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The *Quarles* Public Safety Exception in Terrorism Cases: Reviving the Marshall Dissent

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I. Introduction

In the wake of the attempted car bombing in New York's Times Square on May 1, 2010, the decision to read *Miranda* warnings to the suspect, Faisal Shahzad, ignited a national debate. Republican leaders, such as Senator John McCain, denounced the application of *Miranda* warnings.[1] Senator Christopher Bond, the ranking Republican on the Senate Intelligence Committee, criticized those who prioritized "protecting the privacy rights of these terrorists" over intelligence gathering.[2] Representative Peter T. King, the ranking Republican on the House Homeland Security Committee, argued that terrorism suspects should be deemed enemy combatants and "the first preference should be a military commission because you can get more information."[3] While some conservative commentators, such as Glenn Beck, supported *Miranda* rights for U.S. citizens,[4] Senator Joseph Lieberman called for legislation that would deprive Americans of their citizenship and related rights "when they are apprehended and charged with a terrorist act."[5]

The Obama administration's approach to the Shahzad controversy evolved over time. Following his inauguration, President Obama issued an executive order banning any interrogation techniques not already authorized in the U.S. Army Field Manual and creating an interagency task force on interrogation.[6] The task force recommended the creation of the High-Value Detainee Interrogation Group (HIG), a specialized interagency group that would be housed within the FBI and subject to the oversight of the National Security Council.[7] The primary goal of the group would be gathering intelligence, as well as, "where appropriate, to preserve the option of gathering information to be used in potential criminal investigations and prosecutions."[8] Although members of the HIG assisted with the questioning of Faisal Shahzad,[9] the task force's recommendations did not reference *Miranda* rights.[10]

The White House and Democratic leaders initially supported the decision to read Shahzad his *Miranda* rights, as they had done in previous controversies.[11] Democrats focused on the decision's practical effects, maintaining that the *Miranda* warnings did not impede law enforcement efforts.[12] Representative Adam Smith explained, "We have proven in this country for a long, long time that you can get very valuable information out of people after you Mirandize them."[13] Despite an initially strong stance on *Miranda* rights, however, in May 2010, Attorney General Eric H. Holder Jr. requested legislation that would allow investigators greater flexibility to interrogate terrorist suspects without informing them of their rights.[14] In a reference to *New York v. Quarles*, which established a public safety exception that permits law enforcement officials to temporarily interrogate suspects without advising them of their *Miranda* rights when "reasonably prompted by a concern for public safety,"[15] Holder asked that the legislature expand the public safety exception in terrorism-related cases.[16]

Although the administration did not produce a proposal and no such legislation was enacted, the Federal Bureau of Investigation issued a memorandum, dated October 21, 2010, that effectively implemented Holder's suggestions.[17] The FBI Memorandum detailed FBI policy regarding the use of *Miranda* warnings for custodial interrogations of operational terrorists who have not been indicted and are not represented by an attorney.[18] In accordance with the *Quarles* public safety exception, it advised agents to ask questions that "are reasonably prompted by an immediate concern for the safety of the public or the arresting agents" before administering *Miranda* warnings.[19] The FBI Memorandum instructed agents, in exceptional cases, to proceed with continued unwarned interrogation after exhausting the relevant public safety questions when "necessary to collect valuable and timely intelligence not related to any immediate threat."[20] The agents were advised to first consult with supervisors on

the understanding that "the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation," including the suppression of the resulting statements at trial.[21]

Finally, the FBI Memorandum proposed that "[i]n light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of the attacks," the interrogation of an operational terrorist "may warrant significantly more extensive public safety interrogation without Miranda warnings than would be permissible in an ordinary criminal case."[22]

Civil liberties and human rights organizations responded with dismay. A coalition of thirty-five organizations sent a letter to Holder stating, "[c]urrent law provides ample flexibility to protect the public against imminent terrorist threats while still permitting the use of statements made by the accused in a criminal prosecution."[23] The coalition argued that an expansion of the public safety exception "would undercut our fundamental Fifth Amendment rights for no perceptible gain."[24]

This Article will address the legal foundations of the current debate over the *Miranda* rights of terrorist suspects, focusing on the proposed expansion of the *Quarles* public safety exception. Part II will discuss the development of the *Miranda* doctrine, the emergence of the public safety exception, and the impact of the *Dickerson* decision. Part III will address the current scope of the public safety exception, including the circuit split over the standard for both the factual basis for the concern and the immediacy of the threat. Part IV will consider additional exceptions to the *Miranda* doctrine, such as the admissibility of derivative evidence, the use of statements for impeachment purposes, certain types of overseas interrogations, and the public safety exception in the context of the *Edwards* rule, which requires that questioning halt after suspects invoke their right to an attorney. In light of these standards, Part V considers the application of the current public safety exception to three high profile terrorism cases: the 2008 coordinated bombing and shooting attacks in Mumbai, the 2009 Christmas day bombing attempt of a Detroit-bound airplane, and the 2010 attempted car bombing in New York's Times Square. Finally, Part VI returns to Justice Marshall's dissent in *Quarles* as support for this Article's conclusion that the public safety exception should not be expanded. Where law enforcement officials determine that immediate questioning is needed, they may, of course, do so; this does not require, however, altering *Miranda*'s prohibition on the introduction of such statements at any criminal trial of the person questioned.

II. The Development of the *Miranda* Doctrine

A. The Development of the *Miranda* Doctrine

The Supreme Court's seminal *Miranda v. Arizona* decision[25] was the culmination of a decade's long struggle to define the meaning of an "involuntary" confession. The Court's previous jurisprudence primarily applied a "voluntariness doctrine" in the context of the Due Process Clause of the Fourteenth Amendment.[26] The doctrine considered the totality of the circumstances to determine whether the defendant's power of resistance was overcome by an excessively coercive interrogation.[27] However, there was no "talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen."[28] Rather, the Court has considered a multitude of factors, such as the condition of the suspect, isolation from others, the character of the police conduct, and the length of the interrogation.[29] As described by Steven Penney, the Court's pre-*Miranda* jurisprudence was uneven and alternatively dominated by three, sometimes overlapping, themes: the unreliability of confessions under questionable circumstances, deterring abusive police practices, and protecting the autonomy of the individual suspect.[30]

The challenges of the voluntariness doctrine reflected the Court's "internal disagreements concerning the proper balancing of the interests of suspect and society."[31] In two cases in 1964, the Court began to take a different approach.[32] In *Massiah v. United States*[33] and *Escobedo v. Illinois*,[34] the Court invalidated two confessions under the Sixth Amendment right to counsel.[35] Instead of requiring law enforcement officials to refrain from unlawful interrogation practices, the Court imposed an affirmative obligation to provide counsel to the suspect.[36] The majority in *Escobedo* was clear about the decision's practical effect on law enforcement efforts, stating:

> No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[37]

Shortly after the *Massiah and Escobedo* decisions, the Supreme Court again reconsidered its confessions jurisprudence in *Miranda v. Arizona.*[38]

In *Miranda v. Arizona*, the Court changed course, signaling clearer reliance on the Fifth Amendment right against self-incrimination.[39] In a 5-4 decision, the Court held that a custodial interrogation is inherently coercive and thus, "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."[40] These procedural safeguards include warnings of (1) the right to remain silent, (2) the possibility that statements can and will be used against the suspect in court, (3) the right to confer with counsel before answering questions and to have counsel present, and (4) the right of indigent suspects to appointed counsel.[41] The dissenting justices strongly rejected the constitutional basis for the decision,[42] which held that the scope of "compulsion" under the Fifth Amendment is broader than "coercion" prohibited under the Due Process Clause, and which imported a right to counsel, addressed in the Sixth Amendment, into the Fifth Amendment.[43] Justice Harlan warned that the decision "entails harmful consequences for the country at large,"[44] predicting that the effect of new warnings would be to "negate all pressure, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all."[45]

B. The *Quarles* Public Safety Exception

While the dissenters in *Miranda* predicted that dire consequences would result from its strict application,[46] the Court soon limited its reach with a series of exceptions.[47] In *Harris v. New York*,[48] for example, the Court allowed the use of unwarned statements to impeach a defendant.[49] Shortly thereafter, in *Michigan v. Tucker*,[50] the Court held that derivative evidence from unwarned statements are admissible.[51] Most notably for this discussion, in *New York v. Quarles*, the Court created a public safety exception to *Miranda* warnings.[52]

In *New York v. Quarles*, a young woman told police officers that she had been raped and provided a description of the rapist, including a statement that the accused had just entered a supermarket carrying a gun.[53] The officers apprehended the defendant in the supermarket and frisked him, discovering that his shoulder holster was empty.[54] Three officers were present, and after handcuffing the defendant, one officer asked him where the gun was.[55] The defendant nodded towards some empty cartons and responded, "[T]he gun is over there."[56] The officer retrieved a loaded .38-caliber revolver, placed the defendant under arrest, and read him his *Miranda* rights.[57] The defendant waived his rights, confirmed that he owned the gun, and stated the place of purchase.[58] At trial, the Supreme Court of New York excluded the defendant's initial statement, "the gun is over there," as well as the gun itself, reasoning that the officer had not read the defendant his *Miranda* warnings.[59] The trial court also excluded the defendant's subsequent statements as evidence tainted by the prior *Miranda* violation.[60]

The Supreme Court reversed, finding that the case presented a "situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rule enunciated in *Miranda*."[61] Justice Rehnquist, writing for the majority, engaged in a balancing test of the rights of the defendant with the social cost of *Miranda* warnings, which he cautioned might deter a suspect from responding to police questioning.[62] Noting that the primary social cost of *Miranda* warnings is generally the possibility of fewer convictions, he argued that here the cost would be the failure to obtain information necessary "to insure that further danger to the public did not result from the concealment of the gun in a public area."[63] Thus, the application of the *Miranda* doctrine without exception would

> [P]lace officers . . . 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 *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.[64]

Considering these practical effects, the majority concluded that absent actual coercion by the officer, there was not a constitutional imperative to exclude evidence resulting from such public safety questioning without Miranda warnings.

Considering these practical effects, the majority concluded that absent actual coercion by the officer, there was not a constitutional imperative to exclude evidence resulting from such public safety questioning without *Miranda* warnings.[65] The Court limited this *Miranda* exception to situations where law enforcement officials are "reasonably prompted by a concern for the public safety,"[66] and when, distinguishing from *Orozco v. Texas*,[67] there is "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime."[68] The test is objective rather than subjective, and the "availability of that exception does not depend upon the motivation of the individual officers involved."[69]

In a strongly worded dissent, Justice Marshall rejected the factual assumption that the public was at risk during

the interrogation, noting that the defendant was unarmed, handcuffed, and surrounded by four officers and that the store was deserted at the time.[70] He also objected to the application of a balancing test at all and to the majority's characterization of the *Miranda* decision.[71] Justice Marshall argued that the social costs or benefits of *Miranda* warnings did not inform the *Miranda* decision, which was instead "concerned with the proscriptions of the Fifth Amendment."[72] He condemned the majority's "chimerical quest for public safety," for creating an inevitably confusing and controversial exception at the expense of the clarity of the *Miranda* decision.[73]

Instead, Justice Marshall maintained that public safety could be protected without abridging a suspect's Fifth Amendment rights.[74] He stated:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in Miranda v. Arizona proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.[75]

Justice Marshall conceded that there was a potential cost to his approach if a defendant's incriminating statements were excluded and the state had no independent proof of guilt.[76] He questioned, however, how often such statements would constitute "the crucial and otherwise unprovable element of a criminal prosecution."[77] Regardless of the frequency of such incidents, he maintained that "their regularity is irrelevant": the Fifth Amendment absolutely prohibits self-incrimination whether or not the testimony is compelled to protect public safety.[78]

The Dickerson Decision and the Future of Post-Miranda Jurisprudence

The language in *Quarles* raised questions about the constitutional basis of the *Miranda* decision—namely whether *Miranda* warnings are themselves constitutionally requisite, or are merely "prophylactic" rules protecting constitutional rights.[79] The public safety exception to the warnings, and similar exceptions for impeachment purposes[80] and derivative evidence,[81] seemed to indicate that they were not mandated by the Constitution. Furthermore, the Court repeatedly described *Miranda* as a prophylactic decision that "sweeps more broadly than the Fifth Amendment itself."[82] In 2000, the Court had the opportunity to reconsider its *Miranda* decision. Two years after the *Miranda* decision, an indignant Congress had responded by enacting the Omnibus Crime Control and Safe Streets Act of 1968.[83] Section 3501 of the act made all unwarned but voluntary statements by criminal suspects admissible in federal court, returning to a pre-*Miranda* totality of the circumstances standard.[84] The statute lay dormant until 1999, when the U.S. Court of Appeals for the Fourth Circuit revived Section 3501 to admit a criminal defendant's statement.[85] The Fourth Circuit held that Section 3501 overruled *Miranda* as it applied to federal law enforcement officers, and thus unwarned confessions that met the totality of circumstances test were admissible.[86] The Supreme Court decided to review the decision and—to the surprise of many—reaffirmed the constitutional status of *Miranda*.[87]

In *Dickerson v. United States*,[88] a 7-2 majority of the Court held that, "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress."[89] Chief Justice Rehnquist, who had previously authored several opinions describing the warnings as prophylactic,[90] "concede[d] that there is language in some of our opinions that supports the view" that the warnings are not constitutionally requisite.[91] However, he looked to the Court's consistent application of the *Miranda* requirement to the states over which it has no supervisory power[92] and to the principles of stare decisis to ultimately determine that *Miranda* is a constitutional decision that should not be overturned.[93] Rather, the *Miranda* warnings had "become part of our national culture."[94]

In his dissent, Justice Scalia objected to the majority's attempt to reconcile the numerous exceptions to *Miranda* with its decision.[95] He argued that, "if confessions procured in violation of *Miranda* are confessions 'compelled' in violation of the Constitution, the post-*Miranda* [decisions with exceptions] do not make sense."[96] In response, the majority asserted the constitutional underpinnings of *Miranda*, but acknowledged its inherent flexibility. Recognizing the exceptions to the rule, Chief Justice Rehnquist, albeit in dicta, stated:

> [N]o constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases [setting out exceptions to *Miranda*] are as much a normal part of constitutional law as the original decision.[97]

The *Dickerson* decision created some uncertainty as to the future of the *Miranda* exceptions. As Justice Scalia noted, the majority never explicitly stated whether *Miranda* warnings are themselves constitutionally required,[98] yet the majority's description of *Miranda* as a "constitutional decision" was at odds with the prophylactic line of cases.[99] As stated by Professor George C. Thomas III, "[i]f *Miranda* is best understood, in light of Dickerson, as constitutional in the strong sense, the exceptions and doctrinal limitations made on the authority of the prophylactic theory seem doomed."[100] However, the majority in *Dickerson* indicated — in dicta, but in dicta that was "subscribed to by a formidable majority of seven on the Supreme Court"[101] — that the status quo would continue despite its internal contradictions.[102] That is, *Dickerson* appeared to reaffirm both *Miranda* and the exceptions to *Miranda*'s rules

that the Court had adopted in its previous cases.[103] While the Court has not yet revisited this issue, lower courts have continued to apply the public safety exception after the *Dickerson* decision.[104] Thus, it remains likely that, "although Dickerson seemingly repudiated the premises on which some Miranda-debilitating decisions are based, the exceptions to Miranda will remain in place."[105]

III. Current Scope of the *Quarles* Public Safety Exception

While lower courts have continued to apply the *Quarles* public safety exception in the wake of the *Dickerson* decision, there has been a divergence among the circuits in articulating the relevant standards. The *Quarles* majority limited the public safety exception to situations where officials are "reasonably prompted by a concern for the public safety,"[106] and when there is "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime."[107] The Courts of Appeals, however, have differed in their requirements of both the factual basis for the concern and the immediacy of the threat.[108] The magnitude of the threat has not been a significant factor in any circuit decision.

A. Inherently Dangerous Situations

The Seventh, Ninth, First, and Eight Circuits have applied the *Quarles* doctrine in inherently dangerous situations even when the officers did not have actual knowledge of the presence of a weapon, nor a specific reason to believe that the weapon's presence presents a danger to law enforcement officials or the general public. For example, in *United States v. Edwards*,[109] the Seventh Circuit considered an arrest involving known drug dealers.[110] The defendant and his passengers had been arrested on narcotics charges, frisked, and handcuffed at the time an officer asked if they had firearms.[111] Edwards replied, "What do I need a gun for," since he was en route to a restaurant.[112] The Seventh Circuit affirmed the admissibility of his statements, finding that the officers had an "objectively reasonable need" to protect themselves "from any immediate danger that a weapon would pose" because "drug dealers are known to arm themselves."[113]

The Eighth Circuit has taken a similar approach in applying the public safety exception to inherently dangerous situations. In *United States v. Williams*,[114] the defendant was arrested at his apartment on narcotics charges.[115] After securing the premises, the officers handcuffed Williams and asked him, "[I]s there anything we need to be aware of?"[116] Williams told them that there was a gun in a closet.[117] The court found that *Quarles* applied because the officers "could not have known if any armed individuals were present in the apartment or preparing to enter the apartment within a short period of time," or "whether other hazardous weapons were present in the apartment that could cause them harm if they happened upon them unexpectedly or mishandled them in some way."[118] At the time of the questioning, however, the apartment had been secured,[119] and the only information to support the presence of a weapon was the defendant's status as a narcotics dealer and that he had "at one time" been accused of being a fugitive from a charge involving use of a weapon.[120]

The Ninth Circuit has not required actual knowledge of a threat or its immediacy. Instead, contrary to *Quarles*,[121] the court has focused on the motivations of the officers. In *United States v. Brutzman*,[122] ten officials executed a search warrant related to suspected mail and wire fraud.[123] The officers asked the defendant if any weapons were on the premises, and the defendant admitted there was a shotgun in the closet.[124] The court focused exclusively on whether the officer's questions "'arose from his concern with public safety' and 'his desire . . . 'to obtain evidence of a crime.'"[125] Noting the scope of the questioning,[126] and that the presence of a weapon was completely unrelated to the charge of mail and wire fraud, the court found that the questions had a public safety purpose and fell within the *Quarles* exception.[127] The Ninth Circuit did not consider whether the officers had actual knowledge of the presence of a weapon, or the immediacy of a threat.[128] The court has asserted that "a pressing need for haste is not essential" in determining whether the public safety exception applies.[129]

The First Circuit similarly ignores the immediacy of the threat as a factor. In *United States v. Fox*,[130] the defendant was pulled over during a traffic stop.[131] The officer recognized the defendant from a previous arrest that had included brass knuckles and a concealed firearm, and noticed "a large bulge" in his coat pocket.[132] The officer frisked the defendant, revealing brass knuckles and an unused shotgun shell.[133] The officer asked if there was a gun in the car, which the defendant denied.[134] After the defendant was in the police car, the officer asked again about weapons, and the defendant gave their location.[135] The court concluded that the brass knuckles and shotgun shell provided actual knowledge of a threat, and found that the officer had "ample knowledge to fear for his own safety" to justify the *Quarles* exception even though the officers had secured the vehicle.[136]

These positions have created some division within the federal courts. For example, in a concurring opinion, Judge Raymond Gruender on the Eighth Circuit took issue with the majority's neglect of the immediacy requirement.[137] While ultimately concurring with the majority, out of deference to circuit precedent, Judge Gruender noted that the *Quarles* majority explicitly denounced extending the exception to the mishandling of weapons in its discussion of the *Orozco* decision.[138] Although *Orozco* also involved a missing gun,[139] the *Quarles*

Court distinguished the case because there was no "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime."[140] Judge Gruender suggested that a fair reading of the *Quarles* opinion would limit the exception to situations where "(1) an immediate danger to the police officers or the public exists, or (2) when the public may later come upon a weapon and thereby create an immediately dangerous situation."[141] As seen below, this position has been adopted by other Courts of Appeals.

B. Reasonable Factual Basis and Immediacy of the Threat

In contrast to the positions of the other circuit courts, the Sixth, Tenth, Fourth, Fifth, and Second Circuits have adopted a narrower public safety exception to *Miranda* warnings. As summarized by Judge Lynch, the decisions of these courts are more likely to rest "on *specific* reliable information that a weapon was present, and a *specific* reason to think that the location of the gun posed a concrete danger to the public."[142]

The Sixth Circuit has created a formal test for applying the public safety exception. As established in *United States v. Williams*,[143] and later adopted by the Tenth Circuit,[144] the court limits the exception to situations where an officer has a "reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it."[145] The knowledge must be based on "articulable fact[s] at [the officer's] disposal" at the time.[146] Factors satisfying the first prong may include whether the suspect had a history of violence, was involved with drugs, exhibited evidence of a weapon, or had recently been seen with a weapon.[147] The second prong is more difficult to establish because the factual circumstances are more limited.[148] For example, the court in *Williams* explained that the exception might apply if the defendant were unrestrained and heading towards the possible location of a weapon.[149] If a defendant were handcuffed and out of reach of a weapon, however, the officers "plainly could not have had an objectively reasonable fear for their safety," and the exception would not apply.[150]

The Fourth Circuit has taken a similar approach in earlier cases. In *United States v. Mobley*,[151] the court considered an arrest where agents asked whether "there was anything in the apartment that could be of danger to the agents who would be staying to conduct the search warrant, such as a weapon."[152] Since the apartment had been secured and Mobley was the only person present besides the agents, the court found that there was "no demonstration of an 'immediate need' that would validate protection under the *Quarles* exception."[153] Analogous to the second prong of the Sixth Circuit's test in *Williams*,[154] the Fourth Circuit held that "[a]bsent other information, a suspicion that weapons are present in a particular setting is not enough, as a general matter, to demonstrate an objectively reasonable concern for immediate danger to police or public."[155] Noting that *Quarles* is "an *exception* to the *Miranda* rule," the court warned against applying it in "an ordinary and routine arrest scenario."[156]

There is no doubt that while a loaded handgun in a crowded supermarket or in the possession of an unrestrained accomplice may threaten the safety to the general public or officers on the scene, a terrorist in possession of a dirty bomb presents a threat of a different nature.

The Fifth Circuit has addressed related concerns, limiting its application of the public safety exception. In *United States v. Raborn*,[157] police officers pulled over a narcotics suspect.[158] The defendant stepped out of his truck wearing a holstered pistol, which an officer saw him remove and place inside the truck.[159] The officers, who were unable to find the gun, asked the defendant where it was located and he stated that it was under the seat cover.[160] As the officers were aware of the presence of the gun, the court focused on the immediacy of the threat.[161]

Since the officers had seized the truck and there was no immediate danger of someone other than police gaining access to the weapon, the court held that the *Quarles* exception did not apply.[162] Since the *Raborn* decision, the Fifth Circuit has firmly held that "[w]hen the danger inherent in a confrontation has passed, so has the basis for the [public safety] exception."[163]

Finally, the Second Circuit requires "sufficient indicia supporting an objectively reasonable need to protect the police or the public from immediate harm."[164] For example, in *United States v. Estrada*,[165] officers executed an arrest warrant for a drug dealer with a criminal record that included assault convictions.[166] After handcuffing the suspect, an officer asked about the location of any weapons, and the defendant stated that there was a gun in the pocket of a jacket.[167] For actual

knowledge, the court looked to the defendant's criminal history, which showed that he "was capable of violence," and his status as a drug dealer and concluded that it was a reasonable inference that weapons were present in the apartment.[168] Regarding immediacy, the court found this existed in the officers' knowledge that an additional person, a co-resident of the apartment, was also present during the arrest.[169]

C. Magnitude of the Threat

Since the majority of cases involving a public safety exception to *Miranda* involve missing firearms, there has been little discussion of whether the magnitude of the threat affects the *Quarles* analysis. Thus, the proposal in the FBI memorandum that the public safety exception be expanded based on "the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks"[170] presents a novel argument. There is no doubt that while a loaded handgun in a crowded supermarket or in the possession of an unrestrained accomplice may threaten the safety to the general public or officers on the scene, a terrorist in possession of a dirty bomb presents a threat of a different nature.

The few cases addressing such scenarios have not explicitly taken into consideration the magnitude of the potential threat. For example, in *United States v. Khalil*, discussed in greater detail in Part V, the Second Circuit considered the questioning of an accused terrorist with respect to a bomb that was discovered in his apartment.[171] The court's discussion of the *Quarles* exception was limited to the officer's questioning of the defendant as to whether he intended to kill himself in the bombing, reasoning that the defendant's "vision as to whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability."[172] Since the questioning was supported by an objectively reasonable need to protect the police and the public from a specific, imminent threat—the agents were already in possession of a ticking time bomb—the public safety exception applied. As noted later by Judge Lynch in *Jones*, "In *Khalil,* the exigent risks to public safety were more extreme even than in *Quarles* itself, and the Court made clear that the acceptability of the questioning was to be tested in light of its relevance to that exigency."[173] Thus, despite the interests at stake, the court focused on the nexus between the questioning and the specific threat, and did not address whether the magnitude of the threat alone justified an expansion to the exception.[174]

The court's framework may determine the magnitude of the potential threat on the court's reasoning in future cases. Courts that apply the *Quarles* doctrine in inherently dangerous situations might consider the magnitude of the threat as relevant to determining the nature of the situation. For example, courts that have relied primarily on the defendant's status as a known drug dealer to apply a public safety exception without knowledge of the presence of a weapon or a reason to believe that the weapon presents a danger,[175] would take a similarly expansive approach to a suspect's status as a known terrorist. In contrast, courts that have applied a narrower exception are more likely to continue to require both actual knowledge of a specific threat as well as a reason to believe that the threat poses an immediate danger to the public regardless of its magnitude. Since many of these cases, including *Khalil*, were decided before the September 11, 2001 attacks,[176] however, it remains to be seen whether courts will adapt these standards when considering the magnitude of the threat in future terrorism cases.

IV. Additional Exceptions to the *Miranda* Doctrine

The *Quarles* public safety exception is one of only several other exceptions to the *Miranda* doctrine. For example, even where a statement is excluded from the Government's case-in-chief based on improper *Miranda* warnings, the statement may be used for impeachment purposes if the defendant testifies.[177] Additionally, there is no "fruit of the poisonous tree" rule for *Miranda* violations,[178] and hence any derivative evidence may be introduced in the prosecution's case-in-chief. Furthermore, *Miranda* generally does not apply to interrogations conducted by foreign officials.[179] Finally, if a suspect invokes his *Miranda* rights, a public safety exception may still apply to the resulting statements and derivative evidence when there are exigent circumstances.[180]

A. Admissibility for Impeachment Purposes

A statement that is inadmissible under *Miranda* may nonetheless be introduced to impeach the defendant's testimony.[181] Such an exception was seemingly rejected by the *Miranda* Court, which said that the rules applied to all improperly obtained statements, including "direct confessions," "statements which amount to 'admissions' of part or all of an offense," or "statements alleged to be merely 'exculpatory.'"[182] The Court noted that allegedly exculpatory statements are often used to impeach the defendant's testimony at trial, finding that "[t]hese statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement."[183]

In 1971, however, the Court established an exception for impeachment use of statements taken in violation of *Miranda*.[184] In *Harris v. New York*,[185] a police officer failed to fulfill the *Miranda* requirements when he failed to warn the suspect he had a right to appointed counsel if he could not afford counsel.[186] At trial, the prosecution conceded that the resulting statements were not admissible and made no effort to use them

in its case-in-chief.[187] The prosecution used the statements for impeachment of the defendant, however, and the jury was instructed that it should consider these statements "only in passing on [the defendant's] credibility and not as evidence of guilt."[188] The Court held that the prosecution's use of the statement to impeach the defendant's testimony was permissible.[189]

Harris was met with controversy at the time,[190] nonetheless the Court has since reaffirmed its position.[191] Justice Marshall acknowledged the vitality of the *Harris* decision in his dissent to *Quarles*, emphasizing the jury instructions that the statement not be considered as evidence of guilt.[192] While courts have disagreed over impeachment use when law enforcement officials deliberately violated the *Miranda* rule,[193] the impeachment exception remains valid.[194]

B. Admissibility of Derivative Evidence

The Court held, pre-*Dickerson*, that the failure to give a suspect *Miranda* warnings does not require the suppression of the physical fruits of the suspect's unwarned but voluntary statements.[195] For example, the Court permitted the introduction of testimony from a witness discovered solely because of an unwarned statement in *Michigan v. Tucker*,[196] and a written confession obtained after *Miranda* warnings cured a previous unwarned interrogation in *Oregon v. Elstad*.[197] Since these rulings were based on a prophylactic view of the rules rejected in the *Dickerson* decision, the future of the derivative evidence exception seemed unclear immediately after *Dickerson*, even though, *Dickerson,* in dicta, reaffirmed both *Miranda* and the exceptions to *Miranda*.[198]

The Court resolved the confusion over the continued legitimacy of the derivative evidence exception in *United States v. Patane*.[199] In *Patane*, an officer attempted to advise the defendant of his *Miranda* rights, but the defendant interrupted, asserting that he knew his rights.[200] The officer then asked about the location of the defendant's pistol, and retrieved it.[201] The Tenth Circuit affirmed the suppression of the pistol, reasoning that *Tucker* and *Elstad* were incompatible with the *Dickerson* ruling.[202] The Supreme Court reversed, finding that the Self-Incrimination Clause is not implicated by the admission into evidence of the physical fruit of an unwarned but otherwise voluntary statement.[203] Adopting a distinction between testimonial and non-testimonial evidence that had been advocated by Justice O'Connor in her concurring opinion to *Quarles*,[204] the Court in *Patane* held that "'the word 'witness' in the constitutional text limits the' scope of the Self-Incrimination Clause to testimonial evidence."[205] Thus, "the exclusion of unwarned statements . . . is a complete and sufficient remedy" for *Miranda* violations,[206] and the Self-Incrimination Clause is not violated by the introduction of non-testimonial evidence obtained as a result of the statements, including Patane's pistol.[207] The Court stated that "nothing in *Dickerson,* including its characterization of *Miranda* as announcing a constitutional rule," changed any of its observations.[208]

The ruling in *Patane* is limited, however, to physical fruit of otherwise voluntary statements that were taken without full *Miranda* warnings.[209] Significantly for terrorism cases, evidence derived from statements made under duress—that is, statements that are coerced—is not admissible, prohibited not by *Miranda*, but by the text of the Fifth Amendment itself.[210] For example, just this year, in *United States v. Ghailani*,[211] a judge in the District Court for the Southern District of New York had before him a defendant charged with supplying the explosives used to bomb U.S. embassies in Tanzania and Kenya more than a decade ago.[212] The defendant alleged that he had suffered physical and psychological abuse at the hands of his interrogators, and the Government asked the court to assume for the purposes of the motion that the defendant's statements while in CIA custody were coerced in violation of the Fifth Amendment.[213] Judge Kaplan held that the testimony of a witness whom the government identified from Ghailani's statements was not admissible.[214] In cases where a statement is obtained through coercion, the court held, the Fifth Amendment prohibits the use of the statement or any derivative evidence—testimonial or non-testimonial—unless the evidence "'has been come at . . . instead by means sufficiently distinguishable to be purged of the primary taint.'"[215]

C. Admissibility of Statements to Foreign Officials

While the Supreme Court has not addressed the extraterritorial application of the *Miranda* doctrine, lower courts have held that some form of *Miranda* warnings is required for overseas custodial interrogations conducted by American officials,[216] albeit with some disagreement over the scope of the protections.[217] The courts have not, however, applied *Miranda* to overseas interrogations conducted by foreign officials unless there was substantial participation by U.S. personnel. But, if the interrogation tactics are so severe as to "shock the judicial conscience," the resulting statements are coerced in violation of the Fifth Amendment and are inadmissible.[218]

To determine whether there has been substantial participation of American officials, courts have applied the joint venture doctrine.[219] The first prong of the doctrine provides that "evidence obtained through activities of foreign officials, in which federal agents substantially participated and which violated the accused's Fifth Amendment or *Miranda* rights, must be suppressed in a subsequent trial in the United States."[220] The second prong prevents U.S. officers from using local agents to perform a custodial interrogation "in order to circumvent the requirements of *Miranda*."[221] Demonstrating that the foreign officials had their own interest in the matter may satisfy this requirement.[222]

The precise requirements of the joint venture test remain unclear. While the presence of U.S. officials at an interrogation is not sufficient unless they participate in some way,[223] there is not a clear standard for the requisite level of participation. For example, in *United States v. Abu Ali*,[224] the Fourth Circuit split on whether there was a joint venture.[225] Saudi Arabian officials had interrogated the defendant using some of the questions supplied by U.S. officials.[226] Noting that the Saudi interrogators "determined what questions would be asked, determined the form of the questions, and set the length of the interrogation," thus remaining in control of the investigation,[227] Judges Wilkinson and Traxler were convinced that the American officials were not trying to evade the strictures of *Miranda*.[228] They also argued that a broad application of *Miranda* protections would frustrate allies, creating an "unwarranted hindrance to international cooperation."[229] In contrast, Judge Motz found that providing the questions to be asked by cooperating foreign officials constituted sufficient participation to establish a joint venture.[230] She cautioned that the majority's view "permits United States law enforcement officers to strip United States citizens abroad of their constitutional rights simply by having foreign law enforcement officers ask the questions."[231]

While *Miranda* warnings do not apply to overseas interrogations conducted by foreign officials, the resulting statements are inadmissible if they have been coerced in violation of the Self-Incrimination Clause or the Due Process Clause. U.S. courts conduct a voluntariness analysis to determine whether the defendant's due process rights have been violated.[232] When the interrogation tactics were so severe as to "shock the judicial conscience," the court may exclude the resulting evidence.[233] In very rare cases, coercive interrogations by foreign officials may taint later interrogations by U.S. officials, even when they first administer *Miranda* warnings.[234] Given the standard's high bar, which is generally limited to tactics amounting to torture, and the evidentiary challenges of proving acts committed overseas in environments controlled by foreign officials, most defendants are unlikely to meet this burden. Courts have become increasingly open to the participation of foreign officials, taking novel steps such as allowing for a live, two-way video link for overseas depositions of foreign officials.[235] The majority of statements taken by foreign officials without substantial participation by U.S. personnel are likely to be admitted in future cases, even though no *Miranda* rights were given. Again, however, statements that "shock the conscience" or otherwise violate the defendant's due process rights will not be admitted, even if obtained from foreign sources.

While Miranda warnings do not apply to overseas interrogations conducted by foreign officials, the resulting statements are inadmissible if they have been coerced in violation of the Self-Incrimination Clause or the Due Process Clause.

D. The Public Safety Exception in the Context of an *Edwards* Violation

Another possible exception to the *Miranda* doctrine occurs in the context of a violation of the *Edwards* rule, which requires that questioning cease after a suspect invokes his right to counsel.[236] While the Supreme Court has never considered whether the public safety exception applies to *Edwards* situations, two courts of appeals have determined that the *Quarles* exception applies.[237]

The Ninth Circuit was the first appellate court to determine that a public safety exception applies to excuse an *Edwards* violation.[238] In *United States v. DeSantis*,[239] officers executed an arrest warrant at the defendant's apartment.[240] DeSantis maintained that after he was read his *Miranda* rights, he asked to call his attorney and was refused.[241] He then asked to change his clothes in another room.[242] The officers asked if weapons were present in the room, and he told them that there was a gun in the closet.[243] In addressing the defendant's suppression motion, the court faced the question of whether "the considerations undergirding *Quarles* necessitate relaxation of certain procedural safeguards enunciated in *Edwards v. Arizona*."[244] The court answered in the affirmative, finding the same considerations in *Quarles* "that allow the police to dispense with providing Miranda warnings in a public-safety situation would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel."[245] Since the officers were legally entitled to question DeSantis about the location of weapons for their own safety, the statements and the gun were admissible.[246]

In *United States v. Mobley*, the Fourth Circuit confronted similar facts.[247] FBI agents arrested the defendant at his home and "Mobley had answered the door naked, and it was quite apparent that he was unarmed."[248] After being advised of his *Miranda* rights, Mobley invoked his right to counsel.[249] Agents

then asked if there were weapons present, and Mobley admitted that there was a gun in a closet.[250] The court denied his suppression motion, holding that the public safety exception should be extended to *Edwards* cases.[251] The Fourth Circuit, however, declined to extend the new exception to the facts before it in *Mobley*, where the defendant had been encountered naked, the FBI had already made a security sweep of the premises, and there were no other individuals present.[252] Thus, the court found that, although "the public safety exception is a valid and completely warranted exception to the *Miranda* and *Edwards* rules, we are persuaded that there was no demonstration of an 'immediate need' that would validate protection under the *Quarles* exception in this instance."[253]

While not specifically addressing this issue, the Supreme Court has allowed for other exceptions to the *Edwards* rule.[254] For example, the Court held in *Oregon v. Hass* that statements made after a suspect invokes his right to counsel may be used to impeach contrary trial testimony.[255] Although *Hass* was decided before *Edwards*, the Court has since reaffirmed the impeachment exception. In *Michigan v. Harvey*,[256] the Court stated that "Hass was decided 15 years ago, and no new information [that an impeachment exception diminishes the deterrent effect of excluding the statements from the prosecution's case-in-chief] has come to our attention which should lead us to think otherwise now."[257] And although rulings extending the *Quarles* exception to the *Edwards* rule are thus far confined to two circuit courts, it appears likely that other courts will find the *Edwards* rule susceptible to public safety arguments.[258]

V. Case Studies: The Public Safety Exception and Terrorism

A. Pipe Bombs in Brooklyn: Abu Mezer

The Abu Mezer case epitomizes the ticking time bomb scenario. In July 1997, Abdelrahman Mossabah was living with two roommates, Abu Mezer and Khalil, in an apartment in Brooklyn, New York.[259] Abu Mezer, who was angered by the situation between Israel and Palestine, showed Mossabah pipe bombs in the apartment and shared his plans to detonate them in a crowded subway or bus terminal.[260] Mossabah panicked and approached Long Island Rail police, trying to explain what he had seen.[261] He provided police officers with a key to the apartment and a diagram of its layout and the location of the bombs.[262]

In the raid on the apartment, Abu Mezer lunged for the first officer and grabbed for his gun, while Khalil crawled toward a black bag containing the bombs.[263] Officers shot and wounded both men, who were handcuffed and taken to the hospital.[264] Technicians examined the black bag and found pipe bombs with one of the switches already flipped, and "were concerned that the bomb would explode before they could disarm it."[265] Officers at the hospital asked Abu Mezer a series of questions about the make of the bombs and the procedure for disarming them, and he answered all of the questions.[266] Officers also asked him if he planned to kill himself in the explosion, to which he responded, "Poof."[267]

Later that afternoon, officers read Abu Mezer his *Miranda* rights and he continued to respond to questions.[268] He explained his motivations for the attack, his associations with terrorist organizations, his preparations and plans for the bombing, and his hopes for future attacks.[269] He also stated that when he realized the police were in his apartment, "he had wanted to blow himself up."[270]

At trial, the defendant did not question the applicability of *Quarles*, except as applied to his statement in response to questioning about whether he intended to kill himself in the bombing.[271] In a brief discussion, the Second Circuit found that Abu Mezer's "vision as to whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb's stability."[272] The questioning fell within the public safety exception and the resulting statement was admissible.[273] As noted by Judge Lynch, the *Khalil* decision did "little to test the limits of the *Quarles* exception," because "the exigent risks to public safety were more extreme even than in *Quarles* itself."[274] He explained that "confronted with a bomb that might or might not be about to explode, no rational person could think that the police, before questioning the bomb's maker about its characteristics, must advise the bomber in effect that it behooves him to consult counsel before answering."[275]

B. The Christmas Day Bomber: Umar Farouk Abdulmutallab

On December 25, 2009, Umar Farouk Abdulmutallab, a Nigerian national, was a passenger on a flight from Amsterdam to Detroit, Michigan.[276] There were 279 passengers and eleven crew members.[277] Abdulmutallab was carrying a concealed bomb designed to allow detonation at the time of his choosing.[278] Shortly before landing, he disappeared into the bathroom for twenty minutes.[279] When he returned, he pulled a blanket over himself and passengers then heard popping noises and saw his pant leg and part of the wall catch on fire.[280] Passengers and flight crew intervened, extinguishing the fire and restraining him.[281] A flight attendant asked Abdulmutallab what was in his pocket, and he responded "explosive device."[282] After landing, he was taken into custody and received medical treatment.[283]

Once he was in custody, the FBI questioned Abdulmutallab for about fifty minutes without reading his *Miranda* rights.[284] During questioning, one source said that Abdulmutallab warned of other terrorism attacks, stating that, "[o]thers were following me."[285] The interrogation lasted until he was taken into surgery

for the burns he sustained.[286] After surgery, a second team of FBI agents reportedly attempted to continue questioning, but Abdulmutallab stopped cooperating and, in consultation with four government agencies, interrogators read his *Miranda* warnings.[287] Days after the attempted bombing, FBI agents traveled to Nigeria and worked to gain the trust of Abdulmutallab's relatives.[288] On January 17, 2010, FBI agents returned with two family members who conveyed to him that they "had complete trust in the U.S. system" and they believed he "would be treated fairly."[289] Senior administration officials said that he began talking again, and has been cooperating on a daily basis and providing actionable intelligence.[290]

His trial is still in the pre-trial stage, although Abdulmutallab, who is representing himself, has inquired about the possibility of a guilty plea.[291] Given the substantial forensic evidence and number of eyewitnesses, the prosecution would be unlikely to depend on his statements —either those before after the *Miranda* warnings—at trial. Neither the complaint nor the indictment references the statements, referring instead to the overwhelming evidence from the scene.[292]

C. The Times Square Bomber: Faisal Shahzad

On May 1, 2010, a car was discovered abandoned on the street in New York's Times Square.[293] Inside the car were "multiple, filled propane tanks, gasoline canisters, and fertilizer — as well as fireworks, clocks, wiring, and other items."[294] By the time emergency services workers arrived, the vehicle was visibly smoking.[295] An investigation revealed that Faisal Shahzad bought the car, that one of the keys in the vehicle opened the door to his residence, and that he used a pre-paid cellular telephone to call a fireworks store and receive a series of calls from Pakistan after his purchase of the vehicle.[296]

On May 3, 2010, Shahzad was arrested at the John F. Kennedy International Airport.[297] After his arrest, joint terrorism task force agents and officers from the New York Police Department interviewed Shahzad for three or four hours before reading him his *Miranda* rights.[298] The Deputy Director of the FBI, John S. Pistole, described Shahzad as "cooperative," stating that he provided "valuable intelligence and evidence."[299] After investigators determined there was not an imminent threat, Shahzad was read his *Miranda* rights and waived them.[300] He then "continued to cooperate and provide valuable information."[301]

According to the complaint, after his arrest, Shahzad admitted to attempting to detonate a bomb in Times Square, and that he had recently received bomb-making training in Waziristan, Pakistan.[302] The complaint does not state whether he made these statements before or after he was read the *Miranda* warnings,[303] although he could also have reaffirmed the statements after the warnings. Hours after his arrest, there were reports of seven or eight additional arrests in Pakistan.[304] While there were no official statements linking the arrests to Shahzad's statements, commentators, such as former Assistant U.S. Attorney Andrew C. McCarthy, argued that "the information supporting these arrests almost certainly came from Shahzad."[305] The government's sentencing memorandum states that after Shahzad waived his *Miranda* rights, he stated, "among other things, that he believed his bomb would have killed at least 40 people, and that, if he had not been arrested, he planned to detonate a second bomb in New York City two weeks later."[306]

Shahzad ultimately pled guilty to all ten counts of the indictment,[307] so the court never ruled on the scope of the public safety exception as applied in his case.

VI. Conclusion: Reviving Justice Marshall's Dissent to *Quarles*

Despite the claims that the *Quarles* public safety exception should be expanded, Justice Marshall's assertion that public safety can be protected with abridging a suspect's Fifth Amendment rights remains valid. After the September 11, 2001 terrorist attacks, some commentators predicted that the *Miranda* could not survive in the context of terrorism. William Stuntz cautioned:

> Terrorists tend not to be easily cowed or confused; they are therefore less likely to agree to talk to the police than are average suspects. The consequence is that *Miranda*'s invocation rule, which caused only distributive injustice before September 11, risks causing homicides after that date. Of course, the police can prevent that result by ignoring the invocation rule, but that has a high price as well: Suspects who maybe guilty of terrible crimes may be effectively immune from prosecution.[308]

Thus, *Miranda*, which had "seemed unshakeable," may now be "untenable."[309]

So far, however, this has not proven to be the case. As seen in the examples of Abu Mezer, Umar Farouk Abdulmutallab, and Faisal Shahzad, some terrorist suspects have willingly provided information after, as well as before, receiving *Miranda* warnings.[310] Mezer explained to officers how to defuse the pipe bombs he had constructed, and continued to provide detailed information after hearing his *Miranda* rights.[311] Abdulmutallab initially provided information after his arrest.[312] While he ceased cooperating after his surgery, he resumed under the influence of relatives the FBI had flown from Nigeria.[313] Shahzad also cooperated with authorities and waived his *Miranda* rights.[314] In fact, since September 11, 2001, federal authorities have resolved nearly 700 terrorism-associated prosecutions,[315] which have included significant numbers of cooperators, informants, and guilty pleas.[316]

The preexisting legal framework provides sufficient flexibility for successful terrorism investigations, intelligence operations, and prosecutions. As argued by Justice Marshall, public safety may be protected without creating an exception to *Miranda* or abridging a suspect's Fifth Amendment rights.[317] He stated:

> If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.[318]

The courts have continuously upheld Justice Marshall's position that a suspect's Fifth Amendment rights are not violated by an unwarned interrogation unless the resulting statements are introduced at trial.[319] Furthermore, courts recognize that officials conduct unwarned interrogations for intelligence purposes.[320] As stated by Judge Sand, "[t]o the extent that a suspect's *Miranda* rights allegedly impede [intelligence] collection, we note that *Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place."[321]

The preexisting legal framework provides sufficient flexibility for successful terrorism investigations, intelligence operations, and prosecutions.

As Justice Marshall recognized, there will be potential costs to this approach if excluded incriminating statements constitute "the crucial and otherwise unprovable element of a criminal prosecution."[322] However, he rightly questioned the frequency of such scenarios. In the case studies examined in this Article, the Government had sufficient independent evidence without the defendants' incriminating statements. For Abu Mezer, the government had the pipe bombs in his bedroom, the testimony of his roommate, and his assault on a police officer.[323] Abdulmutallab was literally captured with a smoking bomb on his person, and the government had access to an airplane full of eyewitnesses.[324] Shahzad purchased the vehicle he used as a car bomb, one of the keys in the vehicle opened the door to his residence, and he placed calls to a fireworks store and received a series of calls from Pakistan after his purchase of the vehicle.[325] While additional incriminating statements would certainly have bolstered each case, the efficacy of a prosecution is not sufficient to overcome the Fifth Amendment prohibition on self-incrimination.

In addition to the public safety exception, the Supreme Court has developed numerous other exceptions to the prescriptions of *Miranda*.[326] As described in Part IV, these include the admissibility of derivative evidence, the use of statements to impeach the defendant, certain types of overseas interrogations, and the public safety exception even where the defendant has invoked his *Edwards* rights. In the case of Faisal Shahzad, arguably the weakest in the terms of independent evidence, these exceptions could have significantly affected the prosecution. For example, even if his statements were excluded, any derivative evidence could have been introduced into the prosecution's case-in-chief. Shahzad reportedly stated that he received bomb-making training in Waziristan, Pakistan. Without introducing this statement, the Government could have questioned witnesses who accompanied Shahzad on the trip or attended the training in Pakistan. If Shahzad testified at trial, the statements themselves, potentially including his admission of guilt, could be used for impeachment purposes. If, hypothetically, Shazad had been overseas and foreign officials had interrogated him there, *Miranda* might not apply at all. And, even if he invoked his rights during the interrogation, the public safety exception as spelled out by the courts (without any expansion as proposed by the Department of Justice [footnote to supra]) might still apply to permit admission of his statements.

Nearly thirty years after the *Quarles* decision, Justice Marshall's opposition to the creation of a public safety exception is largely academic. Having survived the *Dickerson* decision, some form of the *Quarles* public safety exception is here to stay. The basic principles Justice Marshall articulated, however, cautions against a legislative or judicial expansion of the exception in the context of terrorism cases.[327] Officers may conduct an unwarned interrogation to identify or stop terrorist activity when there is not an immediate threat to public safety, but the Fifth Amendment requires that the resulting statements be inadmissible for prosecution. Prosecutors may avail themselves of other evidence as well as the many other exceptions to the *Miranda* doctrine.

I propose that the courts should continue to interpret the public safety exception within the confines of reasonableness and exigency as articulated in the *Quarles* decision. In the context of terrorism, a public safety exception based on the inherent

dangerousness of the situation could well render *Miranda* rights meaningless—making *Quarles* the "narrow exception" that swallows the rule in terrorist trials. Even the broader interpretations of the exception by the courts have limited the scope and duration of the inquiry. The exception does not grant law enforcement officials "an automatic right to interrogate suspects" without *Miranda* warnings simply because it is possible that terrorism is involved.[328] Rather, at a minimum, when the authorities are "reasonably prompted by a concern for the public safety,"[329] and when there is "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime,"[330] there should be a factual basis for both the specific concern and the immediacy of the threat. The public safety exception should remain within the limits envisioned by the *Quarles* court: a narrow exception "circumscribed to by the [public safety] exigency which justifies it."[331]

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[1] *See* Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. Times (May 4, 2010), http://www.nytimes.com/2010/05/05/nyregion/05arrest.html (insisting that *Miranda* warnings should be delayed when dealing with terrorism suspects).

[2] *Id*.

[3] *Id.* (stating Representative King was "troubled by the rush to charge Mr. Shahzad as a civilian.").

[4] *Id.* (quoting Beck as saying "We don't shred the Constitution when it's popular."); *see also* Emily Bazelon, *Miranda Worked! The Bizarre Criticism of the Faisal Shahzad Interrogation*, Slate (May 5, 2010), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/05/miranda_worked.html (noting with irony Beck's support for reading Shahzad his rights).

[5] *See* Terrorist Expatriation Act, S. 3327, 111th Cong. § 2 (2010); *see also* Jordan Fabian, *Lieberman Wants to Strip Citizenship of Americans Who Join Foreign Terror Orgs*., The Hill (May 4, 2010), http://thehill.com/blogs/blog-briefing-room/news/95967-lieberman-wants-to-strip-citizenship-of-americans-who-join-foreign-terror-orgs (quoting Senator Lieberman in an interview on Fox News on May 6, 2010, introducing a bill that would add joining a foreign terrorist organization or engaging in or supporting hostilities against the United States or its allies to the list of acts in the Immigration and Nationality Act for which United States nationals would lose their citizenship and accompanying rights).

[6] *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (requiring also that the CIA "as expeditiously as possible" close any secret detention facilities overseas and begin immediate compliance with Common Article 3 of the Geneva Convention, which prohibits "humiliating and degrading" treatment of prisoners).

[7] *See* Office of Public Affairs, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*, Department of Justice (Aug. 24, 2009), http://www.justice.gov/opa/pr/2009/August/09-ag-835.html. The HIG limits its interrogations techniques to those in the U.S. Army Field Manual, although the administration began a scientific study to improve interrogation techniques.

[8] *Id.*

[9] Michael Isikoff, *U.S. Officials Skeptical About Shahzad's Claims That He Acted Alone*, Newsweek (May 4, 2010), http://www.newsweek.com/blogs/declassified/2010/05/04/u-s-officials-skeptical-about-shahzad-s-claims-that-he-acted-alone.html (stating members of the HIG served a "support" role and helped to "inform" questioning of Shahzad).

[10] *Id.*; *see* Office of Public Affairs, *supra* note 7 (referring to several policy recommendations with there being no mention of Miranda).

[11] *See* Baker, *supra* note 1; *see also* Richard A. Serrano & David G. Savage, *Officials OKd Miranda Warning for Accused Airline Plotter*, L.A. Times (Feb. 1, 2010), http://articles.latimes.com/2010/feb/01/nation/la-na-terror-miranda1-2010feb01 (discussing that the decision to read Umar Farouk Abdulmutallab, the so-called Christmas Day bomber, his *Miranda* rights sparked a similar controversy); s*ee also* Isikoff, *supra* note 9 (pointing out that members of HIG did not question Abdulmutallab because the group was not operational at the time).

[12] *See* Baker, *supra* note 1.

[13] *Id.* (asserting that "constitutional protections need not be tossed aside in cases of terrorism.").

[14] *See* Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. Times (May 9, 2010), http://www.nytimes.com/2010/05/10/us/politics/10holder.html (acknowledging that dealing with terrorists necessitates a different approach).

[15] New York v. Quarles, 497 U.S. 649, 656 (1984).

[16] *See* Savage, *supra* note 14 (recalling that Mr. Holder's Congressional testimony mentioned the lack of a bright-line rule regarding a temporal limit on the exception).

[17] *See* Memorandum from the FBI on Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (Oct. 21, 2010), http://www.nytimes.com/2011/03/25/us/25miranda-text.html (articulating that agents finding it necessary to continue "unwarned interrogation" after exhausting public safety questions should seek approval first).

[18] *Id.* at n.1 (observing that these two characteristics limit the scope of application for this policy which defines an operational terrorist as "an arrestee who is reasonably believed to be either a high-level member of an international terrorist group; an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation.").

[19] *Id.*; *see Quarles*, 467 U.S. at 656.

[20] FBI Memorandum, *supra* note 17.

[21] *Id.*

[22] *Id.*

[23] Jack King & Ivan J. Dominguez, *Diverse Coalition Urges Attorney General Holder to Reconsider His Call to Weaken Miranda Rights*, The Champion, June 2010, at 10 (lauding the coalition's willingness to jointly resist what it perceives to be the erosion of constitutional principles).

[24] *Id.*

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

[26] *But see* Bram v. United States, 168 U.S. 532, 542 (1897) (relying on the Fifth Amendment right against self-incrimination to evaluate the admissibility of confessions).

[27] *See* Fikes v. Alabama, 352 U.S. 191, 197–98 (1957) (citing Stein v. New York, 346 U.S. 156, 185 (1953) (stating "[t]he limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.").

[28] Schneckcloth v. Bustamonte, 412 U.S. 218, 224 (1973) (examining the Court's jurisprudence on confessions for assistance in assessing the voluntariness of a Fourth Amendment consent search).

[29] *See* Sidney M. McCrackin, Note, New York v. Quarles*: The Public Safety Exception to Miranda*, 59 Tul. L. Rev. 1111, 1112 (1985); Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It — And What Happened to It*, 5 Ohio St. J. Crim. L. 163, 163 (2007).

[30] *See* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 Am. J. Crim. L. 309, 313 (1998).

[31] Lesley A. Lunney, *The Erosion of* Miranda: *Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 735 (1999).

[32] *See* Massiah v. United States, 377 U.S. 201 (1964) (holding the prosecution could not use the defendant's self-incriminating statements against him because they were deliberately elicited outside the presence of an attorney after the Sixth Amendment right to counsel attached); Escobedo v. Illinois, 378 U.S. 478 (1964) (finding violation of the Sixth Amendment right to counsel when police questioned the defendant after denying his request for counsel); *but see id.* at 497–98 (White, J., dissenting) (rejecting the majority's "new approach" which conflated the Fifth and Sixth Amendments and ignored that prior cases involving the Sixth Amendment right to counsel "dealt with the requirement of counsel at proceedings in which definable rights could be won or lost, not with stages where probative evidence might be obtained.").

[33] *Massiah*, 377 U.S. at 201.

[34] *Escobedo*, 378 U.S. at 478.

[35] *See Massiah*, 377 U.S at 206; *Escobedo,* 378 U.S. at 490–91.

[36] *See Escobedo*, 378 U.S. at 496 (White, J., dissenting) (criticizing the majority's rule by declaring it "wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side").

[37] *Id.* at 490 (emphasis added).

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

[39] *Id*. at 471 (reasoning that if the constitution guarantees the right to counsel for trial independent of a defendant's request, the same "proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.").

[40] *Id.* at 444.

[41] *Id.* at 471–72. The majority recognized some flexibility, noting "We cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process." *Id.* at 467.

[42] *Id*. at 500 (Clark, J., dissenting in three cases and concurring in one) ("The ipse dixit of the majority has no support in our cases."); Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting) ("[T]he decision of the Court represents poor constitutional law . . ."); *id.* at 526 (White, J., dissenting) ("The proposition that the privilege against self-incrimination forbids in custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.").

[43] *See id*. at 510 (Harlan, J., dissenting) (arguing that the new rules requiring a right to counsel during custodial interrogations "derive from quotation and analogy drawn from precedents under the Sixth Amendment . . .").

[44] *Id*. at 504 (Harlan, J., dissenting).

[45] *Id.* at 505 (Harlan, J., dissenting).

[46] *See* Miranda v. Arizona, 384 U.S. 436, 504, 505 (1966).

[47] *See*, e.g., Harris v. New York, 401 U.S. 222, 226 (1971) (allowing impeachment exception for perjured testimony); *see infra* note 52.

[48] *Harris*, 401 U.S. at 222.

[49] *Id.* at 226 (preserving the limits restraining the prosecution from introducing the such evidence during the case in chief, but not rejecting the idea that Miranda would be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

[50] *See* Michigan v. Tucker, 417 U.S. 433 (1974) (distinguishing a self-incriminating confession from the fruits of such evidence).

[51] *See id*. at 452 (reversing the exclusion of testimony because "[i]t does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes"); *see also* United States v. Patane, 542 U.S. 630, 643-44 (2004) (refusing to exclude a weapon recovered after the defendant voluntarily made a statement about that weapon because it was non-testimonial despite the fact that the case was decided after Dickerson v. United States, 530 U.S. 428 (2000), which characterized the Miranda rule as a constitutional requirement); Oregon v. Elstad, 470 U.S. 298, 318 (1985) (refusing to exclude a statement made after suspect was given *Miranda* warnings when police failed to tell the suspect that a prior statement made before the *Miranda* warnings could not be used against the suspect).

[52] New York v. Quarles, 497 U.S. 649, 657 (1984) ("[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.").

[53] *Id.* at 651–52.

[54] *Id.* at 652.

[55] *Id.*

[56] *Id.*

[57] *Id*.

[58] *Id.*

[59] *Id.*; *but see* Michigan v. Tucker, 417 U.S. at 452 (emphasizing the confession as the focus) so the gun would be admissible as derivative evidence even if the statements were excluded. In the *Quarles* decision, 467 U.S. at 600, Justice O'Connor rejected the public safety exception, excluding the statements but finding that the gun should be admissible as non-testimonial derivative evidence (O'Connor, J., concurring in the judgment in part and dissenting in part).

[60] New York v. Quarles, 497 U.S. 649, 649 (1984).

[61] *Id*. at 653.

[62] *See id.* at 657 (declaring "the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles.").

[63] *Id.*

[64] *Id*. at 657-58.

[65] *Id*. at 658 n.7 (1984).

[66] *Id.* at 656.

[67] Orozoco v. Texas*,* 394 U.S. 324, 325 (1969) (excluding a defendant's statements after four officers entered the defendant's boardinghouse and awakened him, four hours after a murder had been committed, to interrogate him about whether he had been present at the scene of the shooting and whether he owned a gun).

[68] *Quarles*, 467 U.S. at 659 n.8.

[69] *Id.* at 656.

[70] *Id.* at 674–77 (Marshall, J., dissenting).

[71] *See id*. at 681 (stating "[t]he majority's error stems from a serious misunderstanding of Miranda v. Arizona and of the Fifth Amendment upon which that decision was based. The majority implies that Miranda consisted of no more than a judicial balancing act . . .").

[72] *Id.* at 682 (Marshall, J., dissenting).

[73] New York v. Quarles, 497 U.S. 649, 679 (1984) (Marshall, J., dissenting); *see also id.* at 663–64 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence.").

[74] *Quarles*, 497 U.S. at 686 (Marshall, J., dissenting) (declaring "[t]he irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment.").

[75] *Id.* (Marshall, J., dissenting) (citing comparison to Weatherford v. Bursey, 429 U.S. 545 (1977) (noting the Sixth Amendment is violated only if the trial is affected)).

[76] *Id.* at 686-87 (Marshall, J., dissenting).

[77] *Id.* at 687, n. 9 (Marshall, J., dissenting).

[78] *Id.* at 687-88 (Marshall, J., dissenting).

[79] New York v. Quarles, 497 U.S. 649, 654 (1984) (citing other cases discussing whether the Miranda warnings are merely prophylactic or are required by the Constitution).

[80] *See* Harris v. New York, 401 U.S. 222, 226 (1971) (allowing statements taken in violation of *Miranda* to impeach perjured testimony).

[81] *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985) (ruling that statements initially obtained in violation of *Miranda* do not necessarily taint all subsequent evidence); *see also Patane*, 542 U.S. at 644 (limiting the "scope of the Self-Incrimination Clause" and, thus, the *Miranda* exclusionary rule to testimonial evidence only).

[82] *See Elstad*, 470 U.S. at 306; *see also* Chavez v. Martinez, 538 U.S. 760, 770 (2003) (relying on the precedents of *Elstad* and *Tucker* in stating, "In the Fifth Amendment context, we have created prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause.").

[83] 18 U.S.C. § 3501 (2001). For a detailed description of the relevant political factors, *see* Yale Kamisar, *Foreword: From* Miranda *to Section 3501 to* Dickerson *to* …, 99 MICH. L. REV. 879 (2001).

[84] 18 U.S.C. § 3501(a).

[85] *See* United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999) (holding that Congress was authorized to enact § 3501 so that admissibility standard trumps the *Miranda* rule).

[86] *Id*.

[87] Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that "Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.").

[88] *Id.*

[89] *Id*. at 428. There is still some disagreement among the Court on whether *Miranda* is required by the constitution. *Cf.* Missouri v. Seibert, 542 U.S. 600, 604 (2004) (A statement initially obtained in violation of Miranda and later repeated after warnings, although technically mirandized, was inadmissible because it "could not effectively comply with Miranda's constitutional requirement"), *with* United States v. Patane, 542 U.S. 630, 636 (2004) ("[T]he Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause.").

[90] *See* New York v. Quarles, 497 U.S. 649, 653 (1984) (mentioning "the prophylactic rules enunciated in Miranda"); *see also* Michigan v. Tucker, 417 U.S. 433, 439 (1974) (considering whether the police "infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right.").

[91] *Dickerson*, 530 U.S. at 438.

[92] *Id.*

[93] *Id*. at 444.

[94] *Id.* at 443.

[95] *Id.* at 451–53 (Scalia, J., dissenting) (citing cases where the Court held that statements could be obtained in violation of *Miranda* and yet did not violate the Constitution)

[96] *Id*. at 455 (Scalia, J., dissenting).

[97] *Id.* at 441.

[98] *See id.* at 446 (Scalia, J., dissenting) (arguing that if a majority of the Court actually believed that custodial interrogations not proceeded by *Miranda* warnings or their equivalent violated the Constitution, it would have plainly said so).

[99] *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (describing the rules laid down in *Miranda* as prophylactic); *See also* Michigan v. Tucker, 417 U.S. 433, 452 (1974) (allowing statements derived from a *Miranda* violation to be used on the premise that *Miranda* was merely prophylactic).

[100] George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1090 (2001).

[101] M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 271 (2002) [hereinafter Darmer, *Lessons*].

[102] *See id.* (noting that the majority of the *Dickerson* Court upheld the constitutionality of *Miranda* while at the same time sustaining cases based on the view that *Miranda* was merely prophylactic).

[103] *Id.* (suggesting the Court must reevaluate *Dickerson* to have "an internally consistent Miranda and confessions law jurisprudence" because of the inherent conflict of claiming that Miranda is constitutionally required yet perpetuating exceptions based on the premise that it is merely prophylactic).

[104] *See* United States v. Luker, 395 F. 3d 830, 833 (8th Cir. 2005) (affirming the district court's application of the exception); United States v. Donachy, 118 F. App'x 424 (10th Cir. 2004) (affirming the district court's application of the exception); United States v. Jones, 154 F. Supp. 2d 617, 630 (S.D.N.Y. 2001) (ruling that the public safety exception justified an unwarned interrogation about firearms in an apartment with children).

[105] Kamisar, *Foreword*, *supra* note 29, at 894.

[106] New York v. Quarles, 497 U.S. 649, 656 (1984).

[107] *Id.* at 659 n.8.

[108] *See* United States v. Jones, 154 F. Supp. 2d 617, 626, 627 (S.D.N.Y. 2001) (discussing how federal circuit courts have dealt with *Quarles* and stating that some federal courts of appeals have taken a narrower view of *Quarles* than others have); *infra* notes 109–36.

[109] United States v. Edwards, 885 F.2d 377 (7th Cir. 1989).

[110] *Id.* at 379.

[111] *Id.* at 383.

[112] *Id*. at 384.

[113] *Id.* at 384, 384 n.4.

[114] 181 F.3d 945 (8th Cir.1999).

[115] *Id*. at 947–48.

[116] *Id*. at 948.

[117] *Id.*

[118] *Id.* at 954.

[119] *Id.* at 948.

[120] *Id*. at 949.

[121] Quarles, 497 U.S. at 656 (The "availability of the exception does not depend upon the motivation of the individual officers involved.").

[122] No. 93-50839, 1994 WL 721798 (9th Cir. Dec. 28, 1994).

[123] *Id.* at *1.

[124] *Id.*

[125] *Id.* at *2 (quoting United States v. Brady, 819 F.2d 884, 888 (9th Cir.1987) (officer responding to report of man beating woman asked if arrested suspect had a gun; while there was "no similar indication that [suspect] possessed a weapon . . . [or] had placed an unguarded weapon in a public place," the officer was trying to "control a dangerous situation" involving gathering crowd)).

[126] *Id.* at *2.

[127] *Id*.

[128] *See* United States v. Brutzman, No. 93-50839, 1994 WL 721798, at *2 (9th Cir. Dec. 28, 1994) (focusing instead on whether there was reason to objectively fear for the public safety).

[129] United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994) (citing *Brady*, 819 F.2d at 885 considering applicability of the exception when inquiring about possible weapons in a vehicle after individual was frisked).

[130] United States v. Fox, 393 F.3d 52 (1st Cir. 2004).

[131] *Id*. at 56.

[132] *Id.*

[133] *Id.*

[134] *Id*.

[135] *Id.* at 57.

[136] *Id.* at 60.

[137] United States v. Liddell, 517 F.3d 1007, 1011 (8th Cir. 2008) (Gruender, J., concurring) (agreeing with the majority, "even though this record is bereft of evidence of exigent circumstances.").

[138] *See id.* (discussing the inapplicability of the exception in Orozoco v. Texas, 394 U.S. 324, 324 (1969), saying "[T]he Quarles Court did not indicate that the inherent danger of a trained police officer discovering a weapon by itself was sufficient to justify the application of the exception.").

[139] Orozco, 394 U.S. at 325 (1969) (rejecting a defendant's statements when four officers entered the defendant's boardinghouse and awakened him, four hours after a murder had been committed, to interrogate him about whether he had been present at the scene of the shooting whether he owned a gun, and where that gun was).

[140] New York v. Quarles, 497 U.S. 649, 659 n.8 (1984).

[141] *Liddell*, 517 F.3d at 1011–12 (Gruender, J., concurring).

[142] United States v. Jones, 154 F. Supp. 2d 617, 628 (S.D.N.Y. 2001) (citing with approval United States v. Mobley, 40 F.3d 688 (4th Cir. 1994), which reiterated the narrowness of the public safety exception when considering applying it after a suspect invoked the right to counsel).

[143] 483 F.3d 425 (6th Cir. 2007).

[144] United States v. DeJear, 552 F.3d 1196, 1201–02 (10th Cir. 2009) (citing *Williams* and stating, "We agree with the Sixth Circuit's formulation and apply it here.").

[145] United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007).

[146] United States v. Talley, 275 F.3d 560, 564 (6th Cir. 2001) (reversing and remanding the district court's decision to grant a motion to suppress evidence of weapons because officers' quick entry during execution of a search warrant was justified as a protective sweep of a dark apartment when police heard sounds of unsecured individuals running and saw shadowy figures).

[147] *See Williams*, 483 F.3d at 428–29; *see e.g.*, United States v. Kellogg, 306 Fed. App'x 916, 924 (6th Cir. 2009) (finding reason to believe the defendant had a weapon where he was suspected of a recent armed bank robbery).

[148] *Infra* notes 152–53.

[149] *Williams*, 483 F.3d at 429.

[150] *Id.* If, however, the officers had reason to believe that the defendant had disposed of the weapon in a way that still posed harm to the public, such as outside a school or inside a playground, the *Quarles* exception would still apply.

[151] 40 F.3d 688 (4th Cir. 1994).

[152] *Id*. at 691.

[153] *Id.* at 693.

[154] United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007).

[155] *Mobley*, 40 F.3d at 693 n.2.

[156] *Id.* at 693.

[157] United States v. Raborn, 872 F.2d 589 (5th Cir.1989).

[158] *Id.* at 591–92.

[159] *Id.* at 592.

[160] *Id*.

[161] *See id.* at 595 (noting that the vehicle where the gun was located had already been seized by the police officers when they inquired about and subsequently found the firearm).

[162] *Id.* (finding difficulty applying the public safety exception but noting no violation because the officers would have found the gun incident to lawful search of the car during arrest).

[163] *See* United States v. Brathwaite, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (quoting Fleming v. Collins, 954 F.2d 1109, 1114 (5th Cir. 1992) (en banc)).

[164] United States v. Estrada, 430 F.3d 606, 614 (2d Cir. 2005).

[165] *Id*. at 606.

[166] *Id*. at 608 (outlining defendant DeJesus' convictions, which included conspiracy with intent to distribute 1,000 grams of heroin and fifty grams of crack cocaine).

[167] *Id*. at 608–09 (noting that on appeal, the government conceded these statements were made in response to questions posed by another officer and without *Miranda* warnings).

[168] *Id*. at 612–13 (citing such factors as officers' first-hand knowledge of defendant's past drug convictions and intelligence from a confidential informant).

[169] *See id*. (stating that "the fact that another person was present in the apartment at the time of [the defendant's] arrest contributed to and compounded the threat the officers faced . . ."); *see also* United States v. Newton, 369 F.3d 659, 678 (2d Cir. 2004) (finding immediacy where three people were present in an apartment with a missing weapon); United States v. Reyes, 353 F.3d 148, 153–54 (2d Cir. 2003) (finding immediacy during the apprehension of the defendant caught in a drug transaction in the afternoon across the street from a school).

[170] FBI Memorandum, *supra* note 17.

[171] United States v. Khalil, 214 F.3d 111, 115 (2d Cir. 2000) (discussing police concern during an investigation of a bomb plot revealed by an informant, which yielded a bag containing five pipe bombs after the switch on one had already been flipped).

[172] *Id*. at 121.

[173] United States v. Jones, 154 F. Supp. 2d 617, 626 (S.D.N.Y. 2001.)

[174] *Id.* at 628 (addressing the issue of the magnitude later in the opinion, Judge Lynch called *Khalil* "the extreme" situation under a *Quarles* analysis and found that "no rational person" would expect officers faced with a potentially live bomb to provide *Miranda* warnings to a suspect before questioning him about the bomb).

[175] *See* United States v. Edwards, 885 F.2d 377, 384 (7th Cir. 1989) (finding it appropriate for an officer to ask about weapons when dealing with suspected drug dealers who are "known to arm themselves . . ."); *see also* United States v. Williams, 483 F.3d 425, 428 (6th Cir. 2007) (citing cases where courts applied the exception because police had knowledge that suspects' were "capable of violence . . .").

[176] United States v. Carrillo, 16 F.3d 1046 (9th Cir. 1994) (decided February 18, 1994); United States v. Mobley, 40 F.3d 688 (4th Cir.1994) (decided November 23, 1994); United States v. Raborn, 872 F.2d 589 (5th Cir.1989) (decided April 27, 1989); Fleming v. Collins, 954 F.2d 1109 (5th Cir. 1992) (en banc) (decided March 6, 1992); *Khalil*, 214 F.3d at 111 (decided May 31, 2000).

[177] Harris v. New York, 401 U.S. 222, 226 (1971) (allowing impeachment for perjured testimony).

[178] *See* United States v. Patane, 542 U.S. 630, 637 (2004) (holding that physical evidence derived from unwarned but voluntary statements need not be suppressed because the *Miranda* rule is about Self-Incrimination rather than constraining police conduct); *but see Seibert*, 542 U.S. at 604 (applying an exclusionary rule to unwarned but voluntary statements repeated after Miranda warnings).

[179] United States v. Hensel, 509 F.Supp. 1364, 1372 (1981) (ruling there is no *Miranda* issue where "United States agents do not actively participate in the arrest and interrogation . . .").

[180] *Quarles*, 467 U.S. at 686 (in that case, exigency established by presence of weapon near defendant at time of arrest).

[181] *Harris*, 401 U.S. at 226 (allowing impeachment to avoid misuse of the Miranda rights).

[182] *Miranda*, 384 U.S. at 476–77.

[183] *Id*. at 477.

[184] *See* Harris v. New York, 401 U.S. 222, 224 (1971) (holding prosecution could use such statements to impeach credibility of defendant's testimony).

[185] *Id*.

[186] *Id*. (noting that defendant testified that his statements were not coerced and voluntary).

[187] *Id.* at 223.

[188] *Id*.

[189] *Id.* at 225–26 (stating impeachment process "provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby").

[190] *See e.g.*, Alan M. Dershowitz & John Hart Ely, Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971) (arguing that the majority opinion "in crucial respects, flatly misstates both the record in the case before it and the state of the law at the time the decision was rendered"

and "each of the arguments set forth by the Court masks a total absence of analysis and provides no support for its result.").

[191] *See e.g.*, James v. Illinois, 493 U.S. 307, 320 (1990) (upholding right of prosecution to impeach defendant's testimony with illegally obtained statements, but refusing to expand rule to allow use of illegally obtained statements to impeach other defense witnesses); United States v. Havens, 446 U.S. 620, 626–27 (1980) (holding impeachment proper where defendant, who testified falsely during cross-examination, was impeached with illegally obtained evidence); Oregon v. Hass, 420 U.S. 714 (1975) (holding that where defendant is given full and proper *Miranda* warnings and then makes voluntary statements to officers, those statements could be used for impeachment).

[192] New York v. Quarles, 497 U.S. 649, 683 n. 6 (1984) (Marshall, J., dissenting) (arguing that the Court has not waivered from the position that statements made during custodial interrogation, and without *Miranda* warnings, were inadmissible and that the *Harris* exception allowed them to be considered for credibility and not guilt).

[193] *Compare* People v. Peevy, 953 P.2d 1212, 1219 (Cal. 1998) (accepting impeachment use despite "a calculated and purposeful violation" of the *Miranda* rule) *with* Henry v. Kernan, 197 F.3d 1021, 1028–29 (9th Cir. 1999) (suggesting that because "the officers set out deliberately to violate a suspect's Miranda rights," the resulting statement was not admissible for impeachment).

[194] *See* United States v. Patane, 542 U.S. 630, 631 (2004) (saying "statements taken without Miranda warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial" even when the "fruits of actually compelled testimony cannot . . ."). The impeachment exception is limited to the defendant's testimony, and may not be used to impeach defense witnesses.

[195] *See e.g.*, Michigan v. Tucker, 417 U.S. 433, 450 (1974) (holding government may use defendant to build its own case, including compelling defendant to provide physical evidence against himself); Oregon v. Elstad, 470 U.S. 298, 318 (1985) (finding written confession, given after *Miranda* warnings, admissible at trial).

[196] *Tucker*, 417 U.S. at 447 (noting the case predated *Miranda* and the officers' actions were properly based on the holding in *Escobedo*, 378 U.S. at 478).

[197] *Elstad*, 470 U.S. at 298 (holding that where defendant made voluntary but unwarned confession to police then later provided a written confession after receiving *Miranda* warnings, Fifth Amendment did not require exclusion of written statement at trial).

[198] Dickerson v. United States, 530 U.S. 428, 432 (2000) (declaring *Miranda* warnings based on a constitutional right that Congress could not legislatively circumvent). For a full description of the pre-*Dickerson* jurisprudence and the possible future of the derivative evidence exception, *see* Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 Yale L.J. 447, 507–512 (2002)).

[199] United States v. Patane, 542 U.S. 630, 630 (2004).

[200] *Id*. at 635 (recounting officers arrested defendant after receiving tip from his parole officer that defendant was in possession of a handgun).

[201] *Id*. (noting that defendant was reluctant at first to tell the officer where the gun was for fear he would take it, eventually told the officer it was in his bedroom and gave permission for the officer to search the room).

[202] *Id*. at 635–46 (applying instead the fruit of the poisonous tree doctrine of Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

[203] *Id*. at 643 ("The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial.").

[204] *Id*. at 638 (reasoning that physical evidence cannot violate the Fifth Amendment concerns "*compelled* testimony").

[205] *Id*. at 637 (quoting United States v. Hubbell, 530 U.S. 27, 34–35 (2000) (noting that the word "witness" in the Self-Incrimination Clause "limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character . . .")).

[206] *Id.* at 641–42.

[207] *Id*. at 637. *See e.g.*, *Hubbell,* 530 U.S. at 35 (discussing why compelled blood samples and other examples do not violate the Clause); Oregon v. Elstad, 470 U.S. 298, 304 (1985) (saying, "[t]he Fifth Amendment, of course, is not concerned with nontestimonial evidence.").

[208] *Patane*, 542 U.S. at 640.

[209] *Id.* at 644 ("And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination.").

[210] *See* U.S. Const, amend. V (stating "No person . . . shall be *compelled* in any criminal case to be a witness against himself . . .") (emphasis added); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding that admitting coerced statements was a clear denial of due process required by Fourteenth Amendment).

[211] United States v. Ghailani, 743 F. Supp. 2d 261 (S.D.N.Y. 2010) (deciding on the admissibility of witness testimony the government gained through conceded coercion).

[212] *Id.* at 264.

[213] *Id*. at 267 (discussing that defendant was imprisoned at a secret site where he was subjected to extremely harsh interrogation methods as part of the CIA's "Rendition, Detention and Interrogation Program;" the government stipulated all statements obtained were in violation of Fifth and Sixth Amendments).

[214] *Id*. at 287–88 ("If the government is going to coerce a detainee to provide information to our intelligence agencies, it may not use that evidence—or fruits of that evidence that are tied as closely to the coerced statements as [the witness'] testimony would be here—to prosecute the detainee for a criminal offense.").

[215] *Id*. at 265 (quoting *Wong Sun*, 371 U.S. at 488, to support the possibility of the very narrow exception needed for the government's attenuation argument to prevail).

[216] *See* Memorandum from Sarah Miller, Harvard Nat'l Sec. Research Comm., to Professor Philip Heymann, *The Application of Miranda in Overseas Contexts*, (May 2009), *available at* www.law.harvard.edu/students/orgs/nsrc/miranda101309.pdf *(*"Courts faced with the question have overwhelmingly held that most, if not all, of *Miranda*'s warnings are required for overseas interrogations to be admissible."). *For the custodial interrogation requirement, see* United States v. Suchit, 480 F. Supp. 2d 39, 54 (D.D.C. 2007) (holding that because the defendant was not in custody at the time of FBI interviews taking place in Trinidad, "no *Miranda* warnings were required to render the statements admissible at the trial of this matter.").

[217] *See e.g.*, *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 202 (2d Cir. 2008) (suggesting that *Miranda* as applied to overseas interrogations may not require the full panoply of warnings); United States v. Heller, 625 F.2d 594, 599–600 (5th Cir. 1980) (holding that the exclusionary rule did not apply where U.S. officials' involvement in interrogation of defendant captured overseas was minimal); Cranford v. Rodriguez, 512 F.2d 860, 863 (10th Cir. 1975) (considering a defendant's capture and interrogation by U.S. agents in Mexico and deciding that authorities' failure to mention the right to appointed counsel was a departure from *Miranda* that was "unavoidable and not prejudicial."); United States v. Hasan, 747 F. Supp. 2d 642, 672 (E.D. Va 2010) (finding that defendant, charged with piracy, was not adequately advised of his *Miranda* rights during his initial questioning on board a frigate off the coast of Somalia but that subsequent warnings and a "cleansing statement" made his statements during a later interrogation admissible); United States v. Straker, 596 F. Supp. 2d 80, 93 (D.D.C. 2009) (holding that when defendant was

interrogated in Trinidad by U.S. agents, he waived his Fifth Amendment rights when he invoked the right to counsel but later voluntarily initiated communication with agents).

[218] United States v. Yousef, 327 F.3d 56, 146 (2d Cir. 2003) (citing United States v. Cotroni, 527 F.2d 708, 712 n. 10 (2d Cir. 1975) ("stating that if 'the conduct of foreign police [were] so reprehensible as to shock the conscience,' then application of the exclusionary rule might be warranted . . .")).

[219] *See e.g.*, *In re Terrorist Bombings*, *supra* note 217, at 203 (citing *Yousef*, 327 F.3d at 146, finding the Second Circuit "implicitly adopted" but failed to define the doctrine which states that evidence derived from Miranda violations by foreign police must be suppressed when United States agents are actively involved); *but see* Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980) (finding joint venture doctrine inapplicable where the only U.S. involvement was a treaty encouraging Mexico to capture U.S. citizens who violate its laws); United States v. Marzook, 435 F. Supp. 2d 708, 744 (N.D. Ill. 2006) (finding no involvement by U.S. officials in arrest and interrogation of defendant by Israeli agents).

[220] *Pfeifer*, *supra* n. 219, at 877, *cert. denied*, 447 U.S. 908 (1980). *See e.g.*, Yousef, 327 F.3d at 145 (stating *Miranda* does not apply to interrogations conducted overseas by foreign officials without participation by U.S. personnel); United States v. Yousef, 925 F. Supp. 1063, 1077 (S.D.N.Y. 1996) (deciding terrorist suspect had voluntarily waived his rights since the Philippine police who allegedly tortured him were not acting as U.S. agents, and he was not subject to coercion by U.S. officials while in U.S. custody).

[221] United States v. Bin Laden, 132 F. Supp. 2d 168, 187 (S.D.N.Y. 2001) (citing United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972)).

[222] *Welch*, *supra* note 221, at 213 (finding defendant's confession to Bahamian police without *Miranda* warnings admissible despite FBI agent's presence during questioning because Bahamian officials had their own interest in alleged criminal conduct that demonstrated FBI did not use foreign police to evade *Miranda*).

[223] United States v. Karake, 443 F. Supp. 2d 8, 93 n. 114 (D.D.C. 2006) ("In the absence of active participation by a United States official in the evidence-gathering event, a joint venture can only exist when foreign officials are rendered 'agents' of the United States government, or when the cooperation was designed to evade the constitutional requirements applicable to American investigators.") (internal citations omitted).

[224] United States v. Abu Ali, 528 F.3d 210, 228 (4th Cir. 2008) (holding that FBI did not actively or substantially participate in investigation of an Al-Qaeda affiliated suspect when Saudi Arabian officials had the final say on which questions would be asked and FBI agents observed interrogations from outside the room).

[225] *Id*. at 228 (agreeing that any *Miranda* error was harmless because the Saudis showed their own strong interest in the investigation).

[226] *Id*. at 228 (noting, however, that Saudi agents also had the power to reject the proposed questions from U.S. agents).

[227] *Id*. at 229–30 n. 5.

[228] *Id*. (agreeing with the district court ruling that mere presence of U.S. officials during interrogation by foreign officials did not make statements involuntary).

[229] *Id*. at 230 n. 5.

[230] United States v. Abu Ali, 528 F.3d 210, 230 n. 6 (4th Cir. 2008) (finding whenever U.S. agents propose questions to ask defendant, and those questions are asked by foreign officials, U.S. agents engage in "active" and "substantial" participation of interrogation).

[231] *Id*. at 231 n. 6 (adding "[t]his cannot be the law.")

[232] *See Bin Laden*, 132 F. Supp. 2d at 182 n. 9 (citing *Welch*, 455 F.2d at 213, to show that after finding the exclusionary rule inapplicable where foreign officers conduct interrogation because it would lack deterrent effect, courts must nevertheless conduct an inquiry into whether statements are involuntary, and thus should be suppressed).

[233] Stowe v. Devoy, 588 F.2d 336, 341 (2d Cir. 1978) (quoting United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976)).

[234] United States v. Karake, 443 F. Supp. 2d 8, 94 (D.D.C. 2006) (finding, despite U.S. agents administering *Miranda* warnings when they took over interrogations from Rwandan officials, defendant's statements were involuntary and therefore inadmissible in U.S. courts because of the coercive nature of Rwandan officials' interrogations and conditions of confinement).

[235] *See Abu Ali*, 528 F.3d at 239 (balancing practical limitations with concerns about the right to confrontation, the court allowed defense counsel to contemporaneously depose foreign officers and witnesses in Riyadh, Saudi Arabia via video link).

[236] *See Edwards*, 451 U.S. at 485 (holding that defendant's statements, made after invocation of right to counsel, were inadmissible at trial and did not represent waiver of Fifth Amendment rights).

[237] *See Mobley*, 40 F.3d at 692–93 (deciding the Quarles exception applied where, after being arrested and claiming right to counsel, defendant informed officers of a weapon in a bedroom closet); United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989) (asserting the *Quarles* exception and right of officers to question defendants about matters relating to officers' safety made defendant's statements, and weapon recovered as a result, admissible despite defendant's invocation of his right to counsel).

[238] *DeSantis*, 870 F.2d at 538 (decided March 1989).

[239] United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989).

[240] *Id*. at 537 (noting defendant was free on appellant bond following convictions for conspiracy to distribute and possession with intent to distribute heroin in 1984).

[241] *Id*. (acknowledging a discrepancy between officers' testimony that defendant asked only for a phone book from which to retrieve his attorney's number, whereas defendant claimed he made request to contact attorney immediately upon arrest).

[242] *Id*. (providing context for the request, the court noted this occurred after defendant was told he would be going to court and while he was wearing jogging pants and no shoes).

[243] *Id*. (establishing that officers did recover a .38 caliber revolver from the closet).

[244] *Id*. at 538.

[245] United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989).

[246] *See id.* (concluding his constitutional rights had not been violated when the officers acted lawfully in pursuit of safety).

[247] United States v. Mobley, 40 F.3d 688, 688 (4th Cir. 1994) (discussing officers executing an arrest warrant who confronted a defendant in his home when there was a weapon nearby).

[248] *Id*. at 690 (detailing that in this case, the defendant similarly needed to leave the room to change, but was not asked about a weapon beforehand).

[249] *Id*.

[250] *Id*. at 691 (implicating safety concerns for officers who would remain in the apartment to complete the search after defendant's removal from the premises).

[251] *Id*. (admitting the gun because of the public safety exception).

[252] *See id.* at 693 (finding insufficient justification for the exception on grounds of officer safety, but finding admission of gun at trial was harmless since its discovery was inevitable).

[253] United States v. Mobley, 40 F.3d 688, 693 (4th Cir. 1994).

[254] *See* Michigan v. Harvey, 494 U.S. 344, 352 (1990) (reaffirming the impeachment use of evidence obtained in violation of *Miranda* rights by admitting a written statement given to police after they refused defendant's request for an attorney); Oregon v. Hass, 420 U.S. 714, 723 (1975) (admitting statements made after invocation of right to counsel to impeach defendant's trial testimony).

[255] *Hass*, 420 U.S. at 722 (concluding the impeachment material would aid the jury in assessing the defendant's credibility).

[256] Michigan v. Harvey, 494 U.S. 344, 344 (1990).

[257] *Id*. at 352.

[258] For normative positions on the extension of a public safety exception in *Edwards* situations, *compare* Darmer, *supra* note 101 *with* Timothy Salter, *Last Prophylactic Standing: Why the Quarles' "Public-Safety Exception" Should Not Be Expanded to Excuse Edwards Violations that Occur During Exigent "Public Safety" Circumstances*, 25 St. John's J. C.R. & Econ. Dev. 379 (2011).

[259] United States v. Khalil, 214 F.3d 111, 115 (2d Cir. 2000).

[260] *Id*.

[261] Christopher Dickey, Securing the City: Inside America's Best Counterterror Force — The NYPD 65 (2009) (providing an account of the way Mossabah repeated the word "bomba" to the officers and emulated explosion noises).

[262] *Khalil*, 214 F.3d at 115.

[263] *Id*. (describing the scuffle that ensued after two officers entered the bedroom where the defendants were hiding).

[264] Dickey, *supra* note 261 (reporting that the first officer through the door shot Abu Mezer twice, one round grazing his face and the other in the midsection, and Khalil once. The second officer shot each man one additional time.).

[265] United States v. Khalil, 214 F.3d 111, 115 (2d Cir. 2000).

[266] *Id*. (explaining that Abu Mezer told officers he had made five bombs and that they would explode when all four switches were flipped).

[267] *Id*.

[268] *Id*. at 115–16 (observing that questions in the afternoon focused on his general motivations for the bombing and more details about his plan).

[269] *Id*. at 116 (reciting the facts, the court noted that "He said, *inter alia,* that he had made the bombs, 'want[ing] to blow up a train and kill as many Jews as possible' because he opposed United States support for Israel. Abu Mezer also stated that he was 'with Hamas', a terrorist organization, and had planned to bomb the 'B' subway train at 8 a.m. on July 31 because there were 'a lot of Jews who ride that train'. Questioned as to where he had bought the bomb components, Abu Mezer said he had purchased gunpowder at a gun shop in North Carolina. He had used it to make the bombs found in the raid and had been planning to make one additional bomb in the future." (citations omitted)).

[270] *Id*.

[271] United States v. Khalil, 214 F.3d 111, 117 (2d Cir. 2000) (focusing primarily on challenges to several photographs of him which tended to show his association with an extremist lifestyle).

[272] *Id*. (believing that consideration to be an important justifying factor in rejecting the defendant's contention that the question was unrelated to public safety).

[273] *Id.* (finding admission of the statements, even if not covered by the public safety exception, was harmless error) (*cert. denied* in Abu Mezer v. United States, 531 U.S. 937 (2000)).

[274] United States v. Jones, 154 F. Supp. 2d 617, 626 (S.D.N.Y. 2001) (suggesting there should be little doubt regarding whether public safety was at issue).

[275] *Id*. at 628.

[276] Indictment at 1, United States v. Abdulmutallab, No. 2:10-cr-20005 (E.D. Mich. Jan. 6, 2010) [hereinafter "Abdulmutallab Indictment"] (noting defendant was on Northwest flight 253).

[277] *Id.*

[278] *Id*. at 2 (stating the bomb was concealed in his clothing and consisted of mixture of PETN, TATP, and other ingredients).

[279] Criminal Complaint at 2, United States v. Abdulmutallab, No. 2:09-cr-30526 (E.D. Mich. Dec. 26, 2009) [hereinafter "Abdulmutallab Complaint"] (detailing how passengers and flight crew described his suspicious behavior to agents).

[280] *Id*. (noting that before covering himself with the blanket and initiating the device, the defendant stated his stomach was upset).

[281] *Id*. (recounting that passengers used blankets and extinguishers to put out the fire).

[282] *Id*.

[283] *Id*. (reporting that Customs and Border Protection officials determined defendant needed medical attention, and sent him to University of Michigan Medical Center).

[284] Savage, *supra* note 14 (arguing the Abdulmutallab incident was an example of federal agents pushing the bounds of when *Miranda* rights must be read to terror suspects).

[285] Serrano & Savage, *supra* note 11 (showing justification for ongoing concern for public safety).

[286] Savage, *supra* note 14 (showing no indication that this cooperation was involuntary through the surgery).

[287] Serrano & Savage, *supra* note 11 (recounting agents' belief that defendant had simply had a change of mind).

[288] Ed Henry, *White House Reveals Secret Cooperation with AbdulMutallab Family*, CNN, (Feb. 3, 2010), http://edition.cnn.com/2010/CRIME/02/02/plane.bomb.suspect/ (explaining that the meeting was intended to gain family's help in convincing defendant to cooperate).

[289] *Id*.

[290] *Id*. (failing to resolve the question whether administration officials provided additional *Miranda* warnings before subsequent interrogations).

[291] The Associated Press, *Michigan: Man Accused in Bomb Plot is Allowed to Be His Own Lawyer*, N.Y. Times, (Sept. 13, 2010), http://www.nytimes.com/2010/09/14/us/14brfs-MANACCUSEDIN_BRF.html (reporting that court did order a standby lawyer to be available to provide defendant advice).

[292] Abdulmutallab Indictment, *supra* note 276; Abdulmutallab Complaint, *supra* note 279.

[293] Complaint, United States v. Faisal Shahzad, No. 1:10-mj-00928-UA (S.D.N.Y. May 4, 2010) [hereinafter "Shahzad Complaint"] (revealing discovery was made by a witness who summoned a mounted police officer regarding a suspicious vehicle, the Pathfinder, which was unoccupied and running).

[294] *Id.* at 4.

[295] *Id*. at 5 (saying that on seeing smoke, the first officer on scene called for backup and began evacuating the area).

[296] *Id*. at 8.

[297] *Id*. at 9 (noting defendant was attempting to travel to Dubai).

[298] Savage, *supra* note 14.

[299] Stephanie Condon, *Faisal Shahzad Was Read Miranda Rights After Initial Questioning*, CBS News (May 4, 2010), http://www.cbsnews.com/8301-503544_162-20004108-503544.html.

[300] Baker, *supra* note 1 (reporting agents decision to handle defendant as a civilian prompted the reading of his rights).

[301] Condon, *supra* note 299 (quoting former Deputy Director of the FBI, John S. Pistole).

[302] Shahzad Complaint, at 9.

[303] *Id*.

[304] Mark Mazzetti et. al, *Suspect, Charged, Said to Admit to Role in Plot*, N.Y. Times May 4, 2010, http://www.nytimes.com/2010/05/05/nyregion/05bomb.html?hp (revealing officials were investigating possible links between Shahzad and the Pakistani Taliban).

[305] Andrew C. McCarthy, *Why Was the Shahzad Complaint Made Public?*, National Review Online (May 5, 2010, 6:17 PM), http://www.nationalreview.com/corner/198991/why-was-shahzad-complaint-made-public-andrew-c-mccarthy (criticizing the government for compromising what could have been a useful secret source of intelligence because the

public complaint allowed an easy inference that Shahzad is cooperating with authorities).

[306] Government's Memorandum in Connection with the Sentencing of Faisal Shahzad at 2, United States v. Faisal Shahzad, No. 1:10-cr-00541-MGC (S.D.N.Y. Sept. 29, 2010).

[307] Press Release, U.S. Dep't of Justice, Faisal Shahzad Pleads Guilty in Manhattan Federal Court to 10 Federal Crimes, (June 21, 2010), *available at* http://www.justice.gov/opa/pr/2010/June/10-ag-721.html (reporting the guilty plea came less than two months after arrest).

[308] William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137, 2189 (2002) (voicing the need to treat terrorists differently than ordinary criminals).

[309] *Id*.

[310] *See* United States v. Khalil, 214 F.3d 111, 115-16 (2d Cir. 2000) (providing statements before and after *Miranda* warnings regarding bomb placement, function, and his motivations); Savage, *supra* note 14 (noting that Abdulmutallab voluntarily participated in interrogation for almost an hour, and Shazad for several hours, before being given *Miranda* warnings).

[311] *Khalil*, 214 F.3d at 115–16 (revealing the only question the defendant did not answer directly was whether or not he intended to kill himself in the bombing).

[312] Savage, *supra* note 14 (reporting defendant's cooperation stopped, at least momentarily, after his surgery).

[313] *See id*. (failing to specify how the relatives convinced him to cooperate or why the defendant changed his mind).

[314] Shahzad Complaint, at 9 (defendant Savage admitting his role in the failed bombing and possibly provided actionable intelligence that led to several arrests in Pakistan).

[315] Ctr on Law and Sec., N.Y. Univ. School of Law, Terrorist Trial Report Card: Sept. 11, 2001-Sept. 11, 2010 4 (2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf (specifying 688 prosecutions have been resolved of the 998 indicted cases).

[316] *Id*. (noting, for example, the Report Card indicates they found thirty-eight known cooperators in the Terrorist Trial Database. While this is a small percentage of the entire dataset (4.6% of all defendants, and 5.5% of the non-list defendants), they appear in 12% of non-list cases. Ctr on Law and Sec., N.Y. Univ. School of Law, *Terrorist Trial Report Card: Sept. 11, 2001-Sept. 11, 2019* 44 (January 2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf/ (reporting non-list cases exclude cases in which researchers were not able to identify an association with terrorism other than inclusion on a Department of Justice list).

[317] New York v. Quarles, 497 U.S. 649, 686 (1984) (Marshall, J., dissenting) (calling the majority's rule "a serious loss [to] the administration of justice . . .").

[318] *Id*. at 686 (Marshall, J., dissenting) (citing Weatherford v. Bursey, 429 U.S. 545 (1977)).

[319] *See e.g.*, United States v. Patane, 542 U.S. 630, 631 (2004) (plurality opinion) ("[V]iolations [of the Fifth Amendment right against self-incrimination] occur, if at all, only upon the admission of unwarned statements into evidence at trial."); *Chavez*, 538 U.S. at 769 (plurality opinion) (holding the alleged coercive questioning of the suspect, including failure to read *Miranda* rights, did not violate Self-Incrimination Clause of Fifth Amendment, absent use of suspect's compelled statements in criminal case against him); United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) ("[A] violation [of the Fifth Amendment right against self-incrimination] occurs only at trial.").

[320] *See e.g.*, *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 177, 203 n. 19 (2d Cir. 2008) (finding that application of *Miranda* to overseas detainees would not hinder intelligence gathering); United States v. Bin Laden, 132 F. Supp. 2d 168, 189 n. 19 (S.D.N.Y. 2001) (stating holding not intended to hinder intelligence gathering by authorized officials, but only to limit use of non-*Mirandized* statements at domestic trial).

[321] *Bin Laden*, 132 F. Supp. 2d at 189.

[322] *Quarles*, 467 U.S. at 687, n. 9 (Marshall, J., dissenting).

[323] *Khalil*, 214 F.3d at 115–16 (recall defendant only objected to admission of his statement indicating he wanted to die in the blast, not statements regarding operation of the bombs themselves).

[324] Abdulmutallab Complaint, at 2 (noting officers also discovered a partially melted syringe that, based on witness statements, they believed the defendant used to initiate the device.).

[325] Shahzad Complaint, at 6–8 (detailing that in addition to that evidence, officers also had witness statements from the dealership that sold the Pathfinder used in the failed bombing, vehicle registration information for that vehicle as well as another vehicle known to belong to Faisal Shazad, and statements from witnesses who saw bomb making materials in Shazad's home).

[326] *See e.g.*, *Patane*, 542 U.S. at 644 (refusing suppression of physical fruits of defendant's unwarned statements); *Harris*, 401 U.S. at 226 (admitting unwarned statements for impeachment at trial); *Yousef*, 327 F.3d at 146 (discussing statements to foreign officials and joint venture doctrine); United States v. Mobley, 40 F.3d 688, 694 (4th Cir. 1994) (harmless error); *DeSantis*, 870 F.2d at 541 (holding the public safety exception applies, even to statements made after assertion of Sixth Amendment right to counsel).

[327] Regarding the likelihood of such a change, Philip B. Heymann states that the Supreme Court would be likely to uphold a broader emergency exception for terrorism cases, especially with Congressional approval. Serrano & Savage, *supra* note 11 (inferring that "Not having addressed how long the emergency exception can be, the Supreme Court would be very hesitant to disagree with both the president and Congress if there was any reasonable resolution to that question.").

[328] United States v. Jones, 154 F. Supp. 2d 617, 629 (S.D.N.Y. 2001) (noting that "Such an exception, however, does not accord officers an automatic right to interrogate suspects simply because it is possible that firearms are present at the arrest scene. In the context of searches for weapons, this doctrine requires, at a minimum, that the authorities have some real basis to believe that weapons are present, and some specific reason to believe that the weapon's undetected presence poses a danger to the police or to the public.").

[329] *Quarles*, 497 U.S. at 656.

[330] *Id.* at 659, n. 8 (distinguishing Orozco v. Texas, 394 U.S. 324 (1969)).

[331] *Id*. at 658.

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