Judge White's analysis failed to encompass other types of equal threats, it followed a meaningless distinction.

Judge White also adhered to the hollow distinction between public and private places. As the *John C.* court pointed out, a weapon in or around a private residence threatens a number of people. Citizens at risk are no less members of the public simply because they have left a hotel, restaurant, or baseball game. The public safety exception should protect the public everywhere. So, while Judge White justifiably sought to avoid absurd extensions of the *Quarles* rationale, his suggestions ineffectively redefined *Quarles*.

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256. In the hands of the extremely young, naive, or curious, drugs, too, pose a danger. Drugs create a more limited potential danger than firearms, as drugs harm only the user. But drugs may conceivably cause both emotional and financial harm to the families of users, in addition to the bodily harm that a user might cause an unsuspecting citizen on the street when the user seeks a “fix.”

2. Rough Neighborhoods

The Ninth Circuit Court of Appeals also misapplied the public safety exception in *United States v. Brady*. In *Brady*, a woman left a car and ran toward police. Suspecting Brady of battery, the officer drew his gun, ordered Brady out of the car, and frisked him. Brady responded ambiguously to the officer’s request to search the car. Asked if he had a gun in the car, Brady said that he had one in the trunk. A search of the trunk also revealed contraband. Because of conflicting testimony on the issue of custodial interrogation, the Ninth Circuit reviewed that issue *de novo*. The court determined that the officer’s questioning of Brady was custodial interrogation, but upheld the lower court’s admission of both the physical evidence and statements under *Quarles*. The dangerous crowd that had gathered at dusk in the rough neighborhood, the suspect’s open car door, and the keys that remained in the ignition all contributed to the court’s decision.

Although the circumstances posed potential unrest, these officers had no reason to suspect that Brady disposed of a weapon where it immediately endangered the public. No one had said that Brady had a weapon, and unlike Quarles, he did not wear a shoulder holster. The exchange between Brady and the officer surpassed the mere “Where’s the gun?” inquiry of *Quarles*. The officer asked more than one question and attempted to obtain Brady’s consent to search the

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259. *Id.* at 885.
260. *Id.*
261. *Id.*
262. *Id.* Police frequently rely on consent searches because they involve no paper work and offer an opportunity to search even when probable cause is lacking. KAMISAR, *supra* note 27, at 408-22. The definition of “consent” is a sticky one. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that consent must be voluntarily given, and not the result of duress or coercion, express or implied. The prosecution, however, is not required to demonstrate a suspect’s knowledge of a right to refuse the request to search. *Id.* at 220.
263. *Brady*, 819 F.2d at 885-86. The officer “found a revolver, two speed loaders, ammunition, seal bombs, an electronic scale, a bag of what appeared to be metamphetamine, and a powder that appeared to be a cutting agent.” *Id.*
264. *Id.* at 886. The three witnesses at the suppression hearing gave different accounts of the conversation between police and Brady. *Id.* at 886 n.1.
265. *Id.* at 887-88. The court held that the officer properly inquired about the gun to neutralize a dangerous situation rather than elicit testimonial evidence. *Id.* at 888.
266. *Id.*
267. *Id.*
268. *Id.*
trunk before Brady incriminated himself.\textsuperscript{269} Brady involved both extended questioning and a lack of concrete danger to the public, both factors beyond the crux of Quarles analysis. The court, however, relied on Quarles to admit both the statements and physical evidence.\textsuperscript{270}

Brady should not have fallen within the Quarles exception. The officers could have averted the threat posed by the open door and keys in the ignition by telling Brady to close the door and remove the keys. After all, one officer had successfully removed Brady from the car and detained him at gunpoint. Another officer could have secured the car. Under Quarles, subjective evaluations such as "rough neighborhood" should not unilaterally trigger the exception. Otherwise, the mere occurrence of a crime at a particular street address could activate Quarles. Not coincidentally, these "rough neighborhood" street addresses are where most crimes and, hence, most interrogations, occur.

The court also speculated on potential danger: "If Brady had a gun in the passenger compartment of his car, a passerby or accomplice could seize it . . . . [T]o neutralize this danger, [the officer] properly asked Brady whether he had a gun."\textsuperscript{271} This assumption is a dark moment in Quarles interpretation, grounded in a series of "ifs." Common sense refutes the possibility of such a scenario. An accomplice would concededly pose a threat, but this assumes both the existence of a gun and an accomplice who knew of the gun.\textsuperscript{272} The officers had no reason, objective or subjective, to believe in either\textsuperscript{273} and thus their actions could not have been "reasonably prompted by a concern for the public safety."\textsuperscript{274}

The Ninth Circuit relied on Quarles without addressing the inevitable discovery doctrine. However, the court rejected the prosecution's

\textsuperscript{269} Id.
\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Accomplices should present a concrete danger to trigger the exception. Cf. supra note 233.
\textsuperscript{273} The presence of a "suspected motorcycle gang member carrying a knife among the group of people who had gathered" did not threaten the public safety. Brady, 819 F.2d at 885. Such an individual, if threatening at all, creates an ongoing danger. Surely the police could not visit the suspected gang member at his home and then admit unwarned responses under the exception. The suspect must first pose a threat. If the suspected gang member threatened police, then one of the officers should have detained him, observed him or radioed for assistance. A suspected gang member standing in a crowd does not ring of the exigent circumstances that the Quarles Court envisioned when deciding to admit evidence obtained in violation of Miranda.
\textsuperscript{274} See supra note 62 and accompanying text.
reliance on *Michigan v. Long*, in which the court held that the fourth amendment permits police to search the passenger compartment of an automobile if the officer reasonably believes that the suspect is armed or dangerous. The *Brady* court declined to apply *Long*, even though the Supreme Court has repeatedly upheld the “automobile exception” to the warrant requirement of the fourth amendment.

The Court has even applied the “automobile exception” specifically to the contents of a locked trunk. Police could have searched Brady's trunk without relying on his incriminating statement if the officer reasonably believed that Brady possessed a gun or other contraband.

Through *Long*, if the officer possessed such a belief, then the State could have raised the inevitable discovery doctrine in addition to *Quarles*. The *Brady* court, however, indicated that the officers could not have searched the trunk until Brady made the incriminating statement.

275. *Id.* at 887 n.2 (citing Michigan v. Long, 463 U.S. 1032, 1049-51 (1983)); see also supra note 213 and accompanying text.

276. Simply put, *Long* extended the *Terry* doctrine to automobiles. *Long*, 463 U.S. at 1049-51; see Casenote, Fourth Amendment — Officer Safety and the Protective Automobile Search: An Expansion of the Pat-down Frisk, 74 J. CRIM. L. & CRIMINOLOGY 1265 (1983). In a footnote, the *Brady* court interpreted *Long* to permit searches but not inquiries about whether a suspect has a gun: “Questioning can be more intrusive than a search because it can evoke an incriminating response in a situation where a lawful search would uncover nothing.” *Brady*, 819 F.2d at 887 n.2. In that footnote, however, the court ignored two important factors. First, *Long* applied to passenger compartment searches, while *Brady* involved a more intrusive trunk search. *Long*, 463 U.S. at 1049-51; *Brady*, 819 F.2d at 888-89. Second, *Long* relied heavily on the Court's reasoning in *Terry* which permits inquiries as well as searches and seizures if an officer reasonably believes a suspect is connected with criminal activity. See *Long*, 463 U.S. at 1049-52; United States v. Terry, 392 U.S. 1, 9-10, 30 (1968); see supra note 179.


278. *Cady v. Dombrowski*, 413 U.S. 433 (1973). *Cady*, however, may be more limited than this. *Cady* involved a warrantless search of an auto towed to a private garage even though no probable cause existed to believe that the vehicle contained fruits of a crime. *Id.* at 436-37. The sole justification of this search was that it was incident to the caretaking function of the police to protect the community. *Id.* at 443. The police believed that the incapacitated driver, a police officer, had a weapon in the car that might be discovered by vandals. *Id.* at 437.


280. See *Brady*, 819 F.2d at 887 n.2. The court erected a combination of doctrines on which to hoist *Brady*. In order to establish probable cause under *Ross*, the court upheld the prosecu-
If the Ninth Circuit correctly read *Michigan v. Long*, then the inevitable discovery doctrine did not apply to *Brady*. But in its analysis, the court raised an interesting distinction between the fourth and fifth amendments. In effect, the court reduced the definition of a search to a physical process, not involving questioning. Once an officer adds inquiries to an otherwise valid search, the officer must first issue warnings in order to avoid fifth amendment exclusion of the subsequent incriminating statements and evidence produced as “fruits” of the statements. Although the *Brady* court’s theory apparently limits police behavior, *Terry v. Ohio* had already decided this issue in favor of the police in 1968. Whether the inevitable discovery doctrine applies to *Brady* depends on the scope of inquiries permissible under *Terry*, which are still unclear twenty years later. Yet, the State presumably should not be able to use a fourth amendment search to obtain testimonial evidence. A broad reading of *Terry* allows such a result.

3. Constitutional Violations

In *State v. Kunkel*, the Wisconsin Court of Appeals misapplied *Quarles* by stretching the exception to condone a pure constitutional violation. Police arrested Kunkel at 12:30 a.m. after suspecting him...
of harming his infant son. A detective read him his *Miranda* rights. After the detective advised him of the right to counsel, the detective then advised Kunkel of the right to appointed counsel. Although Kunkel declined to waive his right to counsel, the detective proceeded with questioning. After Kunkel refused to say where his son was, he agreed to speak with a priest. Several officers continued to question Kunkel throughout the night. At about 7:30 a.m., Kunkel reminded the officers of their offer to let him speak with a priest. Kunkel promptly confessed to the priest. After he confessed, the police questioned Kunkel about his son’s whereabouts until he led them to his son’s grave.

In *Kunkel*, police continued to question Kunkel after he claimed his right to counsel. According to the Supreme Court, all questioning must cease once a suspect invokes the right to counsel, unless the suspect initiates the communication. The right to counsel is a con-
stitional right rather than a prophylactic rule. A suspect can claim the right out of either the fifth or sixth amendment. The fifth amendment right attaches when police expose a suspect to custodial interrogation. The sixth amendment right attaches after the State initiates formal proceedings against a suspect. Kunkel's pre-indictment interrogation therefore violated the fifth amendment right to counsel.

The Wisconsin Court of Appeals affirmed the trial court's finding that Kunkel invoked his fifth amendment right to counsel when he said that he could not afford an attorney. Because Quarles cured the Miranda violation, the court held that, in effect, the public safety exception deactivated Kunkel's right to counsel.

By applying the exception to Kunkel, the court expanded the notion that Miranda warnings are not constitutionally required. Under Kunkel, the delineation of "custodial interrogation" as the point at which the fifth amendment right to counsel attaches is not constitutionally mandated. Therefore, the public safety exception now reaches a suspect who has actually invoked his constitutional right to counsel. By removing the bright line activation point for the fifth amendment right to counsel, the Wisconsin Court of Appeals granted courts the power to balance the accused's constitutional rights against the Government's interest in conviction, therefore resurrecting the previously unsuccessful voluntariness doctrine.

299. For a general discussion of the distinction between prophylactic rules and constitutional requirements, see Grano, supra note 26; see also supra notes 20-29 and accompanying text.

300. Miranda, 384 U.S. at 474.


302. Kunkel, 137 Wis. 2d 172, 177, 404 N.W.2d 69, 71 (Ct. App. 1987). Kunkel also claimed that police denied him his sixth amendment right to counsel. Id. at 192, 404 N.W.2d at 78. The court held that Kunkel's sixth amendment right to counsel attached when the judge signed his arrest warrant. Id. at 193, 404 N.W.2d at 78. The warrant, however, was only for interference with parental rights. Id. The first degree murder charge came two days after the interrogation that allegedly violated Kunkel's right to counsel. Id.

303. Kunkel, 137 Wis. 2d at 183, 404 N.W.2d at 74.

304. Id. Quarles, the court argued, made Miranda warnings inapplicable. Id. at 186, 404 N.W.2d at 76. Because Edwards and its waiver requirements are "an outgrowth of Miranda," the court rejected Kunkel's fifth amendment claim. Id. at 190-91, 404 N.W.2d at 77.

305. See Tucker, 417 U.S. at 444; supra notes 43-67 and accompanying text. Kunkel, however, may well have involved the "technical" sort of Miranda violation that even Justice Marshall understood to be encompassed by Tucker. See Quarles, 467 U.S. at 684 (Marshall, J., dissenting).

306. Custodial interrogation is discussed supra notes 14-19 and accompanying text.

307. For a discussion of the voluntariness doctrine, see supra note 11 and accompanying text. The Tucker majority dusted off the old voluntariness test for contemporary application. Justice Rehnquist wrote:
Although the Wisconsin Court of Appeals extended Quarles to excuse a constitutional violation, Kunkel presented uniquely exigent circumstances.\(^{308}\) Time played a more important role in Kunkel than in Quarles,\(^{309}\) as a child's life could have depended on prompt answers from Kunkel.\(^{310}\) Warnings, however, convey to the suspect the adversarial nature of police conversations and thus might deprive police of their only chance to rescue a victim if a suspect exercises the right to silence. A per se ban of all unwarned evidence could therefore have a negative result. On the other hand, allowing police to choose between warnings and investigation would unnecessarily expand police discretion. Police interested in convictions might hesitate to act in a crisis situation. In many cases, however, the prosecution may not need a confession to obtain a conviction. The State would therefore lose nothing through exclusion.\(^{311}\) By applying Quarles to Kunkel, the Wisconsin

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\(^{308}\) A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive [Tucker] of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since Miranda. Certainly no one could contend that the interrogation . . . bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed . . . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court. Tucker, 417 U.S. at 444.

The voluntariness doctrine was little more than an ongoing swearing contest between suspects and the prosecution. With this in mind, the Supreme Court of Oregon expressly refused to apply Quarles to a constitutional violation. In State v. Miller, 300 Or. 203, 709 P.2d 225 (1985), the court would not "speculate about the degree of continuing vitality of Miranda v. Arizona," and adhered to the Supreme Court's waiver requirements articulated in Edwards. Miller, 300 Or. at 224, 709 P.2d at 241; see Edwards v. Arizona, 451 U.S. 477 (1981). Therefore, the court refused to extend Quarles to an Edwards violation. Miller, 300 Or. at 224, 709 P.2d at 241.

\(^{308}\) Actually, Kunkel was not a pure Quarles case. Rather, the court viewed Quarles as a means to uphold California's "rescue doctrine" as an exception to Miranda requirements. Kunkel, 137 Wis. 2d at 186, 404 N.W.2d at 75. The "rescue doctrine" disposes of Miranda when "life hangs in the balance." Id. at 185, 404 N.W.2d at 75. The doctrine requires that police act to save human life, that no other action promises relief, and that the interrogators are motivated primarily by rescue. Id. at 186-90, 404 N.W.2d at 74-75.

\(^{309}\) Id. at 188, 404 N.W.2d at 76. The court, however, stated that police faced a "more calm and clear picture" than in Quarles. Id. Still, the court held that the police acted reasonably. Id.

\(^{310}\) Id.

\(^{311}\) Justice Marshall made this very point in his Quarles dissent:

I also seriously question how often a statement linking a suspect to the threat to the public ends up being the crucial and otherwise unprovable element of a criminal prosecution . . . . Only because the State dropped the rape count and chose to proceed to trial solely on the criminal-possession charge did respondent's answer to Officer Kraft's question become critical. Quarles, 467 U.S. at 687 n.9 (Marshall, J., dissenting).
Court of Appeals established a per se rule of admissibility. Although this approach maximizes both the safety of victims and the number of convictions at trial, it fails to deter objectionable police conduct.312

The Kunkel court did not foresee police abuse of the exception. Police knew that a nine-month old child was missing for seventeen hours, but still they questioned Kunkel for over seven hours before obtaining a confession. The court did not indicate how long the interrogation could have continued without an attorney present. Moreover, the court refused to delineate the boundaries of acceptable interrogation practices when the State's interest in rescue exceeds a suspect's constitutional protection. By avoiding these questions, the court sent confessions law back to the pre-Miranda era when a defendant's rights fluctuated from case to case, depending in part on the State's desire to obtain a conviction.

The lower courts have misapplied Quarles to situations that pose no threat to the public safety, even to the "dangers" posed by a missing kitchen knife313 and a "dangerous crowd" in a "rough neighborhood."314 When a criminal suspect actually threatened the public safety, at least one court was willing to extend Quarles to excuse a pure constitutional violation.315 Without clear boundaries for the exception, courts may continue to use Quarles as a pretext for admitting otherwise improperly obtained evidence.

VII. A CALL FOR CONSISTENCY

For better or for worse, Quarles is now the law.316 Justice Rehnquist's majority opinion optimistically trusted police officers to apply the exception instinctively. As a result, reviewing courts have developed their own notions of "public safety." Assuming that the excep-

312. Somewhat ironically, the Kunkel court claimed that the rescue doctrine was a "limited exception" to Miranda. The court, however, failed to define the limits. Kunkel, 137 Wis. 2d at 189, 404 N.W.2d at 76.

313. People v. Cole, 165 Cal. App. 3d 41, 211 Cal. Rptr. 242 (Ct. App. 1985); see supra notes 244-56 and accompanying text.

314. United States v. Brady, 819 F.2d 884 (9th Cir. 1987), cert. denied, 108 S. Ct. 1032 (1988); see supra notes 258-83 and accompanying text.

315. Kunkel, 137 Wis. 2d at 172, 404 N.W.2d at 69; see supra notes 284-312 and accompanying text. One court invoked Quarles when police had used blatant trickery to induce a drunk, unsophisticated suspect to incriminate himself. See People v. Gilliard, 189 Cal. App. 3d 285, 234 Cal. Rptr. 401 (Ct. App. 1987) (defendant claimed that officer tricked him into answering question by telling defendant that public drunkenness was only charge against him).

316. Justice O'Connor said the same thing about Miranda. See Quarles, 467 U.S. at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part).
tion remains good law, judicial consistency requires a clear set of standards.

One approach to redefining Quarles would distinguish questions that seek an admission of guilt from those that seek to preserve the public safety. Under this approach, courts would permit no more than the bare minimum questioning of a suspect. Superfluous questions undermine the "good faith" aspect of questioning. For example, the following exchange might occur between police and an unwarned suspect:

1. "What happened?" "Someone was shot."
2. "Where is the gun?" "Outside."
3. "Why are you here?" "To meet a friend."
4. "Is your friend or anyone else inside?" "No. He's across the street."

Presumably, answers one, two and four would be admissible under Quarles. Answer three would be suppressed. Assume, arguendo, that the prosecution depends on an accomplice's testimony. Further, assume the State discovered the accomplice only through defendant's response to questions three and four. The accomplice's testimony arguably constitutes fruits of the poisonous tree.

The State in this hypothetical could, however, argue that question four would have revealed the accomplice despite question three. On the other hand, the officers might not have asked question four if not for the answer to question three. Excluding all evidence as impermissible fruits because an officer asked one improper question in the heat of the moment suggests a draconian solution to custodial interrogation in exigent circumstances. If one improper question taints an otherwise legitimate series of questions, pressure to avoid a fatal slip may deter police from defusing volatile situations.

317. See supra text accompanying note 229; see also supra notes 70-74 and accompanying text.
318. See, e.g., United States v. Padilla, 819 F.2d 952, 961 (10th Cir. 1987) (detective promptly discontinued questioning once public safety was secured).
319. See supra note 31 and accompanying text; see also Quarles, 467 U.S. at 688-90 (Marshall, J., dissenting).
320. See supra note 31 and accompanying text.
321. This, in fact, is the predicament that the Quarles Court sought to avoid by establishing the public safety exception. For officers to avoid the penalty of exclusion for improper questioning, they could conceivably design an addendum to the Miranda warnings composed of a laundry list of acceptable questions, e.g., "Where is the gun?" "Is anyone hurt?" "Is anyone inside?" "Are you alone?" Every time an officer is in exigent circumstances, this addendum could be recited in lieu of the standard Miranda warnings. Of course, police will not be deterred from defusing volatile situations when they are acting wholly out of self-preservation. See supra notes 112-116 and accompanying text.
Although Quarles and its progeny relied on the difference between questions intended to elicit confessions and those intended to preserve the public safety, this distinction fails as a standard. The distinction is important, but it invites ill advised journeys into the subjective motivations of police officers.\(^{222}\) Evaluating dual-purpose questions only further blurs the distinction.\(^{222}\) Instead, the exception requires clear and consistent standards.

Perhaps a laundry list of requirements could guide courts in interpreting Quarles. Each public safety exception case would require a court to consider six elements as the exception’s \textit{prima facie} case. The court must first determine whether the suspect created an immediate or future danger. A future danger affords officers an opportunity to use sound police tactics and technology rather than relying on self incriminating statements.\(^{224}\) The second element requires the court to determine whether the suspect posed a real rather than a hypothetical danger to the public safety.\(^{225}\) The more speculative the danger, the weaker the Quarles claim. Third, the court must consider whether police could use any viable alternatives to defuse the situation without offending \textit{Miranda}.\(^{226}\) Fourth, the court must address the duration of the questioning and the number of questions. Extended questioning and multiple questions indicate “actual coercion” under the Quarles standard.\(^{227}\)

The fifth consideration is whether officers sought to locate a missing weapon.\(^{228}\) If officers did seek a missing weapon, the court should employ a two-part analysis: whether the officers reasonably believed in the existence of a missing weapon, and what type of weapon was involved. The exception should not excuse inquiries designed solely to gather evidence of a crime. Presumably, the exception would include firearms but exclude knives, crowbars, drugs, and aluminum suitcases.\(^{229}\) Finally, the court must look for possible accomplices. Again,

\(^{222}\) This journey has been rejected by both the \textit{Innis} and Quarles Courts. \textit{See supra} note 119 and accompanying text.

\(^{224}\) \textit{Self-disclosure is a poor substitute for legitimate police investigation.}

\(^{225}\) \textit{See} \textit{Brady}, 819 F.2d at 884; \textit{see also supra} notes 233, 272-73 and accompanying text.

\(^{226}\) In Quarles, for example, the officers had sufficient time to cordon off the store, warn store employees, and conduct a brief search of the supermarket. \textit{See supra} notes 85-90 and accompanying text.

\(^{227}\) \textit{See supra} notes 235-39 and accompanying text.

\(^{228}\) Not all inquiries over the location of a weapon should trigger the exception. \textit{See supra text} accompanying note 225.

\(^{229}\) \textit{See supra} notes 91-98, 201-13 and accompanying text.
this element must be real rather than hypothetical; the prosecution
must demonstrate an officer's reasonable belief in the presence of
accomplices within the suspect's immediate vicinity.

Must the prosecution in a *prima facie* case for the public safety
exception satisfy all six of the elements? Some elements may not apply
to a given situation; others may apply, but fail for some reason.330
Perhaps the prosecution should satisfy at least the first three ele-
ments.331 A court could determine the necessity of fulfilling each of
the three remaining elements. For example, a missing knife should
normally preclude the application of *Quarles.*332 However, a missing
knife in a crowded barroom where a gang encounter has just occurred
may trigger *Quarles.* Judicial discretion to assess the relevance of the
fourth, fifth, and sixth elements may produce a fairer result than
inflexible adherence to a rule.

To elucidate *Quarles,* courts could also incorporate the inevitable
discovery doctrine as a condition precedent to the public safety excep-
tion.333 This would clarify application of the exception, particularly
when questioning occurs in or near a suspect's car, home, or business.
Courts may validly apply the inevitable discovery doctrine to fourth,
fifth, and sixth amendment contexts. In *Quarles,* for example, the
State would have had to show that police would have found the gun
without Quarles's unwarned statement.

The inevitable discovery doctrine works well with tangible evi-
dence, but not with testimonial evidence. The State would have to
prove that a suspect would have confessed even with the benefit of
*Miranda* warnings. Although some suspects eventually repeat their
incriminating statements to secure a favorable plea bargain or more
lenient sentence, the State would struggle to prove that a suspect
would inevitably have done so.334 Therefore, the inevitable discovery
doctrine as a condition precedent would destroy *Quarles* as a means
of admitting testimonial evidence obtained in violation of *Miranda.*

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330. An example of an element not applying would be a hostage situation where the concern
is more for the location of a victim than of a gun. Another example is an exigent circumstance
created by a dangerous suspect with no sign of accomplices. An example of a failed element is
a situation such as *Brady* in which the danger was more imaginary than real. See United States
v. Brady, 819 F.2d 884 (9th Cir. 1987), cert. denied, 108 S. Ct. 1032 (1988); see also supra
notes 258-83 and accompanying text.
331. These three elements may be the most essential aspects of the exception.
332. See supra notes 91-98, 244-57.
333. See supra note 132 and accompanying text.
334. See *Quarles,* 467 U.S. at 687 & n.9 (Marshall, J., dissenting).
VIII. CONCLUSION

The easiest way to resolve the confusion surrounding the public safety exception is for the Supreme Court to reverse Quarles. This would restore the constitutional presumption of coercion in custodial interrogation settings. The overbreadth of Miranda potentially excludes uncoerced confessions, but overbreadth is less harmful than the prosecution versus defendant swearing contests sponsored by the old voluntariness test. As long as Quarles remains good law, the question of custodial interrogation as presumptively coercive is moot. “Actual coercion” is now the standard, as Quarles satisfies the prosecution’s interest in defusing volatile situations without sacrificing convictions. The Quarles court failed to consider whether the prosecution really needs self incriminating statements to preserve convictions. Despite Quarles, the suspect’s own lips are not the only source of incriminating evidence. Miranda, once a bright-line rule, is now essentially a suggestion, waived unknowingly by any suspect whom the police happened to perceive as dangerous.

The present court is unlikely to overrule Quarles. Instead, the Court has provided the ambitious prosecutor with an amorphous “exception” for admitting improperly obtained evidence at trial. The lower courts’ recent experience with the public safety exception demonstrates that “compulsion” is once again a vague constitutional notion. Because the Supreme Court has put the presumption of coercion out to pasture, the lower courts have applied the standardless exception as inconsistently as they once applied the fluctuating notion of “compulsion” when self incrimination was a due process concept. The good-faith exception that blurs the fourth amendment concept of “reasonableness” has invaded the fifth amendment as well. Police officers, now empowered to ignore the warrant and warnings mandates of the fourth and fifth amendments, are the new arbiters of criminal defendants’ constitutional rights.

Daniel Brian Yeager

335. See id. at 684 n.7 (Marshall, J., dissenting).
336. See supra note 11 and accompanying text.
337. See Quarles, 467 U.S. at 658 n.7.
338. Warnings and the threat of exclusion had little impact on rates of confessions or convictions following arrests. If the Court presumed that Miranda would shift the balance of power from police to criminal suspects, it was mistaken. See Pepinsky, A Theory of Police Reaction to Miranda v. Arizona, 16 CRIME & DELINQ. 379 (1970).
339. See supra note 11 and accompanying text.
340. See United States v. Leon, 468 U.S. 897 (1984); see supra note 106 and accompanying text. Exceptions can be legitimate presumptions. For example, if Miranda presumes coercion, then Quarles shifts the burden to the criminal defendant who threatens the public safety to prove actual coercion. Unfortunately, this concept flies in the face of the presumption of innocence and the privilege against self incrimination.