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I. INTRODUCTION

In New York v. Quarles,1 the United States Supreme Court confronted a case in which there was no question that the requirements of Miranda v. Arizona2 had been violated.3 The suspect's self-incriminating statement, obtained in violation of Miranda, could not be used to prove his guilt.4 The Court, however, created an exception to the Miranda requirements and held that police need not advise a criminal suspect of his constitutional rights when they "ask questions reasonably prompted by a concern for the public safety."5 The Court determined that "concern for public safety must be paramount to

3. Miranda required that a suspect in police custody must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Id. at 479.
4. Quarles, 467 U.S. at —, 104 S. Ct. at 2631.
   The threshold question to determine when a criminal suspect is entitled to the warnings required by Miranda is whether he is in police custody or is "otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 477.
   In Quarles, the suspect had been handcuffed immediately by Officer Kraft and hence was entitled to receive the Miranda warnings before the police interrogated him. Quarles, 467 U.S. at —, 104 S. Ct. at 2631; See Orozco v. Texas, 394 U.S. 324, 326-27 (1969) (Miranda applies when suspect is under arrest whether or not interrogation takes place in police station); Mathis v. United States, 391 U.S. 1, 4-5 (1968) (Miranda applies when accused is questioned in jail on an unrelated charge); Miranda, 384 U.S. at 477. He was then interrogated about the whereabouts of a weapon that the police believed he had been carrying. Quarles, 467 U.S. at —, 104 S. Ct. at 2629-30; see Rhode Island v. Innis, 446 U.S. 291, 300 (1980).
6. Quarles, 467 U.S. at —, 104 S. Ct. at 2632.
adherence to the literal language of the prophylactic rules enunciated in *Miranda*.” As an exception to the dictates of *Miranda*, failure to recite the required warnings will no longer bar the admissibility of statements made in response to custodial interrogation as long as that questioning is geared to protecting the public safety.

Although the majority claims *Quarles* is a narrow exception to the requirements of *Miranda*, the public safety exception has the potential to expand significantly. To test the bounds of the public safety exception, this note will focus on its impact through a retrospective review of three Supreme Court cases decided before *Quarles*. The purpose of this approach is twofold. First, the note will explore the breadth of the public safety exception through an analysis of the facts in *Orozco v. Texas*. The character of a threat to public safety which justifies invocation of the *Quarles* exception is far from clear. While the court said that it is only an imminent threat to public safety which justifies custodial interrogation without fulfilling the requirements of *Miranda*, the Court did not provide any guidance to determine the magnitude of danger necessary to trigger the *Quarles* exception.

Second, the note will consider the possible expansion of the public safety rationale to the Fifth Amendment right to counsel and the Sixth Amendment right to counsel through examination of the facts in *Rhode Island v. Innis* and *Brewer v. Williams*. On another plane, *Quarles* may only serve as a logical progression in the Court’s increasing focus on public safety. The court has recognized the permissibility of warrantless entries and searches in the interest of protecting

6. *Id.* at —, 104 S. Ct. at 2630. A significant element in the Court’s analysis is the finding that the *Miranda* requirements are not constitutionally mandated, but rather are prophylactic measures to ensure protection of the right against self-incrimination. *Id.* at —, 104 S. Ct. at 2631 (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)). See infra notes 105-150.

7. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2632. The Court in *Miranda* said that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Miranda*, 384 U.S. at 444.

8. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2632.

9. See infra notes 82-104 and accompanying text.


11. See infra notes 105-150.

12. See infra notes 151-190.


the public.\textsuperscript{15} The Court has now read a public safety exception into \textit{Miranda}'s Fifth Amendment protections.\textsuperscript{16} The next logical step in the progression is to apply the narrow exception of \textit{Quarles} to the judicially created Fifth Amendment right to counsel. But how far should the court extend the public safety reasoning? While it is harmonious with \textit{Quarles} to extend the exception to permit abridgement of the Fifth Amendment right to counsel, the Court's reasoning is inapt to justify an extension of \textit{Quarles} into the Sixth Amendment right to counsel.

\section{Facts}

On September 11, 1980, at approximately 12:30 a.m., a woman informed two police officers on road patrol in Queens, New York, that she had been raped at gunpoint.\textsuperscript{17} The two officers, Frank Kraft and Sal Scarring, drove the woman one quarter of a block to the supermarket which she saw her attacker enter.\textsuperscript{18} Officer Scarring radioed for assistance while Officer Kraft entered the supermarket in search of the suspect.\textsuperscript{19} Officer Kraft stood at the front of the deserted store\textsuperscript{20} and saw the respondent Quarles, who matched the description of the rap-

\begin{footnotesize}
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\item[\textsuperscript{15}] \textit{See} Michigan \textit{v. Tyler}, 436 U.S. 499, 509 (1978)("A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.'").

In finding that \textit{Miranda}'s requirements are not constitutionally mandated, the Court closely tracks the course it has been following in gradually diluting the Fourth Amendment exclusionary rule. \textit{See Quarles}, 467 U.S. at —, 104 S. Ct. at 2630, n.3; Gardner, \textit{The Emerging Good Faith Exception to the Miranda Rule A Critique}, 35 HASTINGS L. J. 429, 457 (1984). \textit{Compare} United States \textit{v. Leon}, 468 U.S. —, 104 S. Ct. 3405, 3412 (1984)(exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the person aggrieved.") (quoting \textit{Calandra v. United States}, 414 U.S. 338, 348 (1974)) with \textit{Oregon v. Elstad}, 105 S. Ct. 1285, 1293 (1985)(failure to provide \textit{Miranda} should not bar admissibility of a non-coerced confession where suppression would not serve deterrence function).

\item[\textsuperscript{16}] \textit{But cf} \textit{Quarles}, 467 U.S. at —, 104 S. Ct. at 2630 n.3 (Fifth Amendment requirements cannot be outweighed upon a showing of reasonableness but judicially created \textit{Miranda} rights are subject to balancing test).

\item[\textsuperscript{17}] \textit{Id}. at —, 104 S. Ct. at 2629.


\item[\textsuperscript{19}] \textit{Quarles}, 467 U.S. at —, 104 S. Ct. at 2629.

\item[\textsuperscript{20}] \textit{Id}. In determining that the weapon which Quarles was alleged to be carrying was missing in the supermarket, thereby posing a danger to the public safety, the majority failed to take note that there were no customers in the supermarket at the time. \textit{See Id}. at —, 104 S. Ct. at 2632. The dissent, however, focused on this omission to question the validity of the majority's conclusion that the missing weapon posed a danger to public safety. \textit{Id}. at —, 104 S. Ct. at 2642-43 (Marshall, J., dissenting).
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ist, approach the check-out counter. Upon seeing Officer Kraft, Quarles fled to the rear of the store with Officer Kraft in pursuit. Quarles was promptly surrounded by Officer Kraft and three other police officers. While the officers pointed their guns at Quarles, Officer Kraft frisked him and discovered an empty shoulder holster. Officer Kraft then handcuffed Quarles, at which time the other officers put their guns away. After handcuffing Quarles, Officer Kraft asked him, "Where is the gun?" Quarles looked in the direction of some nearby cartons and said, "The gun is over there." After Officer Kraft pulled a loaded revolver from one of the cartons, he told Quarles that he was under arrest and then gave him the Miranda warnings. Quarles then consented to answer further questions regarding the gun, and he admitted that he was the owner of the weapon.

Quarles was subsequently prosecuted for criminal possession of a weapon under New York law. At a suppression hearing, the trial court excluded the statement "the gun is over there" on the ground

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21. The woman described the rapist as a six foot black man who was wearing a black jacket with yellow letters which spelled out "Big Ben." Id. at 104 S. Ct. at 2629.
22. Id. at 104 S. Ct. at 2629-30.
23. Id. at 104 S. Ct. at 2630.
24. Id. See also id. at 104 S. Ct. at 2642 (Marshall, J., dissenting).
25. See id. at 104 S. Ct. at 2642 (Marshall, J., dissenting).
26. Id. at 104 S. Ct. at 2630.
27. Id.
28. Id. at 104 S. Ct. at 2630. Quarles admitted that he had purchased the gun in Miami, Florida. Id. On the admissibility of the subsequent confession after the Miranda warnings have been given, see Oregon v. Elstad, 105 S. Ct. 1285 (1985)(holding that confession obtained after Miranda warnings given not tainted by a prior voluntary confession which violated Miranda on grounds that failure to comply with Miranda evokes no constitutional illegality).
29. Quarles, 467 U.S. at 104 S. Ct. at 2629. Although Quarles was initially charged with rape as well, the record does not disclose the reason the state failed to prosecute further. Id. at 104 S. Ct. at 2630 n.2.
30. Quarles was originally charged with possession of a weapon in the second degree. Joint Appendix at 1a, Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984). "A person is guilty of criminal possession of a weapon in the second degree when he possesses a . . . loaded firearm with intent to use the same unlawfully against another." N.Y. PENAL LAW §265.03 (McKinney 1980). The grand jury, however, returned an indictment of one count of criminal possession of a weapon in the third degree. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984) Joint Appendix at 3a. "A person is guilty of criminal possession of a weapon in the third degree when [h]e knowingly possesses any loaded firearm. Such possession shall not . . . constitute a violation of this section if such possession takes place in such person's home or place of business." N.Y. PENAL LAW § 265.02 (McKinney 1980).

Since the state failed to prosecute Quarles for rape, he could not be prosecuted with intending to use the gun against another, thereby necessitating reduction of the charge to simple unlawful possession. See People v. Forestieri, 87 A.D.2d 523, 448 N.Y.S.2d 12 (1982).
that it had been made without the benefit of the *Miranda* warnings.\(^{31}\)
The court also suppressed both the weapon and the subsequent admission of ownership as tainted fruit derived from the prior *Miranda* violation.\(^{32}\)

The appellate division of the Supreme Court of New York unanimously affirmed the suppression order without opinion.\(^{33}\) The New York Court of Appeals affirmed in a 4-3 decision.\(^{34}\) The court of appeals held that Quarles’s statement and the gun were properly suppressed because they were obtained in the absence of preinterrogation warnings to safeguard the privilege against self-incrimination.\(^{35}\) Additionally, the court held that the admissions obtained after *Miranda* warnings had been given were properly excluded as tainted fruit.\(^{36}\) The court of appeals noted:

Even if it be assumed that an emergency exception to the normal rule might be recognized if the purpose of the police inquiry had been to locate and to confiscate the gun for the protection of the public as distinguished from their desire to obtain evidence of criminal activity on the part of the defendant . . . there is no evidence in the record . . . that there were exigent circumstances posing a risk to the public safety or that the police interrogation was prompted by any such concern.\(^{37}\)

The dissenters thought, however, that the single question posed by Officer Kraft was not custodial interrogation within the meaning of *Miranda* because it was designed “to achieve an articulable and legitimate noninvestigatory purpose.”\(^{38}\) The dissent saw Officer Kraft’s ini-

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31. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2630.
32. *Id.* at —, 104 S. Ct. at 2630. The Supreme Court has decided, however, relying on *Quarles*, that there is no fruit of the poisonous tree for noncoercive *Miranda* violations. *See* *Oregon v. Elstad*, 105 S. Ct. 1285, 1293 (1985).
35. *Id.* at 666, 444 N.E.2d at 985, 458 N.Y.S.2d at 521.
36. *Id.* Even if the original *Miranda* violation was not excusable, Quarles’ subsequent admission would still be admissible since the giving of *Miranda* warnings dissipated the taint of the original illegality. *See* *Oregon v. Elstad*, 105 S. Ct. 1285 (1985).
38. *Id.* at 669, 444 N.E.2d at 987, 458 N.Y.S.2d at 523 (Wachtler, J., dissenting). The dissent read *Miranda* to be “concerned with discouraging official conduct which, examined objectively, reveals an unmistakably deliberate attempt to elicit some incriminating response from the detainee . . . .” *Id.* at 668-69, 444 N.E.2d at 987, 458 N.Y.S.2d at 523 (Wachtler, J., dissenting). *See* *Gardner*, *supra* note 15 at 455-60; *cf.* *United States v. Leon*, 468 U.S. —, 104 S. Ct. 3405, 3418 (1984)(purpose of exclusionary rule is to deter violation of Fourth Amendment by police officers).
tial question as a "prudent measure undertaken to neutralize the very real threat of possible physical harm which could result from a weapon being at large."

III. Decision

The United States Supreme Court reversed the New York Court of Appeals and held that both Quarles's statements and the gun could be admitted into evidence. The Court held that on "these facts there is a public safety exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence."

The Court considered two issues in the formulation of this rule. First, the Court distinguished the warnings required by Miranda from the requirements of the Fifth Amendment. The Court labelled the Miranda warnings as "prophylactic measures" to protect an individual's privilege against self-incrimination as compared to a constitutional right of the defendant.

41. Id. In finding that the circumstances of this case posed an imminent threat to public safety, Justice Rehnquist writing for the Court is in effect relitigating the factual determinations of the court below. See id. at —, 104 S. Ct. at 2642 (Marshall, J., dissenting); see supra text at note 37.

Ordinarily, the Supreme Court will give great weight to findings of fact made by state courts on constitutional claims. See Rushen v. Spain, 104 S. Ct. 453, 456-57 (1984); Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976). The Court, however, will look into the factual determinations of the state courts when findings below create a situation in which constitutional rights may be infringed. See Mincey v. Arizona, 437 U.S. 385, 397-98 (1978); Haynes v. Washington, 373 U.S. 503, 515-16 (1963).

The finding of the New York Court of Appeals that the record indicated that there was not a threat to public safety did not create a situation where a citizen's constitutional rights were in danger of infringement. In contrast, the Supreme Court's decision in Quarles, by reaching factual conclusions opposite to those the state court, has itself created a circumstance where the privilege against self-incrimination, protected by the Constitution, may have been infringed. See Quarles, 467 U.S. at —, 104 S. Ct. at 2642-43 (Marshall, J., dissenting); cf. Rhode Island v. Innis, 446 U.S. 291, 314 (1980)(Stevens, J., dissenting)(Court redetermined factual question of whether defendant was interrogated for Miranda purposes under the Court's newly created standard of interrogation).

Although Justice Rehnquist finds it suitable to reach the decision in Quarles by a re-adjudication of the facts, he took great exception in another Miranda case decided the following term in which he accused the majority of reaching their decision by "deciding [an] essentially factual inquiry contrary to the three other courts that have considered the question." Smith v. Illinois, 105 S. Ct. 490, 495-96 (1984)(per curiam)(Rehnquist, J., dissenting).

42. Quarles, 467 U.S. at —, 104 S. Ct. at 2631.
Second, the Court justified the public safety exception by pro-
claiming "that the need for answers to questions in a situation posing a
threat to public safety outweighs the need for the prophylactic rule
protecting the Fifth Amendment's privilege against self-incrimina-
tion." It referred to the willingness of the Miranda Court to accept a
lower conviction rate as the cost of giving additional reinforcement to
the Fifth Amendment. The Court in Quarles, however, determined
that an exception to Miranda is necessary where the cost of reinforcing
the Fifth Amendment is an unchecked threat to the public welfare
rather than merely a lower conviction rate. The Court reasoned that
to require Miranda warnings would deter a suspect from answering
questions when an imminent threat to public safety existed.

Justice Marshall wrote a passionate dissent castigating the major-
ity's treatment of the case and accusing the Court of abusing the facts
in deciding the appeal. Marshall noted that the New York Court of
Appeals had determined that the missing weapon did not pose a dan-
ger to public safety, while the Quarles majority, on the same facts, felt
constrained to create a public safety exception.

More significantly, Justice Marshall assailed the majority's crea-
tion of the public safety exception as an erosion of Miranda's bright-
line rule. He expressed concern over whether police officers would
be capable of drawing distinctions between interrogations designed to
protect the public and those designed to gather evidence.

Finally, he expressed concern with the majority's holding that the
need to protect the public could outweigh the accused's need for pro-
tection of the privilege against self-incrimination afforded by Miranda.
Justice Marshall read Miranda as concerned with protecting
the Fifth Amendment privilege and not as a formula to balance

44. Quarles, 467 U.S. at —, 104 S. Ct. at 2633.
45. Id. at —, 104 S. Ct. at 2632.
46. Id. at —, 104 S. Ct. at 2632-33; but see Fare v. Michael C., 442 U.S. 707, 718
(1979).
47. Quarles, 467 U.S. at —, 104 S. Ct. at 2632-33. In fact, interrogation under the
Quarles rule is likely to be coercive given the urgency of obtaining information to extin-
guish a pending threat to the public. See id. at —, 104 S. Ct. at 2647 (Marshall, J.,
dissenting).
48. Justice Marshall was joined in dissent by Justices Brennan and Stevens.
49. Id. at —, 104 S. Ct. at 2642 (Marshall, J., dissenting).
50. Quarles, 467 U.S. at —, 104 S. Ct. at 2643 (Marshall, J., dissenting). See supra
notes 20-27, 37, 40-41 and accompanying text.
51. Quarles, 467 U.S. at —, 104 S. Ct. at 2644 (Marshall, J., dissenting). See infra
text at notes 60-64.
52. Quarles, 104 U.S. at —, S. Ct. at 2644 (Marshall, J., dissenting).
He also predicted that the public safety exception would encourage the police to withhold deliberately the *Miranda* warnings in order to obtain information. Ultimately, Marshall feared that *Quarles* would give police *carte blanche* to coerce responses from suspects under the guise of protecting the public.

In addressing the dissent's criticism that the public safety exception would allow introduction of coerced self-incriminating statements, the Court stated that on remand Quarles could always attempt to prove that his answers to Officer Kraft's questions were coerced under traditional standards. In addition, the Court claimed that "absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence that results from police inquiry" into matters posing a threat to public safety.

## IV. Analysis

The assertion that the rationale underlying *Miranda* is offended only when an involuntary confession is sought to be introduced is flawed for two reasons. First, one of *Miranda*'s primary goals was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." An important focus for the *Miranda* Court was that the facts surrounding custodial police interrogation are uncertain, thereby debilitating an adequate assessment of whether a particular confession was coerced under the totality of the circumstances. Although he wrote the majority opinion in *Quarles*, Justice

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53. Id. at —, 104 S. Ct. at 2645.
54. Id.
55. Id. at —, 104 S. Ct. at 2647.
56. Id. at —, 104 S. Ct. at 2647-2648.
57. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2631 n.5. The New York Court of Appeals, however, upon receiving the case on remand denied Quarles the opportunity to present evidence in court that his response had been coerced stating that "[i]nasmuch as the issue was raised and defendant had full opportunity to offer evidence, there is no occasion, . . . to order a new evidentiary hearing; the question should be resolved on the record of the prior hearing." People v. Quarles, 63 N.Y.2d 923, 925, 473 N.E.2d 30, 31 483 N.Y.S.2d 678, 679, (1984)(mem.)(citation omitted).
61. *Miranda*, 384 U.S. at 448; *See Quarles*, 467 U.S. at —, 104 S. Ct. at 2631.
62. *Miranda*, 384 U.S. at 445. The *Miranda* Court, acknowledging that the chal-
Rehnquist has conceded that a central concept of \textit{Miranda} was "to offer a more comprehensive and less subjective protection than the doctrine of previous cases."\(^{63}\) The public safety exception has eliminated the bright-line rule that was once \textit{Miranda}'s greatest attribute.\(^{64}\)

Second, although protection of the public safety is a valued goal,\(^{65}\) the interest of the state in fighting crime does not excuse a disregard for an accused's constitutional rights.\(^{66}\) "The policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety."\(^{67}\) As a practical matter, when faced with a pressing need to thwart a threat to the public, interrogation designed to obtain this information is bound to be coercive in order to avoid delay.\(^{68}\) While the \textit{Quarles} Court claims to have removed a dilemma from the shoulders of the police,\(^{69}\) the Court's new exception fails to heed Justice Brennan's reminder in \textit{Michigan v. Mosley}\(^{70}\) that measures designed to protect the Fifth Amendment privilege must be sensitive to the dangers of compulsion.\(^{71}\) Hence the Court, while seeking to achieve a legitimate goal in formulating the \textit{Quarles} rule, has ignored the concern of the constitutional framers for the criminally accused to be free of coercive tactics designed to wring self-incriminating statements from their lips.\(^{72}\)


\(^{64}\) \textit{Quarles}, 467 U.S. at —, 104 S. Ct. at 2636 (O'Connor, J., concurring in part, dissenting in part); 467 U.S. at —, 104 S. Ct. at 2644 (Marshall, J., dissenting).


\(^{67}\) \textit{Quarles}, 467 U.S. at —, 104 S. Ct. at 2649 (Marshall, J., dissenting).

\(^{68}\) \textit{Id. at —}, 104 S. Ct. at 2647 (Marshall, J., dissenting).

\(^{69}\) \textit{Id. at —}, 104 S. Ct. at 2633. "We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the \textit{Miranda} warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." \textit{Id. at} 2633 (footnote omitted).

\(^{70}\) 423 U.S. 96 (1975).

\(^{71}\) \textit{Id. at} 115-16 (Brennan, J., dissenting).

\(^{72}\) \textit{See Miranda}, 384 U.S. at 458-61.
Allowing the interrogation of a criminal suspect without *Miranda* warnings in the interest of public safety would indeed protect the public. But permitting the fruits of such an interrogation to be admitted into evidence would not further the interests of public safety. "Police officers genuinely concerned with saving lives would continue to seek such information even at the risk of jeopardizing subsequent conviction of the suspect."  

In an apparent attempt to counter the argument that nothing would prevent the *Quarles* rule from applying to all custodial interrogations, the majority sought to keep the exception within the narrow context in which it was intended to operate. The Court implied that the public safety exception would apply only to situations where there was an *imminent* threat to the public safety. It remains to be seen whether courts applying the rule in *Quarles* to future cases will remain faithful to its narrow focus.

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73. Gardner, *supra* note 15 at 473. See *Quarles*, 467 U.S. at —, 104 S. Ct. at 2648 (Marshall, J., dissenting); *cf*. Harris v. New York, 401 U.S.222, 225 (1971)(confession obtained in violation of *Miranda* may be used to impeach defendant's testimony as prohibited police practices are sufficiently deterred when confession is unavailable to the state to prove its case in chief); Massiah v. United States, 377 U.S. 201, 206-07 (1964)(exigent circumstances may provide justification for obtaining statements in violation of Sixth Amendment though they may not be introduced at trial).

74. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2643 n.3 (Marshall, J., dissenting)

75. See id. at —, 104 S. Ct. at 2633-34 n.8. See *infra* notes 95-98 and accompanying text for discussion of the ambiguous nature of the imminency requirement.

76. *Id.* at —, 104 S. Ct. at 2633. Illinois has held that *Quarles* is only applicable to cases wherein the police have only limited time to defuse a volatile situation. People v. B.R., 133 Ill. App. 3d 946, 479 N.E.2d 1084 (1985); See People v. Roundtree, 135 Ill. App. 3d 1075, 482 N.E.2d 693, 697-98 (1985); *Compare Quarles*, 467 U.S. at —, 104 S. Ct. at 2632-33 (this was a "kaleidoscopic situation" where the police had only "a matter of seconds" to choose whether to preserve the admissibility of evidence or to quell a threat to the public safety).

Presently only one court has admitted a custodial statement obtained without *Miranda* warnings solely under the *Quarles* rule. People v. Cole, 165 Cal. App. 3d 41, 211 Cal. Rptr. 242 (1985)(missing knife). See also United States v. Udey, 748 F.2d 1231, 1240 n.4 (8th Cir. 1984)(missing shotgun)(dicta).

Regrettably, mischaracterization of the public safety exception is already apparent as the Fifth Circuit has stated that *Quarles* would be applicable where necessary to protect not the public safety but the defendant's safety in the case of his impending suicide. United States v. Webb, 755 F.2d 382, 392 n.14 (5th Cir. 1985)(dicta).

Additionally, courts have expressed hostility toward the case. See Rogers v. United States, 483 A.2d 277, 283 (D.C. App. 1984), cert. denied, 105 S. Ct. 1223 (1985)("We choose not to reach the constitutionality of an exigent circumstances exception to *Miranda* . . . even were we to assume *Quarles* to be of retroactive effect."); Nebraska v. McCarthy, 218 Neb. 246, 249, 355 N.W.2d 14, 17 (1984)("Whatever the merits of the *Quarles* holding, that case is simply not this case . . . [t]he house in question was surrounded by armed men; defendant McCarthy was certainly 'deprived of his freedom'; and there was no public danger present").
The scope of the *Quarles* rule will evolve on a case by case basis as reviewing courts determine whether or not the interest of public safety may excuse a given *Miranda* violation.\(^{77}\) An instructive device for testing the contours of the public safety exception is to reconsider prior United States Supreme Court cases by applying the *Quarles* rule to the facts of those prior cases.\(^{78}\)

The note will analyze three cases using this method. They have been chosen because their facts are such that were they presented to a reviewing court today, the prosecution could make colorable arguments that the violation of the suspect’s “constitutional rights” were excusable in the interest of protecting the public safety under the *Quarles* rule. The three cases are: *Orozco v. Texas*,\(^{79}\) *Rhode Island v. Innis*,\(^{80}\) and *Brewer v. Williams*.\(^{81}\)

A. *Orozco v. Texas*

Police arrested and interrogated Orozco in his bedroom, without giving him *Miranda* warnings,\(^{82}\) four hours after a murder had been committed. The police asked Orozco whether he had been at the scene of the murder and whether he owned a weapon. Orozco answered these questions as well as two additional questions concerning

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77. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2636 (O'Connor, J., concurring in part, dissenting in part).

78. The Court has previously rejected this method of analysis in the context of fashioning standards for the determination of whether probable cause exists to issue a search warrant. See *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983). The reasons for the Court’s disapproval of this method, however, are not present in a review of prior cases under the *Quarles* rule.

First, the Court rejected this method for analyzing the validity of the “totality of the circumstances” test for determining whether probable cause exists because “[t]here are so many variables in the probable cause equation that one determination will seldom be a useful precedent for another.” *Id.* In the context of the public safety exception, however, this complexity is not present since the *Quarles* rule will apply only if there was an objective need to interrogate a suspect without *Miranda* warnings. *Quarles*, 467 U.S. at —, 104 S. Ct. at 2632. Additionally, the rule in *Quarles* is purported to be easy to apply. *Id.* at —, 104 S. Ct. at 2633.

Second, in *Gates* the Court had revamped the prior probable cause standard of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). *Gates*, 462 U.S. 213. In *Quarles* however, the Court did not revamp *Miranda* but carved out an exception to the rule. See *Quarles*, 467 U.S. at —, 104 S. Ct. at 2632. Hence, rather than applying a reformed standard to prior cases, reflective application of *Quarles* to *Orozco* and to *Innis* only seeks to apply the exception to the rule under which those prior cases had been decided. Considering *Brewer v. Williams* under the *Quarles* reasoning only tests a possible progression in the public safety concept.


80. 446 U.S. 291 (1980).


82. *Orozco*, 394 U.S. at 325.
the location of the weapon.\footnote{83} The answers to these questions were admitted at trial,\footnote{84} and Orozco was convicted of murder.\footnote{85}

The United States Supreme Court reversed the conviction on the ground that Orozco's responses to the police interrogation were obtained without \textit{Miranda} warnings.\footnote{86} The Court addressed its holding to the question of whether \textit{Miranda}'s requirements were only applicable to station-house questioning.\footnote{87} While the four consolidated cases decided in \textit{Miranda} all dealt with police station questioning,\footnote{88} the Court held that its decision would also be applicable to police interrogation conducted "after a person has been . . . deprived of his freedom of action in any significant way."\footnote{89} Although \textit{Miranda} stressed the compelling nature of the incommunicado environment inherent in police station questioning,\footnote{90} the Court in \textit{Orozco} had no difficulty in holding that \textit{Miranda} warnings were required under the facts in \textit{Orozco}.\footnote{91} As the circumstances surrounding the questioning were inherently compelling,\footnote{92} the Court was unpersuaded by the state's argument that \textit{Miranda} should not apply when the suspect was interrogated in the familiar surroundings of his own bedroom.

The fact that the interrogation in \textit{Orozco} occurred four hours after the murder does not diminish the same dangers that moved the Court in \textit{Quarles} to find a threat to public safety: namely, that the missing weapon might be used by an accomplice or might cause injury to an innocent person.\footnote{93} As Justice Marshall noted in \textit{Quarles}: "In both cases, a dangerous weapon was missing, and in neither case was there any direct evidence where the weapon was hidden."\footnote{94}

Although the \textit{Quarles} Court stressed the time lapse between the arrest of the suspect and the alleged crime in \textit{Orozco} as significant,\footnote{95} the requirement that the threat to public safety be "imminent" is a

\begin{itemize}
  \item 83. \textit{Id.}
  \item 84. \textit{Id.} at 325-26.
  \item 85. \textit{Id.} at 324.
  \item 86. \textit{Id.} at 326.
  \item 87. \textit{See id.} at 326-27.
  \item 88. \textit{Miranda}, 384 U.S. at 445.
  \item 89. \textit{Id.} at 444 (dicta)(footnote omitted).
  \item 90. \textit{Miranda}, 384 U.S. at 445.
  \item 91. \textit{Orozco}, 394 U.S. at 326-27.
  \item 92. \textit{Id.} at 326-27. The state argued that since Orozco was interrogated in his bedroom, the compelling atmosphere of police station questioning at issue in \textit{Miranda} was not present. The Court was not persuaded by this argument in light of the general concern of the \textit{Miranda} Court about the compelling nature of custodial questioning in general. \textit{Id.}
  \item 93. \textit{Quarles}, 467 U.S. at --, 104 S. Ct. at 2643 n.2 (Marshall, J., dissenting).
  \item 94. \textit{Id.}
  \item 95. \textit{Id.} at --, 104 S. Ct. at 2633-34 n.8.
\end{itemize}
major weakness in the Court's contention that the new exception will be a narrow one. Differing judicial perceptions of whether a particular threat is imminent will cause great variance in the scope of the Quarles rule\(^\text{96}\) as it is interpreted by individual judges.\(^\text{97}\) Although Justice Rehnquist characterizes the missing weapon in Orozco as not presenting an imminent threat to public safety, his view of remoteness may well be another judge's view of immediacy.\(^\text{98}\) A broader interpretation of what constitutes an imminent threat to public safety would result in an affirmance of Orozco's conviction on grounds that the Miranda violation should be excused on public safety grounds.

The Quarles majority also sought to distinguish Orozco by noting that the interrogation in Orozco was only investigatory rather than prompted by a need to protect the public.\(^\text{99}\) The distinction, however, is without merit. In Quarles, the suspect had been asked only one question, Where is the gun?\(^\text{100}\) In Orozco the police had asked the suspect four questions: what was his name, whether he had been at the scene of the murder, whether he owned a pistol, and where the weapon was located.\(^\text{101}\) Justice Harlan, concurring, felt constrained by stare decisis to reverse Orozco's conviction but noted that the decision condemned a "perfectly understandable, sensible, proper, and indeed commendable piece of police work . . .\) since the police already had a solid case against Orozco. As Justice White suggested, the police had sufficient evidence to link Orozco to the crime, and the interrogation was a prudent measure to ascertain the location of the missing weapon to protect the public.\(^\text{103}\) Moreover, had the police asked Orozco but one question, such as, Where is the gun?, the notion that the question was investigatory would be lost. The focus of the questioning then would undoubtedly have been on locating the weapon to protect the public, rather than on linking Orozco to the

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\(^\text{96.}\) See Quarles, 467 U.S. at —, 104 S. Ct. at 2636 (O'Connor, J., concurring in part, dissenting in part); Traynor, The Devils of Due Process in Criminal Detection, Detention and Trial, 33 U. Chi. L. Rev. 657, 659 (1966). "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." B. CARDozo, The Method of Philosophy, in The Nature of the Judicial Process 9, 13 (1921). See also People v. Cole, 165 Cal. App. 3d 41, 211 Cal. Rptr. 242 (1985).

\(^\text{97.}\) See Orozco, 394 U.S. at 330-31 (White, J., dissenting).

\(^\text{98.}\) Cardozo, supra note 96, at 12.

\(^\text{99.}\) Quarles, 467 U.S. at —, 104 S. Ct. at 2633-34 n.8.

\(^\text{100.}\) Id., 467 U.S. at —, 104 S. Ct. at 2642 (Marshall, J., dissenting); 467 U.S. at —, 104 S. Ct. at 2633.

\(^\text{101.}\) Orozco, 394 U.S. 330 (White, J., dissenting).

\(^\text{102.}\) Id. at 328 (Harlan, J., concurring).

\(^\text{103.}\) Id. at 330-31 (White, J., dissenting). "Prudent measures" may be interpreted as acts in protection of the public safety. See, e.g., supra notes 38-39 and accompanying text.
crime. Orozco's confession could then be said to come under the narrow scope of the *Quarles* rule thereby allowing affirmation rather than reversal of his conviction.

The difficulty in defining the amorphous scope of the *Quarles* rule is revealed from this review of *Orozco*. The truly unfortunate consequence of *Quarles* is that the narrow scope of the public safety exception will expand and contract depending on the perspective of a particular judge.\(^{104}\)

**B. Rhode Island v. Innis**

Innis was arrested for the armed robbery of a taxicab driver.\(^{105}\) Police repeatedly gave Innis *Miranda* warnings after which he said that he wanted to speak with a lawyer.\(^{106}\) On the trip to the station house, with Innis sitting in the back seat of the police car, the police officers discussed the hazards of a loose shotgun in the vicinity of a school for handicapped children.\(^{107}\) In response to this conversation Innis told the police to turn the car around so he could show them where the gun was located.\(^{108}\) He thereafter divulged the location of the gun to the police. The statements and the gun were admitted at trial, and Innis was convicted of robbery, kidnapping, and murder.\(^{109}\) The Rhode Island Supreme Court reversed the conviction and held that Innis had been improperly interrogated after invoking his right to counsel.\(^{110}\)

The United States Supreme Court vacated and remanded, reinstating Innis's conviction. The Court held that Innis had not been interrogated by the police after invoking his right to speak with an attorney.\(^{111}\) It said that an interrogation for *Miranda* purposes is not limited to express questions but also extends "to any words or actions on the part of police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect."\(^{112}\) Based

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104. *See supra* notes 93-101 and accompanying text.
106. *Id*.
107. *Id. See infra* notes 123-124 and accompanying text.
108. *Innis*, 446 U.S. at 295.
109. *Id. at* 291. The murder charge stemmed from the robbery of another taxicab driver the previous week whose body had been discovered the day before Innis was arrested. *Id. at* 293.
111. *Innis*, 446 U.S. at 302-04.
112. *Id. at* 300-01. Indeed, the New York Court of Appeals had held that placing stolen goods outside of the jail cell where an accused burglar was confined was interrog-
on the fact that the police had no reason to know that Innis was particularly susceptible "to an appeal to his conscience concerning the safety of handicapped children," the Court held that under this standard the discussion in the police car had not been an interrogation.113

Application of the Quarles rule to the facts in Rhode Island v. Innis114 is useful for two reasons. First, like Quarles, Innis involved a firearm missing in an area where it could do harm to innocent persons.115 Second, reexamination of Innis provides an opportunity to explore the question of whether the public safety exception would permit custodial questioning of an accused once the accused expresses a desire to speak with an attorney.116

Assuming arguendo that Innis had been interrogated after invoking his right to counsel, as three justices concluded,117 the facts of the case would then be ripe for a Quarles application because it could be argued that the interrogation of the accused was conducted in the interest of finding the weapon to protect the public safety. Indeed the Quarles Court, in distinguishing Innis, entirely rejected the analogy on the basis that the holding in Innis was grounded solely in the finding that Innis had not been interrogated.118

In Innis the accused was arrested on suspicion of holding up a taxicab with a shotgun four hours earlier.119 While the four hour gap between the crime and the arrest is a fact similar to that found in

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113. Innis, 446 U.S. at 302.
115. Id. at 294-95. The gun was missing in an area where a school for handicapped children was located. See infra notes 123-124 and accompanying text.
116. See infra notes 125-144 and accompanying text. The Court in Innis indicated that there is a right to counsel in the Fifth Amendment distinct from the Sixth Amendment privilege. Innis, 446 U.S. at 300 n.4. For a discussion of whether Quarles may extend into the Sixth Amendment protections, see infra notes 165-190 and accompanying text.
117. The Court was split on whether or not Innis had been interrogated within the new standard of interrogation. Justices Marshall and Brennan could not "imagine a stronger appeal to a suspect—any suspect—than the assertion that if the weapon is not found an innocent person would be hurt or killed. . . . The notion that such an appeal could not be expected to have any effect unless the suspect was known to have some special interest in handicapped children verges on the ludicrous." Id. at 306 (Marshall, J., dissenting)(emphasis in original).

Justice Stevens took exception to the Court's new standard. Id. at 309-314 (Stevens, J., dissenting). Additionally, he said that even if the standard developed by the majority was a proper one, the case should have been remanded for a factual determination of whether Innis had been interrogated under the new test. Id. at 314-317.
118. Quarles, 467 U.S. at —, 104 S. Ct. at 2633-34 n.8.
119. Innis, 446 U.S. at 293-94.
Orozco v. Texas,\(^{120}\) two additional factors indicate that Innis is a more compelling case than Orozo for the application of the Quarles rule.

First, there are strong indications that the police were extremely concerned about locating the missing shotgun.\(^{121}\) Although the Court in Quarles said that the application of the public safety exception would not depend on the subjective motivation of the questioning police officers,\(^{122}\) the officers' profound concern for the location of the gun at least provides some indication that there was an actual threat to the public's safety.

Second, the threat is bolstered by the fact that the missing shotgun was believed to be in an area frequented by handicapped children.\(^ {123}\) Hence, even the most skeptical observer would be compelled to find an objectively reasonable need to locate the weapon to secure the safety of children who would be passing through the area shortly thereafter on their way to school.\(^ {124}\) Consequently, protecting these children would most certainly provide a valid basis for interrogation of Innis under the Quarles exception.

One of the most troubling aspects of Quarles is the effect that the public safety exception may have on an accused's request for counsel after Miranda warnings.\(^ {125}\) The Court in Miranda said that

> [o]nce warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney present, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.\(^ {126}\)

Hence, the Court in Miranda read a right to counsel component into the Fifth Amendment to protect the defendant's right to remain silent, which was separate and distinct from the right to counsel guaranteed

\(^{120}\) 394 U.S. 324 (1969). See supra notes 93-98 and accompanying text.

\(^{121}\) See Innis, 446 U.S. at 295. The police sent a “parade of police cars” to the location where Innis said that he had hidden the gun. Additionally, the police captain “ordered the numerous officers still present to position their vehicles so that the headlights could illuminate the area. . . .” Brief for Respondent at 6-7, Rhode Island v. Innis, 446 U.S. 291 (1980).

\(^{122}\) Quarles, 467 U.S. at —, 104 S. Ct. at 2632.


\(^{124}\) Id. at 667, 391 A.2d at 1171 (Kelleher, J., dissenting). Compare New York v. Quarles, 467 U.S. at —, 104 S. Ct. at 2632 (the gun could have been retrieved by an accomplice or found by an employee or a customer).


by the Sixth Amendment.127

The Court in Edwards v. Arizona128 reinforced the Fifth Amendment right to counsel by developing a bright line for protection of a suspect’s request for counsel in response to the Miranda warnings. Justice White,129 writing for a unanimous Court, held that when an accused requests to speak with an attorney the police may not initiate further interrogation of the accused130 “unless the accused himself initiates further communication.”131 Subsequent decisions of the Court have indicated that the Edwards initiation requirement “set forth ‘a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers . . .’” once a request for counsel has been made.132

Where public safety is concerned, it is logical to extend the reasoning of the Quarles opinion to justify abridgement of the Fifth


The difference between the Fifth and Sixth Amendment rights to counsel is the time at which the right attaches. In the Sixth Amendment context, the right to counsel does not attach until the commencement of judicial proceedings against the accused. See Williams, 430 U.S. at 398-99. The Fifth Amendment right, however, attaches once a request for counsel is made. See Edwards, 451 U.S. at 484-85. Thus, the Fifth Amendment right to counsel created by Miranda fills an important gap in the Sixth Amendment right. See Innis, 446 U.S. at 300 n.4.

128. 451 U.S. 477 (1981). Edwards was arrested for robbery, burglary, and first-degree murder. After a brief interrogation session, Edwards indicated that he wanted to speak with an attorney. The interrogation then ceased, and Edwards was placed in the county jail for the night. The next day the police resumed questioning and told Edwards that he had to respond. Edwards then incriminated himself, the confession was introduced at trial, and Edwards was convicted. The Supreme Court reversed on grounds that the second interrogation was conducted in violation of Miranda, since Edwards had previously requested to speak with a lawyer. The Court held that once an accused requests to speak with an attorney, the accused “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.” Edwards, 451 U.S. at 478-488.

129. Although Justice White’s opinion in Edwards gave the Miranda doctrine strong support, he has previously expressed grave doubts about the validity of the Miranda rules. See Miranda, 384 U.S. at 351-37 (White, J., dissenting); Mosely, 423 U.S. at 108 (White, J., concurring); Orozco, 394 U.S. at 330 (White, J., dissenting); Mathis v. United States, 391 U.S. 1, 5-6 (1968)(White, J., dissenting). Justice White, however, has expressed stronger sentiment toward the right to counsel in general than he has toward other aspects of the Miranda rules. Compare Edwards, 451 U.S. 477 with Orozco, 394 U.S. at 330 (White, J., dissenting).


Amendment right to counsel. Even when a suspect requests to speak to an attorney, the Constitution does not require suppression of responses to non-coercive public safety interrogation. The *Quarles* Court justified the public safety exception in part by finding that the *Miranda* warnings are not rights protected by the Constitution but rather are only a judicially created device to protect the vitality of the Fifth Amendment. The Court has noted previously that *Miranda*'s requirement that interrogation cease immediately upon the accused's request for counsel is not a constitutional mandate but a prophylactic device which recognizes that a request for counsel is a per se invocation of Fifth Amendment rights. Likewise, the lack of a constitutional mandate for the "rigid" prophylactic rule of *Edwards* suggests its susceptibility to the balancing test of the *Quarles* exception.

Although the plain meaning of *Miranda* prohibits interrogation of a suspect once the suspect invokes the right to speak with counsel, the *Quarles* Court held that departure from *Miranda*'s requirements are permissible when there is an imminent threat to public safety. In essence, the Fifth Amendment right to counsel is only another prophylactic measure to protect the privilege against self-incrimination, and this may be outweighed by the need to obtain in-


137. The court has previously trimmed back the broad scope of the protections afforded by *Miranda* on the grounds that they are only prophylactic measures to protect Fifth Amendment rights. See *New York v. Quarles*, 467 U.S. 649, —, 104 S. Ct. 2626, 2633 (1984)(*Miranda* warnings need not be given when the situation presents exigent circumstances, which pose a threat to public safety); *Solem v. Stumes*, 104 S. Ct. 1338, 1343 (1984)(*Edwards* rule not to be applied retroactively because it is only a prophylactic rule); *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983)(suspect's refusal to take blood alcohol test admissible at trial for driving while intoxicated because police inquiry of whether suspect will take blood alcohol test is not an interrogation within meaning of *Miranda*); *Michigan v. Tucker*, 417 U.S. 433, 445-46, 449-52 (1974)(failure to advise suspect that he has right to appointed counsel does not bar admissibility of testimony of third party whose identity was obtained from the accused's lips); *Gardner, supra* note 15 at 456-60.


139. *Quarles*, 467 U.S. at —, 104 S. Ct. 2633. *But see supra* text at note 68; *Smith v. Illinois*, 105 S. Ct. 490, 492 (1984)(per curiam)(once an accused requests counsel, interrogation must cease to prevent badgering by the police to elicit responses and override the defendant's will).

formation from the accused to avert a public danger.\footnote{Quarles, 467 U.S. at --, 104 S. Ct. at 2633; See Miranda, 384 U.S. at 544 (White, J., dissenting).} Therefore, the conclusion appears inescapable that since the Fifth Amendment right to counsel is only a judicially created right,\footnote{See supra text at notes 125-26 and 132.} the balancing approach used by the \textit{Quarles} Court\footnote{See supra notes 44-47 and accompanying text.} will eventually serve to allow circumvention of the right to counsel when necessary to protect the public.\footnote{See Quarles, 467 U.S. at --, 104 S. Ct. at 2643 n.3 (Marshall, J., dissenting); Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 \textit{SUP. CT. REV.} 99, 123 (1977).}

Proponents of such an extension of \textit{Quarles} point out that the accused can always seek to prove that his statements were not voluntary but instead were coerced.\footnote{See Quarles, 467 U.S. at --, 104 S. Ct. at 2631 n.5; but see Smith v. Illinois, 105 S. Ct. 490, 495 n.8 (1984)(per curiam)(application of Edwards rule does not depend on whether responses were actually coerced).} Interrogation conducted after an accused has requested to speak with counsel would weigh heavily against a finding that the statements were voluntarily made.\footnote{Miranda, 384 U.S. at 475.\footnote{Edwards, 451 U.S. at 480-82.\footnote{Catch-22 is "a dilemma from which the victim has no escape." \textit{Oxford American Dictionary} 97 (1980).\footnote{Quarles, 467 U.S. at --, 104 S. Ct. at 2647 (Marshall, J., dissenting); see Quarles, 467 U.S. at --, 104 S. Ct. at 2632.\footnote{See supra notes 138-144.\footnote{Williams, 430 U.S. 387.}}}} The ability of the accused to prove that a statement was compelled, however, is a heavy burden to sustain.\footnote{Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 \textit{SUP. CT. REV.} 99, 123 (1977).}

The possible extension of \textit{Quarles} to excuse violations of an accused's Fifth Amendment right to counsel casts the warnings mandated by \textit{Miranda} into the conundrum of a Catch-22.\footnote{Catch-22 is "a dilemma from which the victim has no escape." \textit{Oxford American Dictionary} 97 (1980).} On the one hand, the police may withhold the warnings in order to protect the public. In this instance, "by deliberately withholding \textit{Miranda} warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights."\footnote{Quarles, 467 U.S. at --, 104 S. Ct. at 2647 (Marshall, J., dissenting); see Quarles, 467 U.S. at --, 104 S. Ct. at 2632.}

On the other hand, even when a suspect invokes his judicially created Fifth Amendment right to counsel, the police may be able to subvert the invocation of these rights by continued interrogation that is pursued in the interest of protecting the public.\footnote{See supra notes 138-144.}

C. \textit{Brewer v. Williams}

Williams was sought for the kidnapping of a ten-year-old girl in Des Moines, Iowa.\footnote{Williams, 430 U.S. 387.} Upon advice of his retained counsel in Des
Moines, Williams voluntarily surrendered to the Davenport, Iowa, police. Williams's Des Moines attorney advised him by telephone not to speak to the police in Davenport nor to the police officers from Des Moines who would be driving him back to Des Moines later that day. The Des Moines officers assigned to transport Williams agreed with Williams's attorney not to question Williams during the trip.

Williams was then arraigned in Davenport on an arrest warrant issued in Des Moines charging him with the kidnapping. Williams conferred with an attorney in Davenport after the arraignment. Detective Learning and another officer arrived from Des Moines to transport Williams back to Des Moines. Before embarking on the three-hour drive, Williams again spoke with the Davenport lawyer who advised him to say nothing to the officers on the drive to Des Moines. Additionally, the Davenport attorney admonished Detective Learning not to question Williams on the ride to Des Moines.

During the trip, Williams asserted repeatedly that he would not answer any questions until he had an opportunity to speak with his attorney in Des Moines. Detective Learning proceeded to engage Williams in small talk to set him at ease. With the knowledge that Williams was a religious zealot, Detective Learning delivered the renowned "Christian Burial Speech" in the hope of prompting Williams to disclose the location of the kidnap victim's body. In response to this monologue, Williams led the police to the body.

152. Id. at 390.
153. Id. at 391.
154. Id.
155. Id. at 391-92.
156. Id. at 392.
157. Id.
158. Detective Learning said to Williams:
   I want to give you something to think about while we're travelling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleet, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.
   Id. at 392-93.
159. Id. at 399.
160. Id. at 393.
Williams was subsequently convicted of murder.\textsuperscript{161} His conviction was affirmed by the Iowa Supreme Court which held that Williams had waived his right to counsel in disclosing the location of the body.\textsuperscript{162} The United States Supreme Court granted habeas corpus relief. The Court held that Detective Learning’s “Christian Burial Speech” was a violation of Williams’s Sixth Amendment right to counsel, as defined in \textit{Massiah v. United States}\textsuperscript{163} in that it was a deliberate attempt to elicit information from Williams after judicial proceedings had commenced against him.\textsuperscript{164}

Consideration of the facts in \textit{Brewer v. Williams} in light of the \textit{Quarles} opinion presents an opportunity to probe the appropriateness of creating a public safety exception to the Sixth Amendment to permit infringement of the constitutional right to the assistance of counsel in the interest of protecting the public.\textsuperscript{165} Although the Sixth Amendment right to counsel is an express constitutional requirement,\textsuperscript{166} the interest in rescuing a kidnap victim or another public safety concern may well prompt the Court to hold that such good faith motivation is a valid excuse for violation of an accused’s Sixth Amendment rights.\textsuperscript{167}

Although public safety is a valued goal, the theoretical founda-

\begin{itemize}
  \item 161. \textit{Id.} at 394.
  \item 162. \textit{State v. Williams}, 182 S.W.2d 396, 402 (Iowa 1970).
  \item 163. 377 U.S. 201 (1964). In \textit{Massiah}, the defendant had been indicted for violations of federal narcotics laws. At the behest of federal agent Murphy, Colson, one of Massiah’s co-defendants, lured Massiah into his car which had been equipped by federal agents with a radio transmitter. Colson engaged Massiah in a conversation about the pending charges while Murphy eavesdropped on the conversation over the radio. At trial, Murphy testified as to the substance of Massiah’s self-incriminations, and Massiah was convicted of several narcotics violations.
  \item 164. \textit{Williams}, 430 U.S. at 398-99. The Court said that the Iowa court had applied the wrong standard for determining whether Williams had waived his rights. \textit{Id.} at 401-04. The U.S. Supreme Court noted that the Iowa Supreme Court had erroneously analyzed the case as one involving a violation of \textit{Miranda}. \textit{Id.} at 397. Instead the Court said that Williams’s right to counsel as defined in \textit{Massiah v. United States}, 377 U.S. 201 (1964), had been violated, that is, once judicial proceedings have begun, the government may not deliberately elicit incriminating responses from the defendant. \textit{Williams}, 430 U.S. at 397-98. The Court implied that the standard for waiver of the Sixth Amendment right to counsel is higher than the standard for waiver of the Fifth Amendment right to counsel and that the government had not met its burden of proof that Williams had waived his Sixth Amendment right. \textit{See Kamisar, Brewer v. Williams, Massiah and Miranda: What is “Interrogation”? When does it Matter?}, 67 GEO. L.J. 1, 28-33 (1978).
  \item 165. \textit{See infra} text at notes 172-179.
  \item 166. \textit{See infra} text at notes 168-171.
  \item 167. \textit{See infra} notes 172-190 and accompanying text.
\end{itemize}
tion of *Quarles* weighs heavily against creating an emergency exception to the Sixth Amendment right to counsel. The foundation of the public safety exception rests in a determination that the warnings required by *Miranda* are not constitutionally required but rather are judicial devices to protect the Fifth Amendment privilege. Violations of *Miranda* are excused on public safety grounds because the accused does not have a constitutional right *per se* to receive the warnings but only to be free from being compelled to incriminate himself. Hence the need for *Miranda* warnings, as prophylactic measures, may be outweighed by the need to protect the public.

The Sixth Amendment right to counsel is derived directly from the Constitution, and thus it should not be susceptible to the same balancing approach to which the *Miranda* protections were subjected in *Quarles*. A public safety concern should not be sufficient to justify a violation of the constitutionally mandated right to counsel in the Sixth Amendment. Deliberately eliciting statements from the accused after institution of judicial proceedings against him violates his substantive Sixth Amendment rights rather than only judicially created safeguards.

Chief Justice Burger, however, has expressed the view that the rule of *Massiah* is only a prophylactic device to protect the Sixth Amendment right to counsel. He reasons that the Sixth Amendment seeks to protect only the fairness of the accused's trial. Consequently, requiring exclusion of all statements obtained from the accused without the assistance of counsel, without considering the actual effect on the trial of using the uncounseled statements, is only a prophylactic device to ensure the Sixth Amendment goal of providing the accused a fair trial.

In his recent dissent in *Maine v. Moulton*, the Chief Justice said that no Sixth Amendment violation exists when inculpatory state-

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168. See supra text at notes 42-43.
170. "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. CONST. amend. XI.
172. "[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Williams*, 430 U.S. at 397-98.
174. *Id.*
175. 54 U.S.L.W. 4039 (U.S. December 10, 1985).
ments are elicited deliberately from an indicted defendant pursuant to a legitimate law enforcement investigation targeted against the defendant's planning and perpetration of additional crimes.\textsuperscript{176} The Chief Justice stated that the incriminating statements pertaining to the indictment should not have been suppressed because "the state was not trying to build its theft case against [Moulton] in obtaining the evidence, [and thus] excluding the evidence from the theft trial will not affect police behavior at all."\textsuperscript{177}

The Chief Justice remarked that evidence gathered after Sixth Amendment deprivations should be suppressed only after the costs and benefits are weighed. Accordingly he would not exclude evidence obtained in violation of Massiah when the officers were acting "‘for legitimate purposes not related to the gathering of evidence concerning the crime for which [the defendant] had been indicted.'"\textsuperscript{178} Suppression of such evidence is inappropriate when the fairness of the trial is not affected, and the police act in good faith, leaving no conduct to deter.\textsuperscript{179}

This argument parallels that advanced in Quarles,\textsuperscript{180} viz, that uncoerced statements obtained in violation of the prophylactic rules of Miranda should not be suppressed where exclusion would not advance Fifth Amendment goals. The Chief Justice's view, therefore, provides fertile ground for the planting of a public safety exception to the Sixth Amendment right to counsel. Proponents would argue that Massiah does not mandate suppression of statements made without assistance of counsel if these were obtained to protect the public. In such cases, so long as the police conduct does not affect the fairness of the accused's trial, the evidence should not be suppressed because exclusion of the evidence would not advance Sixth Amendment values,\textsuperscript{181} and the cost of exclusion is too high.

Justice Traynor, writing for the California Supreme Court in Peo-

\textsuperscript{176} Id. at 4047, 4048 (Burger, C.J., dissenting). In Moulton, the defendant, who had been indicted on theft charges, proposed a plan to his co-defendant that they kill the state's chief witness against them. The co-defendant, fearing for his own life, permitted the police to conceal a transmitter on his person prior to meeting with the defendant. During the course of the discussions about the proposed killing of the witness, the defendant made incriminating statements, monitored by the police, which related to the subject matter of the indictment.

\textsuperscript{177} Id. at 4048.

\textsuperscript{178} Id. (quoting United States v. Leon, 468 U.S. —, 104 S. Ct. 3405 (1984)).

\textsuperscript{179} Id. (citing United States v. Leon, 468 U.S. —, 104 S. Ct. 3405 (1984)).

\textsuperscript{180} Quarles, 467 U.S. at —, 104 S. Ct. at 2630-2631.

\textsuperscript{181} Id. Cf. Quarles, 467 U.S. at —, 104 S. Ct. at 2626 (Even though Miranda is violated, suppression is not required so long as statement is voluntarily made under the totality of the circumstances.)
pie v. Modesto\textsuperscript{182} suggested that the Sixth Amendment should not constrain the police from interrogating a suspect when they are searching for a missing kidnap victim.\textsuperscript{183} The court said that "the officers' investigatory and rescue operations were inextricably interwoven until [the victim's] body was found, and it would be needlessly restrictive to exclude any evidence lawfully obtained during the rescue operations."\textsuperscript{184} Under such circumstances \textit{Massiah} does not control, and the accused's Sixth Amendment right to counsel \textsuperscript{185} may be infringed if necessary to obtain information to save the life of a kidnap victim.\textsuperscript{186} The California courts have followed the "rescue theory" in holding that the police are justified in failing to give \textit{Miranda} warnings when interrogating a suspect in the effort to find a kidnap victim.\textsuperscript{187}

\textit{Massiah}, however, did not prevent the police from deliberately eliciting statements from the accused in violation of the Sixth Amendment in such exigent circumstances, but it prohibited the use of these statements in evidence at trial.\textsuperscript{188} Moreover, the Court in \textit{Williams}, while noting that attempting to locate a kidnap victim might be a no-

\begin{itemize}
  \item \textsuperscript{182} 62 Cal.2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965).
  \item \textsuperscript{183}  Id. at 446, 398 P.2d at 759, 42 Cal. Rptr. at 423.
  \item \textsuperscript{184}  Id. at 446-47, 398 P.2d at 759, 42 Cal. Rptr. at 423.
  \item \textsuperscript{185}  The \textit{Modesto} court believed that \textit{Massiah} was applicable under the "focus test" of Escobedo v. Illinois, 378 U.S. 478 (1964), wherein the court held that the Sixth Amendment right to counsel attaches when the police investigation of the crime has focused on the accused. Under the present interpretation of \textit{Massiah}, however, Modesto's Sixth Amendment right would not attach until he was formally charged. Kirby v. Illinois, 406 U.S. 682 (1972). Nonetheless, even though \textit{Massiah} would not be applicable in \textit{Modesto} under today's standards, Traynor's analysis of the kidnapping issue in the Sixth Amendment context illuminates the potential breadth of the public safety doctrine.
  \item \textsuperscript{186}  \textit{Modesto}, 62 Cal. 2d at 447, 398 P.2d at 759, 42 Cal. Rptr. at 423.
  \item \textsuperscript{187}  People v. Riddle, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170 (1978), cert. denied, 440 U.S. 937 (1979); People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974). The California courts, however, recognizing that constitutional protections for the criminally accused must be given broad effect, narrowly defined the rescue situations in which police could fail to give \textit{Miranda} warnings. In \textit{People v. Riddle}, the court developed a three-part test to determine whether a given situation provided a sufficient justification not to give \textit{Miranda} warnings:
    \begin{enumerate}
      \item urgency of need in that no other course of action promises relief;
      \item possibility of saving human life by rescuing a person whose life is in danger;
      \item rescue as primary purpose and motive of the interrogators.
    \end{enumerate}


  In \textit{Brewer v. Williams}, the violation of Williams's Sixth Amendment rights would not be excused under this test since at the time the "Christian Burial Speech" was given, the police no longer believed that the kidnaping victim was no longer alive. \textit{See supra} note 158.

  \item \textsuperscript{188}  \textit{Massiah}, 377 U.S. at 206-07; \textit{cf. Quarles}, 467 U.S. at —, 104 S. Ct. at 2648 (Marshall, J., dissenting)\textit{(Miranda} does not proscribe this sort of questioning but rather prohibits the introduction of such statements at trial).
ble goal, said that "[d]isinterested zeal for the public good does not assure either wisdom or right in the method it pursues." Thus the express constitutional status of the Sixth Amendment right to counsel would appear to present too high an obstacle for the Quarles opinion to leap. Whereas the logic of Quarles lends itself to an extension of the emergency exception to the Fifth Amendment right to counsel, the reasoning of Quarles does not support a violation of the express Sixth Amendment right to counsel. On the other hand, legitimate concerns for a kidnap victim may provide sufficient justification for infringing upon the accused's Sixth Amendment right and allowing statements thus obtained to be admissible at trial. In considering that the Sixth Amendment right to counsel is constitutionally mandated, the rescue justification, if adopted, should be applied narrowly to prevent the complete erosion of the right to counsel.

V. CONCLUSION

The United States Supreme Court in Quarles determined that the need to protect the public from imminent threats outweighs a criminal suspect's need to receive the warnings developed in Miranda v. Arizona to protect the privilege against self-incrimination. Although the Court claims to have lifted a dilemma from the shoulders of the police, the Court has created many new questions, yet provided few answers. One question the court left open is the type of emergency that would justify the failure to give the Miranda warnings. The scope of the Quarles exception will be determined upon the lower courts' interpretation of how ominous a threat to public safety was present in a given situation. Although the Supreme Court indicated that only an imminent threat to the public safety would justify a failure to adhere to Miranda, much will turn on the perceptions of the individual judge, thereby creating widely disparate results.

Post hoc examination of an alleged threat to public safety will severely limit the broad protection Miranda provided for the privilege against self-incrimination. Given the exigent circumstance, interrogation designed to quell a threat to public safety is likely to be compelling. Using such statements, obtained pursuant to Quarles, to prove a defendant's guilt creates a direct clash with the Fifth Amendment. Placing on the accused the burden of proving that the statements were

189. 430 U.S. at 406 (quoting Haley v. Ohio, 332 U.S. 596, 605 (1948) (Frankfurter, J., concurring)).
190. See supra note 187.
coerced defeats the intent of the *Miranda* decision—to remove such a burden from the accused.

Additionally, the *Quarles* decision may foreshadow an expanded emphasis on public safety where the need to protect the public may provide a sufficient justification to excuse the failure to adhere to other Supreme Court pronouncements on the rights of criminal suspects. The requirement that interrogation cease after an accused requests to speak with an attorney is designed to assist the accused in the exercise of his Fifth Amendment privilege. Since this Fifth Amendment right to counsel, however, is not a constitutionally mandated protection, the need to protect the public may well serve as a justification for interrogating a suspect even after he makes a request to speak with an attorney.

Allowing the use at trial of statements obtained as a result of public safety interrogation after the accused requests to speak with counsel would further diminish *Miranda*'s Fifth Amendment safeguards. Such a rule would deny an accused the assurance that the police would only communicate in the presence of counsel once a request for a lawyer was made. A rule allowing the police to continue an interrogation after invocation of the Fifth Amendment right to counsel would, in effect, deprive the *Miranda* requirements of their substance.

The Sixth Amendment right to counsel, because it enjoys a direct constitutional mandate, is not as easily balanced away. While the *Quarles* rule hinges on the notion that the *Miranda* warnings are only procedural rights, the dictates of the Sixth Amendment are absolute and cannot be outweighed by the need to protect the public.

On the other hand, Chief Justice Burger has suggested cutting back the broad meaning which *Massiah* read into the Sixth Amendment right to counsel. Burger’s characterization of *Massiah*’s rule as only prophylactic leaves the Sixth Amendment right to counsel only a step away from the *Quarles* balancing test. The Court might find the rescue of a kidnapping victim, for example, sufficient justification to define a narrow public safety exception and forgive violation of the Sixth Amendment in limited circumstances.

Creation of such a public safety exception to the Sixth Amendment is inconsistent with the evolution of the right to counsel. Casting *Massiah* as no more than a prophylactic rule turns the clock back on the most fundamental right enjoyed by the accused in a criminal prosecution. Our fundamental constitutional protections are directly endangered by the denial of counsel during interrogation to a person against
whom adversarial proceedings have begun. No good faith exception can justify such an action.

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