1984

Right Against Self-Incrimination -- "Public Safety" Exception

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In the future, explicit use of the *Mathews* framework would help clarify the Court's decisions in this area.

From the perspective of the *Mathews* test, it is clear that the *Schall* majority erred in its assessment. The additional procedural safeguards suggested for the detention statute by one judge — precise evidentiary guidelines for the judges, limits on the types of crimes to be predicted as well as those for which the arrested youth can be subject to detention, and a speedy probable cause determination[80] — would not have transformed the family court into an adversarial arena. Either an informal probable cause assessment[81] immediately after arrest, or a mandatory determination at the initial appearance, would satisfy constitutional requirements. When one considers other factors in the *Mathews* test — the possibility of error and the importance of the individual interest at stake — the need for additional safeguards appears compelling.[82]

With its language about the limited liberty interests of juveniles and professed faith in the unlimited discretion of juvenile court judges, the Court in *Schall* has apparently erected at least a temporary barrier to further expansion of constitutional protections for accused juvenile offenders. At a broader level, the Court's willingness to ignore evidence of a statute's actual administration, and to defer to state judges and legislators in this area, may be seen as part of a growing predilection on the part of the Justices to increase the discretion and authority of state officials while relaxing procedural safeguards.[83]

5. Right Against Self-Incrimination — "Public Safety" Exception. — In *New York v. Quarles*,[1] decided last Term, the Supreme Court created a "public safety" exception to the famous rule of *Miranda v. Arizona*[2] requiring police officers to advise suspects of their rights to

relate uniquely to the goals of the juvenile-court system"); *In re* Winship, 397 U.S. 358, 366 (1970) (use of reasonable-doubt standard will have no "effect on the informality, flexibility, or speed of the hearing"); *id.* at 375 (Harlan, J., concurring) ("It is of great importance . . . that procedural strictures not . . . jeopardize 'the essential elements of the State's purpose' in creating juvenile courts." (quoting *In re* Gault, 387 U.S. 1, 72 (1967) (Harlan, J., concurring in part and dissenting in part)).

[80] *See* Martin v. Strasburg, 689 F.2d 365, 377 (2d Cir. 1982) (Newman, J., concurring), *rev'd sub nom.* Schall v. Martin, 104 S. Ct. 2403 (1984). Justice Marshall discussed these additional safeguards in his *Schall* dissent. *See* 104 S. Ct. at 2431 & n.33 (Marshall, J., dissenting).

[81] In Gerstein v. Pugh, 420 U.S. 103 (1975), the Court held that the constitutionally mandated probable cause determination for adult detainees need only be "an informal procedure." *See id.* at 120–25.

[82] Perhaps this outcome explains why the Court, unlike Justice Marshall, steered clear of explicit *Mathews*-style analysis despite its obvious suitability.

[83] *See, e.g.*, *supra* pp. 108–18 (discussing good-faith exception to exclusionary rule); *infra* pp. 140–51 (discussing "public safety" exception to *Miranda* requirements).

[1] 104 S. Ct. 2626 (1984).

[2] 384 U.S. 436 (1966).

silence and counsel during custodial interrogation.[3] Although purporting not to repudiate *Miranda*,[4] the Court avowedly struck a distinct balance between the interests of the public at large and those of the arrested individual, and concluded that "overriding considerations of public safety justify [an] officer's failure to provide *Miranda* warnings" before asking questions reasonably necessary to remove a threat to public safety.[5] In such circumstances, the responses so elicited will later be admissible at trial.

At approximately 12:30 a.m. on September 11, 1980, a young woman approached two policemen, Officers Kraft and Scarring, while they were on road patrol in Queens, New York. She told them that she had just been raped and that her assailant was armed and had entered a nearby supermarket. Kraft entered the store and spotted the respondent Quarles, who matched the woman's description. He pursued the suspect to the rear of the store, and after three other officers had arrived on the scene, Kraft frisked him, discovered an empty shoulder holster, and handcuffed him. Before apprising Quarles of his *Miranda* rights, Kraft asked him, "Where is the gun?" Looking toward a stack of empty cartons, Quarles answered, "The gun is over there." After recovering a loaded revolver, the police read the suspect his rights.[6] In the later prosecution for criminal possession of a weapon,[7] the trial court excluded both Quarles's statement and the handgun because the police had failed to read the defendant his rights before obtaining this evidence. The Appellate Division of the Supreme Court of New York[8] and the New York Court of Appeals[9] affirmed the suppression order.

The Supreme Court reversed. In an opinion written by Justice Rehnquist and joined by Chief Justice Burger and Justices White, Blackmun, and Powell, the Court held that "there is a 'public safety'

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[3] "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 a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

[4] "[W]e do not believe," the Court stated, "that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to [this] situation . . . ." *Quarles*, 104 S. Ct. at 2632.

[5] *Id.* at 2629.

[6] The majority and the dissent recounted substantially the same events except that the dissent noted that the other officers trained their weapons on Quarles during the frisking. *See id.* at 2629–30; *id.* at 2642 (Marshall, J., dissenting). After receiving his *Miranda* warnings, Quarles indicated that he was willing to answer questions without an attorney present and that he owned the revolver and had purchased it in Miami, Florida. *See* 104 S. Ct. at 2630. The *Quarles* opinions do not join issue over these later statements: finding an exception for the gun and initial statement, the majority consequently admitted the later utterances, *see id.* at 2634, but the opinions of Justices Marshall and O'Connor contain no conclusion about their admissibility, *see id.* at 2634 n.1 (O'Connor, J., concurring in part and dissenting in part).

[7] The record fails to explain why the State of New York decided not to prosecute the alleged rape. *See* 104 S. Ct. at 2630 n. 2.

[8] People v. Quarles, 85 A.D.2d 936, 447 N.Y.S.2d 84 (1981) (mem.).

[9] People v. Quarles, 58 N.Y.2d 664, 444 N.E.2d 984, 458 N.Y.S.2d 520 (1982).

exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence."[10] The opinion insisted first that the warnings are not themselves constitutional rights but merely "prophylactic" measures that provide "practical reinforcement" for the right against self-incrimination of the fifth and fourteenth amendments — measures required by the *Miranda* Court's presumption that custodial interrogation is inherently coercive.[11] The *Quarles* opinion noted the *Miranda* Court's belief that these warnings would reduce the likelihood of coercion, but also recognized the cost imposed on the public by the rule: the officer's recitation of the warnings might deter suspects from answering questions, and this in turn might lead to fewer convictions of guilty suspects.[12] The Court did not challenge what it understood to be the *Miranda* majority's view: that this cost is in general outweighed by the additional protection of rights bought by those warnings.

The *Quarles* Court did insist, however, that the social cost of the *Miranda* warnings is higher when the police officer's recitation of them might deter a suspect from responding to questions that are necessary to avert an immediate threat to the public safety, such as the concealment of a loose gun somewhere in a supermarket.[13] In the Court's view, when answers are not actually coerced — and the record contained no claim that Quarles's were — this higher social cost outweighs the need for the *Miranda* safeguards. In such exigent circumstances, the Court explained, evidence obtained without warnings must be admissible in order to save individual officers from the dilemma of having to choose between giving the warnings at the risk that public safety will be jeopardized and withholding the warnings at the risk that probative evidence will be excluded.[14] And although the Court expressed a belief that the good instincts of police officers will ensure accurate application of the exception,[15] the application does not depend on the actual motivation of the officers involved.[16] Rather, informal questioning need only be "reasonably prompted by a concern for the public safety."[17]

Justice O'Connor, writing alone, concurred in the part of the Court's opinion that reversed the decision to exclude the revolver, but dissented from the Court's holding on the admissibility of Quarles's

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[10] 104 S. Ct. at 2632.

[11] *Id.* at 2631.

[12] *Id.* at 2632.

[13] "[A]n accomplice might make use of [the gun, or] a customer or employee might later come upon it." *Id.*

[14] *See id.* at 2633.

[15] *See id.*

[16] *Id.* at 2632.

[17] *Id.* For a fuller exposition of the Court's position on the significance of motivation, see p. 148.

initial statement. The majority, she explained, misunderstood the "critical question" addressed by *Miranda*. *Miranda* had not prohibited the police from asking questions to secure the public safety. It had merely determined that when such questions are asked and answered before proper warnings have been given, the state and not the defendant must bear the cost of securing the public safety; the answers must therefore be inadmissible.[18] In Justice O'Connor's view, the *Miranda* Court, "for better or worse," had found that result "implicit in the prohibition against compulsory self-incrimination."[19] She also criticized the Court's new exception for blurring the clear lines of the *Miranda* rule: police will suffer when reviewing courts disagree with their assessments of "'objective' circumstances" and so suppress probative evidence; the "end result," she predicted, "will be a finespun new doctrine . . . [of] hair-splitting distinctions."[20] Justice O'Connor would, however, have admitted the gun as nontestimonial evidence because "[t]he harm caused by failure to administer *Miranda* warnings relates only to admission of testimonial self-incriminations."[21]

Justice Marshall, joined by Justices Brennan and Stevens, dissented from all the majority's conclusions. First, he criticized the majority for misusing the facts in order to find a threat to public safety. The lower courts had found no subjective belief by the officers in, and no objective facts to establish, a danger to the public or to the police officers.[22] Observing that two appellate courts — the Supreme Court and the New York Court of Appeals — had reached opposite conclusions on the same facts, Justice Marshall warned of the confusion that the new "public safety" exception would engender among courts and police.[23]

More fundamentally, however, the dissent disagreed with the majority's basic claim that a "public safety" exception is consistent with *Miranda*. Justice Marshall understood *Miranda* not to rest on a bal-

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[18] *See id.* at 2636 (O'Connor, J., concurring in part and dissenting in part).

[19] *Id.* at 2634–36. "[F]rom a clean slate," Justice O'Connor might have been inclined to join the Court's full opinion. *Id.* at 2634. In her view, however, *Miranda* "is now the law," and the majority did not provide sufficient justification to depart from that decision's "literal terms." *Id.* at 2634–35.

[20] *Id.* at 2636.

[21] *Id.* at 2639. Thus, according to Justice O'Connor, when police coercion produces both testimonial and nontestimonial evidence, *Miranda*'s concerns are satisfied if the nontestimonial evidence alone is admitted. *See id.* at 2638. Justice O'Connor also suggested that uncoerced statements elicited by police in violation of *Miranda* are less sympathetic bases for a broad suppression ruling than are statements made under the threat of contempt in a judicial proceeding. Because earlier derivative-evidence cases under the fifth amendment involved the latter kind of statements only, she would have applied the derivative-evidence principles more restrictively in *Quarles*. *See id.* at 2639–40. For an analysis of this view, see note 51.

[22] *See* 104 S. Ct. at 2642–43 (Marshall, J., dissenting). "The police could easily have cordoned off the store and searched for the missing gun." *Id.* at 2643.

[23] *See id.* at 2644–45.

ancing of costs and benefits, and thus he denied that the majority's introduction of "public safety" considerations into fifth amendment jurisprudence was simply an adaptation of the *Miranda* analysis to a particular situation. Rather, the *Miranda* Court, in seeking to deal with the "practical problems" of determining when a confession is unconstitutionally compelled, had created a "constitutional presumption" that statements made during custodial interrogation are compelled. Questions asked to secure the public safety are "no less inherently coercive" than any other kind of questions and so should be no less subject to the constitutional presumption.[24] Indeed, the dissent insisted that the majority's central premise was that "public safety" questioning is and should be coercive: the majority feared that if the suspect were apprised of his rights, he might actually use them by refusing to respond.[25] On the particular facts at hand, moreover, the dissent concluded that the interrogation of Quarles was coercive in fact, and that the public safety exception thus should not have been triggered even under the majority's standard.[26] Finally, the dissent declined to consider what it described as Justice O'Connor's "novel theory"[27] on derivative evidence and called for a remand to consider the admissibility of the gun.[28]

The *Quarles* opinions, like *Miranda* itself, recognize that both the coercion felt by a suspect and the motives harbored by a police officer amid the "kaleidoscopic" events of arrest and custodial interrogation may be unknowable or unprovable in a post hoc hearing.[29] The opinions represent compromises with these limits of human knowledge, efforts to rest with comfort on the dark side of the veil drawn across human motivation. Because such motivation cannot be known, the opinions all are based on presumptions about states of mind. But the compromise reached by the majority in *Miranda* differs radically from that reached by the majority in *Quarles* and comes from a very different source of inspiration. At least initially, the *Miranda* compromise seems more consonant with the rest of American jurisprudence.

In certain contexts, the meaning of the constitutional concept "compulsion" and its presence or absence seem clear. For example,

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[24] *Id.* at 2645–47.

[25] *See id.* at 2647. In this sense, the new exception offends not only the prophylactic *Miranda* requirements but also the fifth amendment's absolute prohibition "simply by calculating special costs that arise when the public's safety is at issue." *Id.* at 2649.

[26] *See id.* at 2647.

[27] *Id.* at 2649 n.11.

[28] The dissent would have remanded the case for the trial court to determine whether New York law would allow the application of the newly announced "inevitable discovery" rule of Nix v. Williams, 104 S. Ct. 2501 (1984), and if so, whether the the gun would in fact have inevitably been discovered. *See* 104 S. Ct. at 2649 & n.11, 2650 & n.12 (Marshall, J., dissenting).

[29] *See Quarles*, 104 S. Ct. at 2646 (Marshall, J. dissenting); 104 S. Ct. at 2632 (motives of police officer); Miranda v. Arizona, 384 U.S. 436, 457, 469 (1966) (coercion of defendant).

"compulsion" may be clear when defined as the product of an investigative process marked by specific practices widely perceived to be objectionable. The privilege against self-incrimination arose in reaction to such processes,[30] and the Supreme Court in the last century has readily found violations of the fifth amendment when the contempt power,[31] torture, or prolonged sequestration[32] have been used to obtain confessions. Alternatively, the fifth amendment seems to speak of "compulsion" as actual subjective coercion.[33] The presence or absence of this kind of compulsion might be clear to citizens such as those in the foreground of the portrait of American life implicit in the Constitution: propertied citizens relatively equal in power and judges who are similarly situated, all sharing the experience of a felt, discernible sphere of voluntary action and independence in their own affairs.[34] If modern American society were composed of individuals with such shared emotional referents, the task of determining when a free will was subjectively overborne might be relatively easy for them — as perhaps it may have been for their historical counterparts.[35]

In modern America, however, distinguishing subjective "coercion" from other feelings of pressure has, as a factual and legal matter, become immeasurably more difficult. On a factual level, the relatively homogeneous society of independent equals[36] sketched in the Constitution has given way to a society both more stratified and more complex. As a result, some groups, such as the poor and certain minorities, may feel especially distant from power.[37] More generally,

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[30] *See* Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1–23 (1949); Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 769–83 (1935).

[31] *See, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (proscribing "the cruel trilemma of self-accusation, perjury, or contempt").

[32] *See, e.g.*, Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); Ziang Sung Wan v. United States, 266 U.S. 1 (1924).

[33] Presumably, this is why Justices Rehnquist and O'Connor assume that the fifth amendment itself proscribes only actual subjective coercion. *See supra* p. 142.

[34] This rendition of the suppositions about society evident in the Constitution is, of course, not uncontroverted. It is, however, a common rendition.

[35] "[T]he keen and doughty [colonial] defendants were not one whit less skillful than the best of their prototypes in similar situations in England." Morgan, *supra* note 30, at 19.

[36] Because the Constitution's protection originally extended only to a small fraction of the population, *see, e.g.*, M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 258–67 (1978), this homogeneity may have been artificial; but that fact is irrelevant to the ease with which coercion may have been determined.

[37] *See* Chambers v. Florida, 309 U.S. 227, 238 (1940) ("And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless."); Z. CHAFEE, W. POLLAK & C. STERN, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 159 (1931) (observing that police brutality is directed especially against blacks and the poor); Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 47–48 (1968) (arguing that low-status persons are especially susceptible to coercion in interrogation). *See generally* Bullough, *Alienation in the Ghetto*, 72 AM. J. SOC. 469 (1967) (describing conditions of alienation in inner-city ghettos).

the rise of the professional police force and a mass society perceived to be dominated by big government may cause many citizens to feel a lack of control, to varying degrees, in all dealings with the government.[38] Yet most judges are removed from such feelings of powerlessness as a result of their magistracy over the police. Thus, even if a broad social consensus existed regarding the legal meaning of "voluntariness," judges would largely be ill-equipped to empathize with those less secure citizens whose subjective sense of "voluntariness" in dealings with the government is both narrow and dim.

But in any event, "voluntariness" does not seem to have a functional legal definition. The decisions talismanically intone that pressure that "overbears" a "free will" "under the totality of the circumstances" offends the Constitution.[39] No definition of these terms is available from abstract philosophy; the problems of free will and determinism have plagued the Western intellectual tradition for millennia, and no general agreement on them seems forthcoming. Moreover, as suggested earlier, modern American society lacks shared emotional referents to substitute for philosophical conclusions. Fifth amendment "voluntariness" thus remains a metaphysically indeterminate legal concept: typically, a divided Court recites the standard and the facts and then announces conflicting findings.[40]

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[38] For empirical analyses of the great variety of social and psychological pressures that suspects feel during interrogation, see Driver, *supra* note 37, at 56–59, and Griffiths & Ayres, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300, 312–18 (1967). For empirical analyses of why even warnings standing alone are inadequate to overcome these pressures, see Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1370–79, 1396–98 (1968); *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1562–78, 1613–14 (1967); and Griffiths & Ayres, *supra*, at 312–18.

[39] "Voluntariness" has functioned as shorthand for two other concepts: the "untrustworthiness" of coerced confessions, *see, e.g.*, Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 224 (1971); Miranda v. Arizona, 384 U.S. 436, 507 (1966); Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 414–17 (1954), and the "abusiveness" of certain police practices, *see, e.g.*, New York v. Quarles, 104 S. Ct. 2626, 2635 (1984) (O'Connor, J., concurring in part and dissenting in part); *Miranda*, 384 U.S. at 507; Ashcraft v. Tennessee, 322 U.S. 143, 153–55 (1944); Chambers v. Florida, 309 U.S. 227, 237–40 (1940); Paulsen, *supra*, at 17–23. But "voluntariness" in the sense of an actual exercise of free will also stands on its own bottom — although typically accompanied by reference to abusive practices — as a third strain in the cases. *See, e.g.*, New Jersey v. Portash, 440 U.S. 450, 459 (1979); Mincey v. Arizona, 437 U.S. 385, 398 (1978); United States v. Washington, 431 U.S. 181, 187 (1977); Haynes v. Washington, 373 U.S. 503, 514 (1963); Townsend v. Sain, 372 U.S. 293, 307 (1963); Reck v. Pate, 367 U.S. 433, 440 (1961); Payne v. Arkansas, 356 U.S. 560, 566–67 (1958). On the other hand, pressure that does not overbear a free will is not unconstitutional: the cases are quick to point out, for example, that all supects in custody feel some pressure to confess. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 722–23 (1975).

[40] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 407–08 (1978) (Rehnquist, J., concurring in part and dissenting in part) (terming confession voluntary even though defendant was "seriously wounded and laden down with medical equipment, . . . not able to move about and, because of the breathing tube in his mouth, had to answer Detective Hust's questions on paper"); Haynes

Viewed from this perspective, the crucial issue in *Miranda* was not the meaning of coercion but what the judge should do when he cannot confidently determine whether a defendant subjectively experienced coercion in a particular circumstance. The *Miranda* Court mandated its famous warnings because modern custodial interrogation "contains inherently compelling pressures which work to undermine the individual's will to resist"[41] — psychological pressures that are often very subtle.[42] As each of the *Quarles* opinions explains, the Court in *Miranda* insisted that the presumption of coercion absent these warnings does not depend on particular facts:[43]

> [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.[44]

Thus, the *Miranda* compromise is clear: in the face of inevitable ignorance about volition, courts must presume that all interrogations are coercive unless the prescribed warnings are given.[45]

The *Quarles* Court reached a very different compromise. The majority was careful to insist that the record contained no charge of actual coercion but only of a *Miranda* violation; even in cases involving a threat to public safety, it held, a showing of actual coercion

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v. Washington, 373 U.S. 503 (1963); Gallegos v. Colorado, 370 U.S. 49 (1962); Reck v. Pate, 367 U.S. 433 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 94–104 (1966); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956); *see also* Driver, *supra* note 37, at 49 (sociologists are unable to predict the sensation of pressure from objective information because of the number and complexity of variables); Elsen & Rosett, *Protections for the Suspect Under* Miranda v. Arizona, 67 COLUM. L. REV. 645, 658 (1967) (arguing that when voluntariness of *Miranda* waiver is contested, "reality is wholly indeterminate and both versions may well be true").

[41] Miranda v. Arizona, 384 U.S. 436, 467 (1966).

[42] *See id.* at 445–58.

[43] *See* 104 S. Ct. at 2631; *id.* at 2635 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2647 (Marshall, J., dissenting).

[44] *Miranda*, 384 U.S. at 468–69 (citation omitted).

[45] This analysis has been the most common interpretation of *Miranda*; the warnings are merely "prophylactic." *See, e.g.*, *Quarles*, 104 S. Ct. at 2631; *id.* at 2635 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2647 n.7 (Marshall, J., dissenting); New Jersey v. Portash, 440 U.S. 450, 459 (1979); Michigan v. Mosley, 423 U.S. 96, 99–100 (1975); Harris v. New York, 401 U.S. 222, 224 (1971); Elsen & Rosett, *supra* note 40, at 647–49. Portions of the *Miranda* opinion, however, suggest a holding that custodial interrogation is *per se* — not merely presumptively — coercive. *See Miranda*, 384 U.S. at 458, 461.

warrants exclusion of evidence.[46] These five Justices are apparently confident that coercion can be shown in every case in which constitutional rights need to be protected, and thus they deem it fair to demand evidence of actual coercion in individual cases. Yet as the other two opinions point out,[47] the recognition from which *Miranda*'s presumption springs — that the human mind is ultimately impenetrable — pertains as much to questions involving public safety as to any others.[48]

After appearing to spurn the recognition underlying *Miranda*, the Court reversed its premises when addressing the problem of police motivation. Having suggested that a suspect's psychological experience can be determined after the fact, it proceeded to assume that the motivations of police officers cannot be so determined, or at least determined with enough certainty to ensure a broad application of the new exception:

> [T]he application of the exception . . . should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer. . . . [M]ost police officers . . . would act out of a host of different, instinctive, and largely unverifiable motives — their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence . . . .[49]

After acknowledging that these motivations are unknowable, the Court was nevertheless quick to paint a warm-toned picture of faithful and intelligent officers in order to dispel any worry about inaccurate or abusive application of the exception: "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."[50]

In this sense, *Quarles*'s epistemological structure parallels *Miranda*'s but with radically different components: under *Quarles*, the good faith motivation of the police officer is to be presumed in order to avoid too limited an application of the public safety exception, just as under *Miranda*, the coercion of the defendant is to be presumed in order to avoid too limited an application of the fifth amendment.[51]

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[46] *See* 104 S. Ct. at 2631 & n.5, 2633 n.7.

[47] *See id.* at 2636 (O'Connor, J., concurring in part and dissenting in part); *id.* at 2649 (Marshall, J., dissenting).

[48] *Quarles* nowhere confronts this conflict with *Miranda*, largely because it nowhere attempts an explanation of why that case required warnings. The opinion does suggest that the *Miranda* Court believed that warnings would "reduce the likelihood" of fifth amendment violations, 104 S. Ct. at 2632, but fails to specify why that fact should lead to a constitutional requirement of warnings.

[49] *Id.*

[50] *Id.* at 2633.

[51] Under the same line of analysis, Justice O'Connor's opinion is also in conflict with *Miranda* and internally inconsistent. Justice O'Connor purports to adhere to the earlier case and would

The two cases thus track two very different portraits of society. *Miranda* contemplates a victim in need of warnings and a police officer in need of restraint.[52] *Quarles* envisions an officer acting in good faith and a criminal suspect who has not been coerced until he convinces the court otherwise. And although the last presumption is theoretically rebuttable, *Quarles* has shifted to the suspect the risk that subjective states of mind cannot be objectively determined.[53]

Whether or not one regards *Quarles* as a contradiction of specific precedent, the question remains whether its conclusion or *Miranda*'s is the more warranted. As previously argued, the coercion — or lack of it — that a suspect feels during custodial interrogation is largely unknowable. *Miranda* forthrightly draws this conclusion. *Quarles* does not, yet the conclusion seems latent in aspects of the majority's opinion. The opinion nowhere explains why during "kaleidoscopic" situations such as arrests, the mental states of criminal suspects can be better known than those of police officers. Similarly, the majority nowhere explains why a desire "to obtain incriminating evidence" should be harder to detect than so metaphysical a notion as a "will overborne." The Court, then, cannot but rely on presumptions in painting its constitutional canvas.

To complete what is essentially a portrait from ignorance, the Court must draw on a legitimate source of inspiration. In *Quarles* and *Miranda*, the Court appeals to two distinct sets of values.[54] *Quarles* implicitly invokes the importance of preserving the public

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exclude the statement, yet she would not exclude the gun because it is only nontestimonial evidence "derived not from actual compulsion but from a statement taken in the absence of *Miranda* warnings." *Id.* at 2640 (O'Connor, J., concurring in part and dissenting in part). But *Miranda* equated a confession made in the absence of warnings with a coerced one because of the dangers of judicial ignorance and did not admit of the possibility of knowing of an uncoerced admission made after interrogation without warnings.

[52] *See Miranda*, 384 U.S. at 445–58 (description of manipulative police practices); *id. passim* (repeated incantatory assertion of the coercion inherent in custodial interrogation).

[53] Legally, of course, the subjective experience only of the suspect and not of the officer is relevant to the issue of coercion, and the majority would doubtless insist that factual establishment of the officer's good faith is less important than proof of coercion because they hold only that the objective need not to give warnings in certain situations outweighs the need to do so. But although motivation of police officers may not be directly relevant legally, it certainly is relevant to the Court's rationale: in its balancing, the Court presumes police officers who act in good faith and suspects who are not coerced, and thus shifts the burden of the risk of limited knowledge.

[54] Certain other obvious sources of inspiration are inadequate. The literal language of the fifth amendment will not suffice because it proscribes "compulsion" as a factual matter — precisely the difficulty. Alternatively, the Court could look to systematic probabilities. Yet although *Miranda* refers to police manuals and *Quarles* to a faith in police instincts, neither pretends to cite actual empirical studies, and for good reason: the studies are imperfect, *see, e.g.*, *Interrogations in New Haven*, *supra* note 38, at 1530–33; Medalie, Zeitz & Alexander, *supra* note 38, at 1355–60, the exact probabilities may shift frequently; and in any event, the numbers alone prescribe neither a legal definition of coercion nor the legal consequences to be drawn from a given probability.

safety to justify laying the risk of ignorance on the suspect. *Miranda*, by contrast, explicitly looks to the place of the fifth amendment in American law:[55] it insists that the right against compulsory self-incrimination is "fundamental to our system of constitutional rule."[56] As a result, police officers must as a rule employ objective procedural safeguards in order to ensure the prophylactic protection of the values that the *Miranda* Court saw as the underpinnings of the fifth amendment: the dignity of the individual and his right to a sphere of felt independence from the government. If the police fail to employ such safeguards, systematically doubtful questions of motivation must be resolved in favor of protecting the suspect's fifth amendment right, rather than in favor of enforcing less fundamental criminal laws.[57]

The *Miranda* approach seems more in line with traditional American jurisprudence. The Constitution is technically sovereign law only in the sense that its precise directives take precedence over other laws; but because of its primacy, it is also more significant than those other laws to the resolution of collateral issues such as presumptions of motivation. The *Miranda* holding, moreover, is part of an Anglo-American tradition of translating the right against coerced self-incrimination from subjective terms into objective procedural protections.[58] This translation has accompanied the further tendency of fifth amendment jurisprudence to focus on particular historical practices, rather than on investigation into the nature of the will as understood at any given time.[59] Most important, the *Miranda* Court looked to the values that it considered basic to the governing constitutional provision — the dignity of the individual, the right to autonomy from the state[60] — in order to develop its presumptions about motivation. It did not look, as the *Quarles* majority did, to extraconstitutional considerations — such as faith in the rectitude of government officials[61] — that are directly inimical to the spirit of the fifth amendment.

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[55] This may be what the dissent in *Quarles* means when it calls the *Miranda* rule a "constitutional presumption": it is drawn from values contained in the Constitution and thus is given full constitutional force.

[56] *Miranda*, 384 U.S. at 468.

[57] *See id.* at 460.

[58] *See, e.g., id.* at 486–87 (discussing English Judges' Rules); Kamisar, *supra* note 40, at 73–75 (noting that the 1849 Code of Criminal Procedure submitted by the New York Commissioners on Practice and Pleading recommended warnings for reasons virtually identical to some of those offered in *Miranda*); sources cited *supra* note 30 (privilege against self-incrimination arose as a bar to certain procedural abuses).

[59] *See, e.g., Miranda*, 384 U.S. at 458–66; *id.* at 526–27 (White, J., dissenting); Ullmann v. United States, 350 U.S. 422, 438 (1956) ("The privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is worth a volume of logic.'"); *id.* at 446–53 (Douglas, J., dissenting); Chambers v. Florida, 309 U.S. 227, 237–38 (1940).

[60] *See supra* p. 150.

[61] *See Ullmann*, 350 U.S. at 428 ("Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."); *Chambers*, 309 U.S. at 241 ("Today, as in ages past, we are not

Unfortunately, the argument sketched here may remain undeveloped because the majority never explicitly considered any of the risks of limited knowledge as they relate to defendants and so never invited discussion of the question. The Court insisted that it was balancing not a constitutional right, but only a subordinate judicial creation called "*Miranda* rights."[62] This sleight of hand conceals the real issue: if motivation in "spontaneous" moments is — in the majority's own words — "largely unverifiable," what set of values is fundamental enough to serve as a surrogate for a factual determination of coercion? Although *Quarles* implicitly acknowledges the necessity of answering the question, it attempts no explicit answer. Yet if the *Miranda* conclusion is the right one, then the majority has balanced away real fifth amendment rights, which even the majority implicitly conceded cannot be balanced.[63] The majority comforted itself with its own canvas of presumptions — one in which a confession, albeit in violation of *Miranda*, is not unconstitutionally coerced. But in claiming that it is only an observer and not the creator of that canvas, the Court obscures the fact that it has chosen to favor ensuring successful prosecutions over ensuring constitutional rights.

6. Rights of Prisoners and Pretrial Detainees. — In 1979, in *Bell v. Wolfish*,[1] the Supreme Court rejected constitutional attacks on various jail policies involving the treatment of pretrial detainees.[2] The *Wolfish* Court affirmed that incarcerated persons retain certain constitutional rights,[3] but held that courts examining detainees' claims must accord administrators of correctional institutions "wide-ranging deference in the adoption and execution of policies and practices that

without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.").

[62] *See* 104 S. Ct. at 2631 & n.5.

[63] *See id.* at 2631 n.5; *see also* New Jersey v. Portash, 440 U.S. 450, 459 (1979) ("Balancing [the fifth amendment] . . . is impermissible."). Even if the Court were to hold that fifth amendment rights can be balanced, conventional constitutional analysis suggests that the public interest on the other side of the scale would have to be "compelling" or at least "substantial" to be "overriding." To find such an interest on the facts of *Quarles*, the majority would have had to insist — in the absence of any such finding below — not only that the gun created a substantial or compelling danger, but also that the alternative — excluding the evidence at the risk of losing the misdemeanor conviction of a defendant who could presumably also be prosecuted for rape — also created such a danger.

[1] 441 U.S. 520 (1979).

[2] *See id.* at 533–61.

[3] *See id.* at 545. In the 1974 case of Wolff v. McDonnell, 418 U.S. 539 (1974), the Court forcefully disavowed the so-called "hands off" attitude that had traditionally led state and federal courts to deny jurisdiction over claims involving prison conditions. The *Wolff* Court stated that "though [a prisoner's] rights may be diminished by the needs and exigencies of the