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Revisiting the Public Safety Exception to Miranda for Suspected Terrorists: Dzhokhar Tsarnaev and the Bombing of the 2013 Boston Marathon

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REVISITING THE PUBLIC SAFETY EXCEPTION TO *MIRANDA* FOR SUSPECTED TERRORISTS: DZHOKHAR TSARNAEV AND THE BOMBING OF THE 2013 BOSTON MARATHON

Hannah Lonky*

This Comment examines the application of the public safety exception to Miranda to cases of domestic terrorism, looking particularly at the case of Dzhokhar Tsarnaev and the 2013 Boston Marathon bombing. By comparing the Department of Justice’s War on Terror policies to the Warren Court’s rationale for Miranda, this Comment argues that courts should require law enforcement officers to have reasonable knowledge of an immediate threat to public safety before they may properly invoke the Quarles public safety exception.

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INTRODUCTION

April 15, 2013. The finish line of the Boston Marathon, on the north side of Boylston Street, on a beautiful spring day.¹ It is 2:49 in the afternoon. The race clock reads 4:09:43.² Suddenly, a boom “like a cannon” erupts.³ Runners and spectators see a “ball of fire,” then smoke, glass, debris.⁴ Thirteen seconds later, a second explosion rips through the crowd five hundred feet away.⁵ There are people on the ground, limbs scattered, blood everywhere.⁶ Three spectators lie dead, and nearly two hundred sixty people are strewn, injured.⁷ Bombs made from two pressure cookers filled with nails and shrapnel.⁸

April 18, 2013. The FBI is running a multiagency investigation into the bombing.⁹ It releases images and descriptions of two suspects, soon identified as Chechen-American brothers Tamerlan and Dzhokhar Tsarnaev.¹⁰ In the pre-dawn hours of the next day, the same two men open fire on a campus police officer on the campus of the Massachusetts Institute of Technology in Cambridge.¹¹ They carjack an SUV at gunpoint across the Charles River in Allston. A car chase and shootout with police in Watertown follow, during which Tamerlan is killed.¹² Dzhokhar escapes in the stolen car.¹³

¹ Christine Fennessy et al., *What We Saw and How We Responded: An Oral History of the 117th Boston Marathon*, RUNNER’S WORLD, July 2013, at 70–90.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Press Release, FBI Boston, Remarks of Special Agent in Charge Richard DesLauriers at Press Conference on Bombing Investigation (Apr. 18, 2013), *available at* <http://www.fbi.gov/boston/press-releases/2013/remarks-of-special-agent-in-charge-richard-deslauriers-at-press-conference-on-bombing-investigation-1>, *archived at* <http://perma.cc/L24S-8QT5>. A wide variety of federal, state, and local agencies contributed to the investigation, including the Boston Police, ATF, Massachusetts State Police, and the more than thirty agencies of the Joint Terrorism Task Force. *Id.*

¹⁰ *Id.*; Greg Botelho, *Timeline: The Boston Marathon Bombing, Manhunt and Investigation*, CNN (May 2, 2013, 9:09 AM), <http://www.cnn.com/2013/05/01/justice/boston-marathon-timeline/>, *archived at* <http://perma.cc/Y6W7-W789>.

¹¹ Botelho, *supra* note 10. The officer dies of his wounds. *Id.*

¹² *Id.*

¹³ *The Hunt for the Boston Bombing Suspects*, N.Y. TIMES (Apr. 19, 2013), <http://www.nytimes.com/interactive/2013/04/19/us/boston-marathon-manhunt.html?ref=bostonmarathon> (last visited Mar. 16, 2015), *archived at* <http://perma.cc/7SJ6-YJ89>.

April 19, 2013. The entire Boston region is locked down for most of the day. Residents are told not to leave their houses, as law enforcement searches for the missing suspect.¹⁴ The lockdown is lifted at dusk. Shortly thereafter, Dzhokhar Tsarnaev is found bloody and weakened in a dry-docked boat in a Watertown backyard. After a brief standoff, he is taken into custody around 8 P.M.¹⁵ He is too injured to speak.¹⁶ With official sanction from the Obama Administration, special counterterrorism agents question, but do not Mirandize, Dzhokhar.¹⁷ Dzhokhar confesses to planting the bombs with his brother.¹⁸ He is questioned in his hospital room for sixteen hours over two days, before Magistrate Judge Marianne B. Bowles, and two representatives from the U.S. Attorneys' Office show up to conduct a hearing. At this point, on April 22, 2013, Dzhokhar is finally read his rights.¹⁹

Everyone with a television knows the famous words police officers must say before they can question someone in custody: *You have the right to remain silent. If you give up that right, anything you say can and will be used against you in a court of law. You have the right to an attorney. If you can't afford one, one will be appointed to you.*²⁰ Everyone knows these protections as "*Miranda rights.*"²¹ But the Boston bombing aftermath showed that, contrary to popular belief,²² these rights are not absolute.

¹⁴ Eric Schmitt et al., *Bombing Inquiry Turns to Motive and Russia Trip*, N.Y. TIMES, Apr. 21, 2013, at A1.

¹⁵ *The Hunt for the Boston Bombing Suspects*, *supra* note 13.

¹⁶ Schmitt et al., *supra* note 14.

¹⁷ *Id.*

¹⁸ Rodrique Ngowi et al., *Officials: Suspect Described Plot Before Miranda*, ASSOCIATED PRESS (Apr. 25, 2013, 3:50 AM), <http://bigstory.ap.org/article/lawmakers-ask-who-knew-what-about-bomb-suspect>, archived at <http://perma.cc/QR7-E7DK>.

¹⁹ Transcript of Initial Appearance Before the Honorable Marianne B. Bowler, United States Magistrate Judge, on April 22, 2013 at 4–5, *United States v. Tsarnaev*, No. 1:13-cr-10200 (D. Mass. Apr. 23, 2013) [hereinafter *Tsarnaev Initial Appearance*]; see also Emily Bazelon, *Dzhokhar Tsarnaev Talked for 16 Hours Before He Was Read His Rights*, SLATE (Apr. 25, 2013, 2:06 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/dzhokhar_tsarnaev_s_interrogation_his_miranda_warning_shouldn_t_have_taken.html, archived at <http://perma.cc/XP8Q-CRSZ>.

²⁰ *Law & Order: Special Victims Unit: Hothouse* (NBC television broadcast Jan. 13, 2009).

²¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²² See AM. CIVIL LIBERTIES UNION, WHAT TO DO IF YOU'RE STOPPED BY POLICE, IMMIGRATION AGENTS OR THE FBI, available at https://www.aclu.org/files/assets/aclu_kyr.pdf (failing to mention any exceptions to the *Miranda* rule in its instructions on how to exercise one's *Miranda* rights), archived at <https://perma.cc/ZHQ9-3JED>; "Miranda" Rights and the Fifth Amendment, FindLaw, <http://criminal.findlaw.com/criminal-rights/miranda-rights-and-the-fifth-amendment.html> (last visited Mar. 26, 2015) (same).

The Supreme Court has created a public safety exception to *Miranda*'s broad language. In *New York v. Quarles*, the Court held that in some situations presenting threats to public safety, the public's interest in safety outweighs an individual's right to be informed of her Fifth Amendment rights.²³ In *Dickerson v. United States*, the Supreme Court affirmed that defendants have the constitutional right to have these warnings read to prevent self-incrimination, but it left intact the rule's numerous exceptions.²⁴

Where the right ends and the public safety exception begins remains elusive. Circuits are split as to how that exception should be interpreted and what factual scenarios should properly trigger the exception. Approaches to the public safety exception fall largely into two camps: the broad and the narrow approaches to *Quarles*. Circuits following the broad approach allow courts to admit evidence of prewarning statements made in inherently dangerous situations, regardless of the immediacy or severity of the threat to public safety. Those following the narrow approach admit such evidence at trial only when law enforcement officers have actual knowledge of an imminent threat to public safety.

This Comment advocates for the use of the narrow approach to the public safety exception, even in terror contexts. By requiring officers to have actual knowledge of an immediate threat to the public, the narrow approach hews closely to the facts and reasoning of *Quarles* itself, and allows both *Miranda* and its exception to coexist without the exception consuming the rule. The Supreme Court should clarify that the *Quarles* public safety exception applies only in narrow circumstances before another person is potentially deprived of her constitutional rights. Our constitutional democracy depends on the rule of law—or a match between the law as written and the law as applied—for its legitimacy. Because *Miranda* is a constitutional right,²⁵ exceptions to its rule must be minimized as much as possible, even if the rule has little effect on suspects' behavior in practice. *Miranda* is especially important as “a symbol of American commitment to due process”²⁶ in the terror context.

This Comment proceeds as follows. Part I addresses the history of the Supreme Court's confessions jurisprudence, exploring the reasons the

archived at <http://perma.cc/E4UQ-L92U>.

²³ 467 U.S. 649, 655–56 (1984).

²⁴ 530 U.S. 428, 432 (2000).

²⁵ *Id.*

²⁶ Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 763 (2011).

Warren Court thought the rule necessary, and the Burger, Rehnquist, and Roberts Courts' gradual erosion of the rule. Part II examines the application of *Miranda* and *Quarles* to the War on Terror. It argues that the narrow approach to the public safety exception strikes an appropriate balance between the needs of law enforcement and the individual rights of terror suspects. Part III concludes by analyzing the case of Dzhokhar Tsarnaev and the 2013 Boston Marathon bombing and showing how the narrow approach to the public safety exception can still yield socially desirable convictions.

I. THE HISTORY OF AMERICAN CONFESSION LAW

A. THE ROAD TO *MIRANDA*

In relevant part, the Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.”²⁷ Between the 1880s and the 1960s, courts held this to mean that a confession was admissible only if it was “voluntary” and comported with due process.²⁸ The doctrinal underpinnings of the Court’s criminal jurisprudence in the early-to-mid-twentieth century emphasized the exceptionalism of American due process. It highlighted the contrast between a truly democratic society and the totalitarian regimes of Europe, and between free-willed individuals and the coercive state.²⁹ The Court contrasted unconstrained foreign police forces that were authorized to “wring . . . confessions by physical and mental torture”³⁰ with America’s criminal justice system, which was based on “abstract, defendant-oriented principles such as liberty, dignity, privacy, rationality, and freedom.”³¹

²⁷ U.S. CONST. amend. V.

²⁸ See, e.g., *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010); *Bram v. United States*, 168 U.S. 532, 548 (1897); *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884). See also Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1831 (1987); William T. Pizzi & Morris B. Hoffman, *Taking Miranda’s Pulse*, 58 VAND. L. REV. 813, 816–17 (2005).

²⁹ See David T. Hartmann, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 GEO. MASON U. C.R. L.J. 219, 224–25 (2012); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 636 (2010).

³⁰ *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

³¹ Stephanos Bibas, *The Rehnquist Court’s Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1081 (2006). See, e.g., *United States v. Carignan*, 342 U.S. 36, 46 (1951) (Douglas, J., concurring) (“We in this country . . . early made the choice—that the dignity and privacy of the individual were worth more to society than an all-powerful police.”); *McNabb v. United States*, 318 U.S. 332, 343 (1943) (“A democratic society, in

Police were required to use “fair procedures” in interrogating criminal suspects for such confessions to be admissible in a court of law.³² Courts considered the totality of the circumstances under which a confession was extracted on a case-by-case basis.³³ But this approach to voluntariness proved a poor measure for rooting out unconstitutional conduct. By proceeding on a case-by-case basis and by seeing only the most egregious cases, the Court was unable to provide law enforcement with clear guidance about what interrogation tactics were impermissible.³⁴ These decisions provided unsatisfactory guidance for lower courts about what the focus of a “totality of the circumstances” analysis should be—the police tactics or the characteristics of the suspect.³⁵

Miranda is a landmark decision, not only for replacing courts’ due process balancing test with a bright-line rule establishing protections for suspects during custodial police interrogations, but also as an emblem of the Warren Court’s expansive social and political vision. From 1953 to 1969, when Earl Warren served as its Chief Justice, the Supreme Court took on the role of the nation’s moral compass,³⁶ seeking an emphasis on *justice* rather than brute punishment.³⁷ The Court’s decisions from this era—whatever their context—share a common theme: the federal courts as enforcers of individual rights and “equality norms” against the states.³⁸

Even before *Miranda*, the Warren Court was particularly concerned with the privilege against self-incrimination. Justice Frankfurter called the privilege against self-incrimination “an important advance in the development of our liberty” and “one of the great landmarks in man’s

which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”).

³² *McNabb*, 318 U.S. at 347.

³³ *Id.*

³⁴ See Ogletree, *supra* note 28, at 1832–34.

³⁵ See 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, 163–69 (2007); see also Ogletree, *supra* note 28, at 1834–35.

³⁶ See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 834 (2012); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847 (2007).

³⁷ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963) (requiring states to provide legal counsel for felony defendants); *Fay v. Noia*, 372 U.S. 391, 417 (1963) (allowing federal habeas corpus review of state court judgments); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (holding that racial segregation of schools violates the Equal Protection Clause of the Fourteenth Amendment).

³⁸ Resnik, *supra* note 36, at 834.

struggle to make himself civilized.”³⁹ And two years before the Court decided *Miranda*, Justice Goldberg’s opinion in *Murphy v. Waterfront Commissioner of New York Harbor* gave an elegant discourse on the right:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates “a fair state–individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load”; our respect for the inviolability of the human personality and of the right of each individual “to a private enclave where he may lead a private life,” our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes “a shelter to the guilty,” is often “a protection to the innocent.”⁴⁰

It should not be surprising, then, that Chief Justice Warren’s expansive reasoning in *Miranda* was grounded in preserving “human dignity” and “individual liberty” against unjust police interrogation practices.⁴¹ With these ideas engrained in the Warren Court’s jurisprudence, the stage was set for the 1966 decision in *Miranda*.

B. *MIRANDA V. ARIZONA*

Of all the Supreme Court’s criminal procedure decisions of the twentieth century, *Miranda v. Arizona*⁴² is arguably the most well-known. Chief Justice Warren’s opinion from June 1966 disposed of four consolidated cases dealing with related issues of interrogations and

³⁹ *Ullman v. United States*, 350 U.S. 422, 426 (1956) (citing ERWIN N. GRISWOLD, *THE 5TH AMENDMENT TODAY* 7 (1955) (internal quotation marks omitted)).

⁴⁰ 378 U.S. 52, 55 (1964) (citations omitted), *overruled in part by* *United States v. Balsys*, 524 U.S. 666 (1998) (rejecting the generalized policy concerns underlying *Murphy*’s holding; *see also* *Bibas*, *supra* note 31, at 1079–80 (discussing the Warren Court’s departure from traditional Self-Incrimination Clause jurisprudence)).

⁴¹ *Miranda v. Arizona*, 384 U.S. 436, 455, 457 (1966); *see also id.* at 455–58 (discussing contemporary police interrogation techniques); *id.* at 463–66 (drawing together themes from self-incrimination precedents); *id.* at 468–69 (“The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. . . . More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.”).

⁴² *Id.* at 436.

confessions.⁴³ All four of the cases before the Court that day, including namesake Ernesto Miranda's, "share[d] salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."⁴⁴ While the tactics used by law enforcement in each interrogation might have passed muster under a traditional voluntariness analysis,⁴⁵ the Court required more, ultimately imposing on police an affirmative obligation to adhere to certain "procedural safeguards" to ensure individuals know their rights in order to ameliorate otherwise coercive situations.⁴⁶

The Court ultimately held that prior to questioning an individual in custody, law enforcement agents must "[warn an individual] that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."⁴⁷ The Court reasoned that police–citizen interactions are *inherently* coercive, especially those conducted while the citizen is in custody.⁴⁸ Chief Justice Warren noted that, in order to protect against such an environment, the Fifth Amendment protection against self-incrimination was not limited merely to the criminal courtroom; rather, the protection extended to any situation in which a person's "freedom of action is curtailed in any significant way."⁴⁹ The Warren Court sought to counterbalance the power of the state by strengthening the rights of the individual. Rather than focus on reliability of a particular confession, as the earlier voluntariness due process inquiry did, *Miranda* sought to protect the individual liberty of *all* suspects in *all* inherently coercive environments.⁵⁰

C. LIMITING *MIRANDA*

Although the *Miranda* decision seemed to give individuals more protections during police interrogations, the Court has since limited the *Miranda* doctrine and its liberal underpinnings. The decision's expansive view of an individual's confession rights would not last much longer than the Warren Court itself. Subsequent decisions in the 1970s, 1980s, and

⁴³ *Id.* at 440.

⁴⁴ *Id.* at 445.

⁴⁵ *Id.* at 457.

⁴⁶ *Id.* at 444–45.

⁴⁷ *Id.* at 444.

⁴⁸ *Id.* at 445–48.

⁴⁹ *Id.* at 467.

⁵⁰ See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 17 (2010).

1990s curtailed the Warren Court's broad liberal vision in a "series of nicks [sic] and cuts that, while not yet fatal, have led to critical blood loss."⁵¹

In the Fourth Amendment context, evidence discovered through an unconstitutional search or seizure must be excluded at trial.⁵² The exclusionary rule is intended to deter government misconduct, incentivize compliance with the strictures of the Constitution, and safeguard judicial integrity.⁵³ And yet the Rehnquist Court limited the applicability of the exclusionary rule to *Miranda* violations, undercutting the value of this constitutional right. For example, the Court held in *Harris v. New York* that unwarned statements in violation of *Miranda* could be used to impeach the defendant's direct testimony at trial.⁵⁴ Further, in *United States v. Patane*, the Court declined to extend the full exclusionary rule of the Fourth Amendment to *Miranda* violations and held that the physical fruits of an un-Mirandized defendant's statements could still be admitted at trial.⁵⁵ Moreover, the Court set a low bar by which to judge the adequacy of police warnings by declining to require officers to recite *Miranda*'s warnings in their entirety;⁵⁶ made it easy for suspects in custody to waive their rights under *Miranda*;⁵⁷ and curtailed the duration and circumstances under which officers must respect an invocation of rights under *Miranda*.⁵⁸

Unique among *Miranda*'s progeny is one wholesale exception to the Warren Court's protections: *New York v. Quarles*, a 1984 decision written by then-Associate Justice Rehnquist.⁵⁹ Benjamin Quarles was charged with possession of a weapon in the New York state courts.⁶⁰ Late one night, a

⁵¹ Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1337 (2003); see also Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2626 (1996).

⁵² See *Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

⁵³ *Id.* at 656, 659.

⁵⁴ 401 U.S. 222, 224 (1971).

⁵⁵ 542 U.S. 630, 636–37 (2004).

⁵⁶ *Duckworth v. Eagan*, 492 U.S. 195, 202–03 (1989); *id.* at 203 (“[N]o talismanic incantation [is] required to satisfy [*Miranda*]’s strictures.” (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981))).

⁵⁷ See, e.g., *Davis v. United States*, 512 U.S. 452, 461–62 (1994) (holding that people must unambiguously assert their *Miranda* rights); *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that a waiver of *Miranda* rights need not be explicit).

⁵⁸ See, e.g., *Maryland v. Shatzer*, 559 U.S. 98, 110–11 (2010) (holding that an invocation of the right to counsel ends after a fourteen-day break in custody); *Michigan v. Mosley*, 423 U.S. 96, 102–03 (1975) (holding that the invocation of the right to remain silent is not indefinite).

⁵⁹ 467 U.S. 649 (1984).

⁶⁰ *Id.* at 651.

rape victim approached two police officers in Queens, New York, claiming that the man who had assaulted her had gone, armed, into a nearby supermarket.⁶¹ The officers entered the supermarket and quickly found the man, Quarles, at the checkout counter and apprehended him.⁶² One of the officers handcuffed and frisked him, finding an empty gun holster on his shoulder.⁶³ Before Mirandizing Quarles, the officer asked him where the gun was; Quarles gestured and said, “[T]he gun is over there.”⁶⁴ Only after the officer retrieved the gun did he read Quarles his *Miranda* rights, at which point Quarles waived his right to remain silent and his right to an attorney and consented to answer more questions.⁶⁵ The trial court excluded Quarles’s initial statement and the gun itself on the grounds that the officer had questioned Quarles before reading him his rights, in violation of *Miranda*.⁶⁶ The Appellate Division and Court of Appeals both affirmed.⁶⁷

The Supreme Court, however, reversed and carved out a “public safety” exception to *Miranda*, holding that unwarned testimony from a suspect in custody could be admitted into evidence in “situation[s] in which police officers ask questions *reasonably prompted by a concern for the public safety*.”⁶⁸ This exception applies regardless of the actual motivation of the officers on the scene.⁶⁹ Justice Rehnquist concluded that a threat to public safety changes the balance between the social cost of respect for individual dignity against the need for interrogation and conviction of guilty suspects.⁷⁰

Miranda warnings may deter suspects from answering questions,⁷¹ and, to Justice Rehnquist, this risk was unacceptable in cases where law enforcement officers need to ask questions to get information to protect the

⁶¹ *Id.* at 651–52.

⁶² *Id.* at 652.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 652–53.

⁶⁷ *Id.* at 653.

⁶⁸ *Id.* at 656 (emphasis added).

⁶⁹ *Id.* (“In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.”).

⁷⁰ *Id.* at 657.

⁷¹ The *Miranda* majority conceded this risk. See *Miranda v. Arizona*, 384 U.S. 436, 479–81 (1966). Criminological research over the last fifty years is inconclusive. See *infra* text accompanying notes 151–155.

public.⁷² A defendant's refusal to answer questions in these circumstances would not just mean the loss of evidence, Rehnquist reasoned; an officer needs these questions answered to defuse any public safety risk.⁷³ Justice Rehnquist was clear that courts should defer to an officer's intuition that a certain situation presented a threat to public safety.⁷⁴ Moreover, according to the Justice, there is little risk that officers would take this exception too far because "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."⁷⁵

Therefore, *Quarles* established that the public safety exception seems to apply to anything a defendant said before being given *Miranda* warnings, whether or not those admissions were related to the public safety issue.⁷⁶ In fact, the exception would apply whether or not there actually turned out to be a true threat to public safety, so long as the reviewing court believed the officer was trying to protect the public.⁷⁷ However, the *Quarles* majority was careful to distinguish acceptable prewarning questioning that was related to a specific public safety threat from unacceptable prewarning questions that were "clearly investigatory."⁷⁸ Thus, the public safety exception applies when the police officer reasonably believes there is danger to public safety, and any answers to questions related to that reasonable fear asked before the *Miranda* warnings are given do not violate *Miranda* and may be admitted at trial.

Justice Marshall dissented vigorously from any sanctioned exception to *Miranda*:

The majority has lost sight of the fact that *Miranda v. Arizona* and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The

⁷² *Quarles*, 467 U.S. at 657.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 658–59.

⁷⁶ *Id.* at 657–58.

⁷⁷ *Id.*

⁷⁸ *Id.* at 659 n.8 (distinguishing *Orozco v. Texas*, 394 U.S. 324 (1969)). In *Orozco*, the Court upheld suppression of un-Mirandized questioning about the location of a weapon. *Id.* Justice Rehnquist noted in *Quarles* that the questions in *Orozco* "did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime." *Id.*

majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.⁷⁹

He believed that law enforcement could effectively do its job protecting the public safety without an express exception that he believed eviscerated the rights secured by *Miranda*: law enforcement officials can *always* ask suspects whatever questions they deem necessary, but, according to Justice Marshall, prosecutors should not be able to admit the resulting testimony at trial.⁸⁰ Justice Marshall argued that already-existing exceptions that permitted courts to admit the fruits of unwarned testimony for various purposes⁸¹ would still allow prosecutors to achieve convictions without excising a whole class of cases from *Miranda*'s purview and devastating the underlying *Miranda* rationale.⁸²

In each of these cases undercutting *Miranda*, the Court justified its holding by noting that *Miranda* did not announce a constitutional rule of its own, but merely provided a prophylaxis to protect against violations of the Fifth Amendment.⁸³ “[A] prophylactic rule is a judicial work product somehow distinguishable from judicial interpretation of the Constitution” that “overenforces what the Constitution, as judicially interpreted, would itself require.”⁸⁴ Prophylactic rules, because they are not themselves part of the Constitution, can be changed by statute or ordinary judicial decision;⁸⁵ the Constitution's provisions can only be amended by the procedures established in Article V.⁸⁶ It was not until 2000, in *Dickerson v. United States*,⁸⁷ that the Court finally affirmatively addressed *Miranda*'s status, holding in a flawed⁸⁸ opinion that *Miranda* is a constitutional right that

⁷⁹ *Id.* at 680–81 (Marshall, J., dissenting).

⁸⁰ *Id.* at 686.

⁸¹ See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (permitting the use of unwarned testimony for impeachment purposes at trial) and *Michigan v. Tucker*, 417 U.S. 433 (1974) (imperfect *Miranda* warnings will not bar the use of a suspect's testimony at trial where statement was otherwise voluntary).

⁸² *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting) (“The irony of the majority's decision is that the public's safety can be perfectly well protected without abridging the Fifth Amendment.”).

⁸³ See, e.g., *Tucker*, 417 U.S. at 444 (“[T]hese procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”).

⁸⁴ Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30 (2004).

⁸⁵ Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic Rules,”* 70 U. CIN. L. REV. 1 (2001).

⁸⁶ U.S. CONST. art. V.

⁸⁷ 530 U.S. 428 (2000).

⁸⁸ See Caminker, *supra* note 85, at 5 (noting that the *Dickerson* decision exhibits a “lack of intellectual coherence”); Paul G. Cassell, *The Paths Not Taken: The Supreme Court's*

cannot be abrogated by Congress⁸⁹ while punting on addressing the inconsistencies between *Miranda* and cases like *Quarles*.⁹⁰

But the important takeaway from *Dickerson* is that *Miranda* is a constitutional rule—the “law as written” for the purposes of our constitutional democracy.⁹¹ The rule of law fails and threatens the legality of a state when there is a “gap” between the law as written and the law as applied.⁹² “Stealth overruling”—whereby the Court claims to be following precedent while in reality subtly chipping it away—exempts the Court from its proper role in our tripartite democracy and threatens the legitimacy of antimajoritarian judicial review.⁹³ A principled approach to the Constitution, seeking to give meaning to all of its guarantees, would preserve *Miranda*’s protections and minimize the exceptions to their application.

D. LOWER COURTS AND THE PUBLIC SAFETY EXCEPTION

Lower courts disagree markedly over the scope of the public safety exception. How important to the *Quarles* majority was it that the officer asked “only the question necessary”⁹⁴ to defuse the public safety risk before informing Quarles of his rights? The Court gave no guidance as to how to determine which questions are “necessary” to protect the public and which might be merely helpful in a future prosecution. Similarly, it is unclear how significant Justice Rehnquist’s inclusion of the phrase “on these facts” is to the holding—a situation in which the officers on the scene specifically knew the risk to public safety.⁹⁵ Absent any further direction from the

Failures in Dickerson, 99 MICH. L. REV. 898, 902 (2001) (arguing that “*Dickerson* could have been written coherently—that the Court could have crafted other resolutions that would have allowed it to harmonize its doctrine far more effectively than the skimpy, jerry-built opinion the Court announced”); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 976 (2001) (referring to *Dickerson* as an “opportunity missed” to make *Miranda* jurisprudence coherent and effect real change).

⁸⁹ *Dickerson*, 530 U.S. at 444.

⁹⁰ *Id.* at 441.

⁹¹ See Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 929 (2007).

⁹² *Id.*

⁹³ See Friedman, *supra* note 50, at 3–4; Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008) (commenting on courts “purport[ing] to respect a precedent while in fact cynically interpreting it into oblivion”).

⁹⁴ *New York v. Quarles*, 467 U.S. 649, 659 (1984).

⁹⁵ *Id.* at 655. As Justice Marshall’s dissent shrewdly points out, the facts as recounted by Justice Rehnquist differ markedly from those found by New York’s highest court. *Id.* at 675–76 (Marshall, J., dissenting). According to that record, Quarles had been “reduced to a

Supreme Court, circuit courts have been divided over what factual circumstances are required to properly invoke *Quarles*.⁹⁶

The First, Eighth, and Ninth Circuits take a broad approach to the public safety exception, admitting prewarning statements in inherently dangerous situations, regardless of the immediacy or severity of the threat to public safety.⁹⁷ These circuits do not require that officers have actual knowledge of weapons or other threats, only that the questions they ask of the suspect be “reasonably prompted by a concern for the public safety.”⁹⁸ Threats to public safety may include threats only to police officers who are acting in the course of their job.⁹⁹ These courts may admit evidence resulting from prewarning questioning whenever there is an “objectively reasonable need to protect the police or the public from any immediate danger,”¹⁰⁰ such as asking an arrestee whether he had drugs or needles on his person that might hurt an officer during a bodily search,¹⁰¹ asking a drunk man if he had a gun on his person in an area filled with bars and

condition of physical powerlessness” by the time police officers questioned him about his gun. *Id.* at 675 (Marshall, J., dissenting) (quoting the opinion below in the Court of Appeals of New York, 444 N.E.2d 984 (N.Y. 1982) (internal quotation marks omitted)). For the purposes of this Comment, I will accept the majority’s account of the facts, which does not affect my arguments below.

⁹⁶ See Geoffrey Corn & Chris Jenks, *Strange Bedfellows: How Expanding the Public Safety Exception to Miranda Benefits Counterterrorism Suspects*, 41 *FORDHAM URB. L.J.* 1, 10 (2013); Keith A. Petty, *A Different Kind of Criminal? Miranda, Terror Suspects, and the Public Safety Exception*, 4 *ELON L. REV.* 175, 181–82 (2012); Rorie A. Norton, Comment, *Matters of Public Safety and the Current Quarrel over the Scope of the Quarles Exception to Miranda*, 78 *FORDHAM L. REV.* 1931, 1947–60 (2010).

⁹⁷ Norton, *supra* note 96, at 1948. See, e.g., *United States v. Watters*, 572 F.3d 479, 482–83 (8th Cir. 2009) (permitting questioning of a suspect to locate a gun he “might have hidden” on a street busy with bars); *United States v. Fox*, 393 F.3d 52, 60 (1st Cir. 2004) (allowing an officer to question a suspect because of a visible “bulge” in his pocket), *vacated*, 545 U.S. 1125 (2005) (remanding for further consideration in light of the Court’s opinion in *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Reilly*, 224 F.3d 986, 992 (9th Cir. 2000) (“[T]he exception was properly applied because there existed an objectively reasonable need for the officer to protect himself from potential bodily harm.”).

⁹⁸ *United States v. Williams*, 181 F.3d 945, 953 (8th Cir. 1999) (quoting *United States v. Lawrence*, 952 F.2d 1034, 1036 (8th Cir. 1992) (internal quotation marks omitted)); accord *Watters*, 572 F.3d at 483; *Fox*, 393 F.3d at 60; *Reilly*, 224 F.3d at 992.

⁹⁹ See, e.g., *United States v. Liddell*, 517 F.3d 1007, 1009–10 (8th Cir. 2008) (allowing officers to question a suspect before Mirandizing him even though they had already handcuffed the suspect and seized his gun because they “had good reason to be concerned that additional weapons might pose a threat to their safety”).

¹⁰⁰ See, e.g., *United States v. Carillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (quoting *United States v. Brady*, 819 F.2d 884, 888 n.3 (9th Cir. 1987) (internal quotation marks omitted)).

¹⁰¹ *Id.*

people,¹⁰² or asking a suspect if he was armed in a case where officers had not yet secured the surrounding area.¹⁰³

On the other hand, the Second, Fourth, Fifth, Sixth, and Tenth Circuits take a narrow approach,¹⁰⁴ admitting prewarning admissions and evidence only when law enforcement officers have actual knowledge of an imminent threat to public safety. This

exception applies *only* where there is “an objectively reasonable need to protect the police or the public from any *immediate danger* associated with [a] weapon.” Absent such circumstances posing an objective danger to the public or police, the need for the exception is not apparent, and the suspicion that the questioner is on a fishing expedition outweighs the belief that public safety motivated the questioning that all understand is otherwise improper.¹⁰⁵

These courts have upheld admissions when the suspects were asked about guns when they were arrested during a drug deal¹⁰⁶ and when officers saw a magazine of semiautomatic weapons and ammunition when they entered a suspect’s home to arrest him,¹⁰⁷ but not when the suspect was already in custody and his gun was hidden in a place to which the public had access.¹⁰⁸ The Fifth Circuit in *United States v. Raborn* drew a distinction between a case like *Quarles*, in which the gun was likely on the defendant’s person and in his control, and a case like the one before them, in which the gun was easily accessible to and within the control of the police.¹⁰⁹

¹⁰² *Watters*, 572 F.3d at 482–83.

¹⁰³ *Reilly*, 224 F.3d at 992.

¹⁰⁴ Norton, *supra* note 96, at 1948. See, e.g., *United States v. Reyes*, 353 F.3d 148, 153–54 (2d Cir. 2003) (allowing questioning of a suspect who was known to carry a gun when he was arrested in the afternoon near a school); *United States v. Lackey*, 334 F.3d 1224, 1227 (10th Cir. 2003) (permitting officers to ask a “focused question” that implicated the safety of the officer and bystanders); *United States v. Talley*, 275 F.3d 560, 564 (6th Cir. 2001) (permitting an officer to ask a suspect about the presence of a gun after the officer had seen ammunition and a magazine in plain sight); *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (“Mobley was encountered naked; by the time he was arrested, the FBI already had made a security sweep of his premises, and they had found that he was the sole individual present, and that the apartment was a residence for Mobley alone”); *United States v. Raborn*, 872 F.2d 589, 595 (5th Cir. 1989) (holding that the public safety exception does not apply to a suspect’s truck, where only officers had access).

¹⁰⁵ *Mobley*, 40 F.3d at 693 (quoting *New York v. Quarles*, 467 U.S. 649, 659 n.8 (1984)) (emphasis added).

¹⁰⁶ *Reyes*, 353 F.3d at 153–54.

¹⁰⁷ *Talley*, 275 F.3d at 564.

¹⁰⁸ *Raborn*, 872 F.2d at 595.

¹⁰⁹ *Id.*

In one of the more pertinent cases—Justice Marshall’s proverbial “ticking time bomb” scenario¹¹⁰—the Second Circuit held in *United States v. Khalil* that a defendant’s prewarning statements were correctly admitted under the public safety exception.¹¹¹ In that case, upon information that an informant’s two roommates had built bombs and intended to detonate them in the New York City subway, police raided a Brooklyn apartment. They found two men and a black bag, which turned out to contain pipe bombs with their switches flipped.¹¹² A gunfight ensued, putting both men in the hospital.¹¹³ Police questioned one of the defendants, Gazi Ibrahim Abu Mezer, in the hospital almost immediately, out of concern that the bomb would detonate before they could disarm it. In doing so, the officers asked questions only directly related to the weapons: the number of bombs, how to disarm them, and whether they were attached to timers.¹¹⁴ Abu Mezer answered all of these questions.¹¹⁵ Officers also asked Abu Mezer whether he had planned to kill himself, to which he answered, “Poof.”¹¹⁶ The District Court admitted these hospital statements in their entirety, rejecting Abu Mezer’s argument that “Poof” was unrelated to the public safety.¹¹⁷ The Second Circuit affirmed, holding that even if “Poof” did not fit within the public safety exception, its admission was merely harmless error.¹¹⁸ This case fits within the Second Circuit’s narrow approach to *Quarles* because the questioning officers asked questions related only to their actual knowledge of the bombs.

The difference between the broad and narrow interpretations of the *Quarles* public safety exception, while admittedly sometimes negligible, has the potential to overwhelm *Miranda* itself and render the rule

¹¹⁰ In his *Quarles* dissent, Justice Marshall argued that a public safety exception was unnecessary because police are always free to disregard *Miranda* if they think it necessary—prosecutors would just be unable to admit the defendant’s unwarned testimony at trial. *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting). Justice Marshall gave the example of “a bomb . . . about to explode” as the quintessential situation in which the public is seriously imperiled enough to justify ignoring constitutional rights (thereby implying that a gun may or may not be sufficient). *Id.* Yet, Justice Marshall still believed that the state should pay the consequences of inadmissibility if officers asked defendants questions in custody without delivering *Miranda* warnings. *Id.*

¹¹¹ *United States v. Khalil*, 214 F.3d 111, 121–22 (2d Cir. 2000).

¹¹² *Id.* at 115.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 116, 121.

¹¹⁸ *Id.* at 122.

meaningless. The difference between the broad and narrow approaches may mean the difference between admission (using the former approach) and suppression (using the latter) of testimony in cases like that of Dzhokhar Tsarnaev. As one commentator has noted, “[I]n its most permissive posture, the [public safety exception] will admit testimony in response to any question that could have been intended to secure public safety—even if the question was asked with the motive to incriminate or if there was never any actual public safety threat.”¹¹⁹ Absent better guidance as to when and how the public safety exception may be properly invoked, the exception threatens to consume the rule and render *Miranda* virtually meaningless.

II. THE WAR ON TERROR

The scope of the public safety exception to *Miranda* has great significance in the prosecution of domestic terrorism in the U.S. civilian criminal justice system. The Obama Administration’s policy of prosecuting domestic terrorists in civilian courts,¹²⁰ rather than as enemy combatants before military tribunals like the Bush White House did,¹²¹ means the space between the broad and narrow approaches to *Quarles* is a distinction with a real difference. Now that we speak of terrorism in the language of “crime” and not “war,” it should be treated, academically and procedurally, in the same way as other crimes.¹²² The public safety exception to *Miranda* can, and should, apply to suspected terrorists just as it does to any other suspected criminal.¹²³ Because terrorists are now tried in civilian courts, their fates will often turn on what information will be excluded or admitted at trial, which in turn depends on the breadth of the public safety exception. Procedural protections like *Miranda* are particularly important when the death penalty is on the line—which 18 U.S.C. § 2332(a), use of weapons of mass destruction, carries. It is critical to ensure the legitimacy of our constitutional democracy in the ideologically-freighted environment of terrorism in the United States.¹²⁴

¹¹⁹ Joanna Wright, Comment, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296, 1308 (2011).

¹²⁰ Petty, *supra* note 96, at 184 & nn.62–63.

¹²¹ See M. Katherine B. Darmer, *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 631, 631 (2007).

¹²² See Amos N. Guiora, *Relearning Lessons of History: Miranda and Counterterrorism*, 71 LA. L. REV. 1147, 1164 (2011); see Hartmann, *supra* note 29, at 235–41.

¹²³ A discussion of *Miranda*’s application in other executive branch–run coercive environments—for example, Guantanamo and other black box sites—is beyond the scope of this Comment.

¹²⁴ See Margulies, *supra* note 26, at 731.

A. THE OCTOBER 2010 FBI MEMO

Unless and until the Supreme Court clarifies the proper boundaries of the public safety exception, law enforcement officials at the state and federal levels have almost free reign to question whomever, whenever and however they see fit, so long as there is at least some minimal post-hoc public safety justification. The lack of clarity in this area threatens our rights and the legitimacy of our constitutional democracy.

A perfect example of the dangers of this uncertainty is manifest in an unsigned memorandum from the FBI and the Department of Justice, dated October 21, 2010, and published by the *New York Times* in March 2011.¹²⁵ Citing *Quarles*, the memo instructs agents to question un-Mirandized suspects about anything “reasonably prompted by an immediate concern for the safety of the public or the arresting agents.”¹²⁶ The memo further advises that officers may ask questions beyond the immediate threat if “valuable and timely intelligence” may be recovered from the suspect.¹²⁷

The memo rationalizes that the intelligence and security issues specific to terrorism justify these extraordinary measures.¹²⁸ Agents are instructed to seek approval for extra-*Miranda* questioning from FBI headquarters, the Department of Justice, or the Office of General Counsel when there is time.¹²⁹ The memo, however, leaves final discretion with the agents on the scene, who can assess “all the facts and circumstances” and make a determination regarding when to Mirandize an arrestee “on a case-by-case basis.”¹³⁰ The memo suggests areas of unwarned questioning that should be broached prior to warning: “questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might post an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.”¹³¹

¹²⁵ Internal Memorandum from Fed. Bureau of Investigation on Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (October 21, 2010) [hereinafter Internal FBI Memorandum], available at http://www.nytimes.com/2011/03/25/us/25miranda-text.html?_r=0, archived at <http://perma.cc/NLW2-9ZKL>; see Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, Mar. 25, 2011, at A17.

¹²⁶ Internal FBI Memorandum, *supra* note 125.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

In practical terms, this memo authorizes FBI agents to ask almost anyone suspected of terrorism any question. This approach is problematic: “Using the doctrine to justify questioning suspects in non-emergency situations amounts to a deliberate end-run around the *Miranda* rule.”¹³² *Dickerson* made clear that legislative attempts to evade *Miranda* are unconstitutional; it is unclear why an executive evasion would be any less problematic. Although the memo lacks the precedential value of statutory or common law, it reveals the executive branch’s views on *Miranda* and, until challenged in the courts, it reveals the way law enforcement officers are likely to be trained to approach interrogating suspects.

The memo was likely an internal response to two unrelated domestic terrorism incidents: the failed bombing of an international Northwest Airlines flight on Christmas Day 2009,¹³³ and the attempted car bombing of Times Square on May 1, 2010.¹³⁴ In the first, a young Nigerian man, Umar Farouk Abdulmutallab, was taken into FBI custody immediately upon landing in Michigan after the bomb he was wearing on board failed to detonate and instead started a small fire in the cabin.¹³⁵ Recent interviews with the local FBI agents who questioned him before he was Mirandized, nine hours after being taken into custody, reveal the wealth of confessions he made—the type of bomb, that he was affiliated with Al-Qaeda, and that he was acting alone.¹³⁶ After less than an hour of questioning, officers realized Abdulmutallab was under the influence of some type of medication

¹³² Joe Palazzolo & Tammy Audi, ‘Public Safety’ Exception to Miranda Warnings Arises in LAX-Shooting Case, WALL ST. J. LAW BLOG (Nov. 7, 2013, 4:15 PM), <http://blogs.wsj.com/law/2013/11/07/public-safety-exception-to-miranda-warnings-arises-in-lax-shooting-case> (quoting defense lawyer Justine Harris) (internal quotation marks omitted), archived at <http://perma.cc/632L-MA3Y>.

¹³³ See Anahad O’Connor & Eric Schmitt, *U.S. Says Plane Passenger Tried to Detonate Device*, N.Y. TIMES, Dec. 26, 2009, at A1.

¹³⁴ See Mark Mazzetti et al., *Terrorism Suspect, Charged, Admits to Role in Bomb Plot*, N.Y. TIMES, May 5, 2010, at A1.

¹³⁵ O’Connor & Schmitt, *supra* note 133 (misstating the given name of the bombing suspect as “Abdul Farouk Abdulmutallab”); see Anahad O’Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries to Ignite Device on Jet*, N.Y. TIMES (updated Jan. 19, 2010), <http://www.nytimes.com/2009/12/26/us/26plane.html> (correcting the error), archived at <http://perma.cc/YV5S-FDJ7>.

¹³⁶ See Scott Lewis, *Exclusive: FBI Agents Reveal Underwear Bomber Abdulmutallab Wore Explosive Underwear for Three Weeks*, ABC 7 WXYZ DETROIT (Sept. 27, 2012, 4:03 PM), http://www.wxyz.com/dpp/news/local_news/investigations/fbi-agents-underwear-bomber-abdulmutallab-wore-underwear-for-3-weeks, archived at <http://perma.cc/7WJZ-7DPH>; Walter Pincus, *Bomb Suspect Was Read Miranda Rights Nine Hours After Arrest*, WASH. POST, Feb. 15, 2010, at A6.

and broke to allow the medication to wear off.¹³⁷ Once the interrogation resumed, Abdulmutallab became far less talkative, at which point he was read his *Miranda* rights.¹³⁸ In the end, Abdulmutallab pled guilty to the eight federal terrorism-related charges brought against him, so we will never know whether the Michigan federal judge would have admitted his unwarned admissions.¹³⁹

Republican legislators were outraged that the Obama Administration chose to try Abdulmutallab in a civilian court and that President Obama directed FBI officers at the scene to read him his *Miranda* rights so soon.¹⁴⁰ Before the furor could die away, news broke of a second foiled domestic terrorist plot just months later. On May 1, 2010, a car bomb was discovered in a parked SUV in Times Square in Manhattan.¹⁴¹ Law enforcement identified Faisal Shahzad, a naturalized American citizen from Pakistan.¹⁴² He was arrested at John F. Kennedy Airport trying to flee to Dubai.¹⁴³ FBI agents questioned him for three or four hours before Mirandizing him; he waived his rights and continued cooperating, admitting that he had been trained in explosives in Pakistan and was working alone.¹⁴⁴ Shahzad, too, eventually pled guilty to his charges.¹⁴⁵

A week after the Shahzad incident, Attorney General Eric Holder went on the record on *Meet the Press* to say that the Obama Administration would “seek a law allowing investigators to interrogate terrorism suspects

¹³⁷ Opinion, *Abdulmutallab in 50 Minutes*, WALL ST. J., Jan. 26, 2010, at A16.

¹³⁸ *Id.* It is worth noting that it appears there is some confusion over the exact timeline; some reports suggest that Abdulmutallab may have stopped cooperating before he was read his *Miranda* rights. See, e.g., Pincus, *supra* note 136.

¹³⁹ Press Release, U.S. Dep’t of Justice, Umar Farouk Abdulmutallab Sentenced to Life in Prison for Attempted Bombing of Flight 253 on Christmas Day 2009 (Feb. 16, 2012), available at <http://www.justice.gov/opa/pr/umar-farouk-abdulmutallab-sentenced-life-prison-attempted-bombing-flight-253-christmas-day>, archived at <https://perma.cc/5TZW-8MWM?type=source>.

¹⁴⁰ See Pincus, *supra* note 136; Richard A. Serrano & David G. Savage, *Details of Terror Arrest Emerge*, L.A. TIMES, Feb. 1, 2010, at A1.

¹⁴¹ Al Baker & Karin Henry, *Car Bomb Leads to Evacuation in Times Square*, N.Y. TIMES, May 2, 2010, at A1.

¹⁴² Mazzetti et al., *supra* note 134.

¹⁴³ *Id.*

¹⁴⁴ *Id.*; see Michael B. Mukasey, Opinion, *Shahzad and the Pre-9/11 Paradigm*, WALL ST. J., May 12, 2010, at A19; Charlie Savage, *Holder Backing Law to Restrict Miranda Rules*, N.Y. TIMES, May 10, 2010, at A1.

¹⁴⁵ Press Release, U.S. Dep’t of Justice, Faisal Shahzad Pleads Guilty in Manhattan Federal Court to 10 Federal Crimes Arising from Attempted Car Bombing in Times Square (June 21, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-ag-721.html>, archived at <https://perma.cc/SX9D-YRKB?type=source>.

without informing them of their rights.”¹⁴⁶ A handful of *Miranda*-related bills were proposed in the 111th Congress, including measures to prohibit using authorized funds to provide *Miranda* warnings to foreign nationals suspected of terrorist activity¹⁴⁷ and a proposal that would prohibit the use of *Miranda* and related warnings in new “procedures relating to high-value detainees.”¹⁴⁸ Neither of these proposals gained serious traction, nor is it likely that one will, given the general consensus that the public safety exception is flexible enough to effectively aid law enforcement in most situations.¹⁴⁹ But the FBI memo shows that the executive branch has taken it upon itself to push the boundaries of the public safety exception,¹⁵⁰ further widening the gap between the law as written (*Miranda*) and the law as applied, and threatening the rule of law at home.

B. *MIRANDA*, PUBLIC SAFETY, AND THE WAR ON TERROR

Critics argue that because *Miranda* has the potential to deter criminal defendants’ confessions, it is especially inappropriate in the sensitive national security context of the War on Terror. Scholars disagree, however, about the extent to which *Miranda* has a negative “social cost” on the criminal justice system generally and law enforcement practice in particular.¹⁵¹ The general consensus is “that *Miranda* has had relatively little effect on law enforcement.”¹⁵² Some studies indicate that “even when *Miranda* warnings are properly administered many suspects still choose to waive their rights,”¹⁵³ but other studies point in the other direction. One quantitative study examined the number of confessions and convictions lost because suspects refused to cooperate once they were Mirandized. This study concluded that “*Miranda* has led to lost cases against almost four

¹⁴⁶ Savage, *supra* note 144.

¹⁴⁷ See CHARLES DOYLE, CONG. RESEARCH SERV., R41252, TERRORISM, *MIRANDA*, AND RELATED MATTERS 8–10 (2013), available at <http://www.fas.org/sgp/crs/terror/R41252.pdf>, archived at <http://perma.cc/NK7Y-H7YE>.

¹⁴⁸ *Id.* at 9.

¹⁴⁹ *Id.* See also Joanna Wright, *Applying Miranda’s Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions*, 113 COLUM. L. REV. SIDEBAR 136, 147 (2013).

¹⁵⁰ See Savage, *supra* note 125.

¹⁵¹ Compare Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 17 (1986), with Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438 (1996).

¹⁵² White, *supra* note 151, at 17.

¹⁵³ Petty, *supra* note 96, at 187. See also George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1999 (2004); SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC’Y, AM. BAR ASS’N, CRIMINAL JUSTICE IN CRISIS 28 (1988).

percent of all criminal suspects in this country who are questioned.”¹⁵⁴ While this statistic sounds small, in the aggregate this could mean an unacceptably high number of criminals have been set free.¹⁵⁵

Whatever *Miranda*'s social cost in the ordinary criminal context, it is obvious that there may be a special cost to using *Miranda* in terrorist interrogations: a criminal conviction is not the government's only interest in these situations. In any terrorist interrogation, there is always a tension between two national security interests: “(1) neutralizing the current terrorist threat and (2) gathering intelligence in order to neutralize future terrorist threats.”¹⁵⁶ In fact, some commentators, politicians, and practitioners argue that because of the “heightened level of criminality”¹⁵⁷ of terrorists, *Miranda* should be abandoned altogether.¹⁵⁸

It is true that “[d]elaying *Miranda* warnings in order to gain information that could prevent a terror attack is a considerable public interest.”¹⁵⁹ But that does not mean that *Miranda* needs to be changed for the War on Terror. Coupling *Miranda* with the public safety exception, one study concluded *Miranda* poses no special issues for interrogating suspected terrorists, arguing that “the [public safety exception] deftly balances *Miranda*'s constitutional safeguards with public safety, extinguishing any need for legislation revoking suspected terrorists' *Miranda* warnings, a constitutional right crucial to ensuring procedural due process.”¹⁶⁰ In fact, David Kris, a former Assistant Attorney General for National Security at the Department of Justice, notes that intelligence gathered from Mirandized testimony is only slightly less effective than unwarned testimony.¹⁶¹ *Quarles* alone can account for the special interests of a terrorist interrogation as both an intelligence-gathering tool and a source of evidence in a criminal prosecution. Justice Rehnquist's opinion declared that the public safety exception “will be circumscribed by the

¹⁵⁴ Cassell, *supra* note 151, at 438.

¹⁵⁵ *See id.*

¹⁵⁶ David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 72 (2011).

¹⁵⁷ Petty, *supra* note 96, at 186.

¹⁵⁸ Eric Posner, *The New Law We Need in Order to Deal with Dzhokhar Tsarnaev*, SLATE (Apr. 22, 2013, 12:21 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/dzhokhar_tsarnaev_and_the_law_authorize_the_isolation_and_detention_of_suspected.html (arguing in favor of a new law authorizing the isolation and detention of suspected terrorists), archived at <http://perma.cc/E747-NBX9>.

¹⁵⁹ Petty, *supra* note 96, at 186.

¹⁶⁰ Wright, *supra* note 119, at 1300.

¹⁶¹ *See* Kris, *supra* note 156, at 74.

exigency which justifies it.”¹⁶² If a terror suspect really poses a higher risk than a run-of-the-mill criminal does, then our interrogation-confession doctrine, as narrowly construed by the Second, Fourth, Fifth, Sixth, and Tenth Circuits, can accommodate that.

The debate over *Miranda* and the War on Terror has only intensified in the aftermath of the Boston Marathon bombing. Popular media has been filled with commentary about *Miranda*, the public safety exception, its origins, and its scope.¹⁶³ Some legal scholars have called for a robust public safety exception whenever there might be a “ticking-bomb scenario.”¹⁶⁴ Others have argued that “[w]hen the law gets bent out of shape for [Tsarnaev], it’s easier to bend out of shape for the rest of us,”¹⁶⁵ and that “[i]t appears to be DOJ policy to consider invoking the public-safety exception whenever possible to gather information or intelligence.”¹⁶⁶ There is a plethora of informed, persuasive, and even contradictory, opinions out there. Much of the confusion surrounding acts of terror and *Miranda* rights comes down to which circumstances justify an invocation of *Quarles*.¹⁶⁷

In many ways, we are back in the world in which *Miranda* and its predecessors were decided: one pitting the discourses of democracy, individualism, and liberty against totalitarianism and extremism. The individual rights values underlying the Warren Court’s decisions are

¹⁶² *New York v. Quarles*, 467 U.S. 649, 658 (1984).

¹⁶³ See, e.g., Emily Bazelon, *Why Should I Care That No One’s Reading Dzhokhar Tsarnaev His Miranda Rights?*, SLATE (Apr. 19, 2013, 11:29 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/dzhokhar_tsarnaev_and_miranda_rights_the_public_safety_exception_and_terrorism.html, archived at <http://perma.cc/BT2T-YBVW>.

¹⁶⁴ Akhil Reed Amar, *What if Dzhokhar Tsarnaev Decides Not to Talk?*, SLATE (Apr. 22, 2013, 4:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/04/if_dzhokhar_tsarnaev_decides_not_to_talk_the_police_should_be_allowed_to.html, archived at <http://perma.cc/H28B-GTMB>.

¹⁶⁵ Bazelon, *supra* note 163.

¹⁶⁶ Palazzolo & Audi, *supra* note 132 (quoting Northwestern University School of Law professor and former federal prosecutor Juliet Sorensen) (internal quotation marks omitted).

¹⁶⁷ Compare Bill Chappell, *Miranda Rights and Tsarnaev: Ex-U.S. Attorney General Weighs In*, NPR (April 21, 2013, 12:07 PM), <http://www.npr.org/blogs/thetwo-way/2013/04/21/178254784/miranda-rights-and-tsarnaev-ashcroft-says-u-s-move-is-the-right-one> (“Every criminal defendant is entitled to be read *Miranda* rights,” ACLU Executive Director Anthony D. Romero said in a statement released Saturday. “The public safety exception should be read narrowly. It applies only when there is a continued threat to public safety and is not an open-ended exception to the *Miranda* rule.”), archived at <http://perma.cc/7VD7-SVWV>, with Amar, *supra* note 164 (arguing that whenever there is an ongoing threat to public safety, all testimony, fruit, and leads from compelled testimony should be admissible).

relevant again today and should not be ignored. One commentator has argued that “exploiting constitutional exceptions vis-à-vis terror suspects signals to terrorists that their actions are successful at forcing us to dilute civil liberties.”¹⁶⁸ Others have questioned the legitimacy of a government that acts against the “fundamental rights of the people as well as the rule of law.”¹⁶⁹ Expanding the public safety exception beyond the bounds suggested by *Quarles* and into the broad approach—or worse, allowing the executive to unilaterally announce constitutional policy in the form of an FBI memorandum—is exactly that kind of illegitimate action.

The unfortunate truth is that domestic terrorism shows no sign of disappearing—in fact, people like Abdulmutallab, Shahzad, Tsarnaev, James Holmes of Aurora, Colorado,¹⁷⁰ and Paul Ciancia (at Los Angeles International Airport¹⁷¹) will continue to attempt terrorist acts around the country.¹⁷² The extent of the public safety exception to the requirement that individuals be provided with certain inalienable rights is a serious dilemma. In the absence of Supreme Court guidance to the contrary, the most principled way to deal with this exception is to contain it as narrowly as possible and protect the rule of law by complying with the letter of *Miranda* as far as possible. By requiring officers to have reasonable knowledge of an immediate threat to the public, the narrow approach hews closely to the facts and reasoning of *Quarles* itself,¹⁷³ and it allows both *Miranda* and *Quarles* to coexist without one overwhelming the other.

¹⁶⁸ Petty, *supra* note 96, at 185.

¹⁶⁹ CTR. FOR CONSTITUTIONAL RIGHTS, THE STATE OF CIVIL LIBERTIES: ONE YEAR LATER 1, available at http://ccrjustice.org/v2/reports/docs/Civil_Liberties.pdf (last visited Feb. 22, 2015), archived at <http://perma.cc/8B8L-35M4>.

¹⁷⁰ See Jennifer Brown et al., “Our Hearts Are Broken”, DENVER POST, at A1. In 2012, Holmes killed twelve moviegoers at a midnight premiere of *Batman: The Dark Knight Rises* with gas canisters, an assault weapon, and two other firearms. *Id.*

¹⁷¹ See Palazzolo & Audi, *supra* note 132. In November 2013, Ciancia opened fire with an assault weapon in Los Angeles International Airport, shooting three Transportation Security Agency (TSA) agents and one civilian around the airport terminal before airport police stopped him. Greg Botelho & Dan Simon, *LAX Suspect Shot TSA Officer, Walked Away, then Returned to Shoot Him Again*, CNN (Nov. 2, 2013, 9:01 PM), <http://www.cnn.com/2013/11/02/us/lax-gunfire/>, archived at <http://perma.cc/H4XB-Z484>.

¹⁷² See Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 615 (2015) (defining terrorism broadly as “any serious violent or property crime committed to advance a particular ideology”).

¹⁷³ Again, assuming that the facts of *Quarles* are as the Supreme Court majority recounted.

III. DZHOKHAR TSARNAEV AND THE 2013 BOSTON MARATHON BOMBING

Some commentators argue that the public safety exception, used expansively with regard to terrorists, presents no constitutional problems because it does nothing not already sanctioned by the Supreme Court.¹⁷⁴ And technically, they might be correct—one could argue that the October 2010 FBI/DOJ memo is simply an extreme version of the broad approach to *Quarles* followed by the First, Eighth, and Ninth Circuits. But after the Court held in *Dickerson* that *Miranda* is a constitutional right that cannot be abrogated by the legislature, it makes no sense for the executive branch to be allowed to virtually obliterate that same right. The interrogation of terrorists fits within the coercive paradigm *Miranda* sought to remedy,¹⁷⁵ and if *Miranda* still means anything for civil liberties, it needs to be invoked in the situations it was designed to remedy—especially when those suspects, like Faisal Shahzad and Dzhokhar Tsarnaev, are American citizens.

America can still improve its anti-terrorism security under the framework of the narrow public safety exception, which requires officers to have actual knowledge of an imminent threat to public safety. Any testimony in a true “ticking time bomb” scenario could be admitted, like in *United States v. Khalil*; anything less would be excluded, under the Warren Court’s vision of criminal law, as a fishing expedition. Adherence to the rule of law requires a circumscribed application of the public safety exception such that *Miranda* is as fully realized in reality as it appears on paper. The narrow approach follows the reasoning of *Quarles* itself, allowing both doctrines to coexist without one overwhelming the other. The Supreme Court should clarify that the application of the exception is extremely narrow in *all* public safety situations.

When Dzhokhar Tsarnaev was apprehended on April 19, four days after the bombs detonated on Boylston Street, he was practically incapacitated and in dire need of medical care to address gunshot wounds.¹⁷⁶ The next day, on April 20, FBI agents questioned Tsarnaev in the hospital, although he was unable to speak due to his injuries and had to

¹⁷⁴ See Petty, *supra* note 96, at 186.

¹⁷⁵ See Guiora, *supra* note 122, at 1150–51; see also Ryan T. Williams, *Stop Taking the Bait: Diluting the Miranda Doctrine Does Not Make America Safer from Terrorism*, 56 LOY. L. REV. 907, 928 (2010).

¹⁷⁶ Alyssa Newcomb, *Authorities: Boston Bombing Suspect Is Responding to Questions in Writing*, ABC NEWS (Apr. 21, 2013), <http://abcnews.go.com/US/authorities-boston-bombing-suspect-responding-questions-writing/story?id=19009283>, archived at <http://perma.cc/2WLD-RF8K>.

respond in writing.¹⁷⁷ It was not until Monday, April 22, a week after the bombing and after sixteen hours of interrogation, that Magistrate Judge Marianne B. Bowler read Tsarnaev his rights during a bedside special court appearance.¹⁷⁸

Regardless of the time medical attention would take, the Department of Justice was clear immediately after officers arrested Tsarnaev that it would be invoking the public safety exception to question him in the hospital before reading him his rights.¹⁷⁹ Unlike the other suspects discussed above, Tsarnaev did not plead guilty to the charges and proceeded to trial in March 2015.¹⁸⁰ Since Tsarnaev was charged in the District of Massachusetts, it is likely that his unwarned testimony would have been admitted at trial under *Quarles* if it had been offered into evidence, since the First Circuit follows the broad approach to the public safety exception. But if confronted with that evidence, the District Court should not have admitted Tsarnaev's confession.

Under the narrow approach, Tsarnaev's medical status should have made clear that there was no immediate threat to law enforcement officers or the public—he was captured in a dry-docked boat in a Boston backyard after suffering significant blood loss and admitted to a local hospital in “serious” condition.¹⁸¹ And even if his activities (involving a bomb, a car chase, a shootout) of the previous few days prompted a reasonable concern for public safety, it should have become clear almost immediately that once

¹⁷⁷ See Bazelon, *supra* note 19; Pete Williams et al., *Badly Wounded Boston Marathon Bombing Suspect Responding to Questions*, NBC NEWS (Apr. 21, 2013, 7:53 AM), http://usnews.nbcnews.com/_news/2013/04/21/17848814-badly-wounded-boston-marathon-bombing-suspect-responding-to-questions?lite, archived at <http://perma.cc/VQ3M-J9EJ>; Ngowi et al., *supra* note 18.

¹⁷⁸ See Tsarnaev Initial Appearance, *supra* note 19.

¹⁷⁹ See Brian Beutler, *DOJ Official: No Miranda Rights for Boston Bombing Suspect Yet*, TALKING POINTS MEMO (Apr. 19, 2013, 10:18 PM), <http://talkingpointsmemo.com/livewire/doj-official-no-miranda-rights-for-boston-bombing-suspect-yet>, archived at <http://perma.cc/H2CS-SKTM>; Amy Davidson, *What Happened to the Miranda Warning in Boston?*, NEW YORKER (Apr. 21, 2013), <http://www.newyorker.com/online/blogs/cloread/2013/04/what-happened-to-the-miranda-warning-in-boston.html>, archived at <http://perma.cc/DQ8L-6GC9>.

¹⁸⁰ Michael McLaughlin, *Opening Statements Begin in Boston Marathon Bombing Trial: 'He Had Murder in His Heart'*, HUFFINGTON POST (Mar. 4 2015, 10:24 AM), http://www.huffingtonpost.com/2015/03/04/opening-statements-boston-marathon-bombing_n_6797010.html, archived at <http://perma.cc/ZFF8-Q3NK>.

¹⁸¹ Pete Williams et al., *'We Got Him!': Boston Bombing Suspect Captured Alive*, NBC NEWS (Apr. 19, 2013, 9:35 PM), http://usnews.nbcnews.com/_news/2013/04/20/17823265-we-got-him-boston-bombing-suspect-captured-alive?lite, archived at <http://perma.cc/XWC8-UV79>.

Tsarnaev was in police custody, no further threat existed. At most, law enforcement needed a few hours to defuse the threat and discover other weapons or co-conspirators, not days. Tsarnaev's case is about as different from *Quarles* as can be—there was no knowledge of weapons on the scene; there was no physical struggle; and officers had days, not minutes, to plan their questioning.¹⁸²

Miranda and its requirements should have applied when officers first found and questioned Tsarnaev because he was clearly subject to a custodial interrogation. Using the narrow interpretation of the public safety exception, Tsarnaev should have been warned of his rights before questioning, and since he was not, any statements given before Judge Bowles read him his rights should have been excluded at his trial. The officers on the scene had no actual knowledge of an imminent threat, and any threat of a second bombing incident could arguably have been uncovered as easily by officers legally searching the Tsarnaev brothers' apartment and questioning friends, family, and neighbors as by questioning an injured suspect, Tsarnaev, who was unable to speak and in intensive medical care. In fact, as in most cases, the FBI still had plenty of other inculpatory evidence to obtain a conviction without needing to admit an un-Mirandized confession.¹⁸³ The court system could have had its cake and have eaten it, too, following the narrow approach: it would have been able to respect Tsarnaev's constitutional rights against self-incrimination while still obtaining the conviction of a dangerous criminal. In cases where the death penalty is on the line,¹⁸⁴ the utmost care should be taken to observe each and every protection the Constitution affords.

CONCLUSION

The Warren Court had lofty visions when it decided *Miranda* in 1966. It sought to uphold the civil liberties of the individual, minimize the coercive power of the state, and make the American criminal justice system a beacon of liberty and integrity in the Cold War. The *Quarles* public safety exception seriously jeopardizes that vision, and expansions of the exception with regards to the War on Terror threaten it even further. Our constitutional democracy depends on the rule of law for its legitimacy.

¹⁸² See Wright, *supra* note 149, at 138.

¹⁸³ See Ngowi et al., *supra* note 18.

¹⁸⁴ Tsarnaev was ultimately found guilty of all 30 charges against him at trial, and the jury imposed the death penalty for six of 17 capital counts. Verdict at 1-32, *United States v. Tsarnaev*, No. 1:13-cr-10200 (D. Mass. Apr. 8, 2015), ECF No. 1261; Penalty Phase Verdict at 21-22, *United States v. Tsarnaev*, No. 1:13-cr-10200 (D. Mass. May 15, 2015), ECF No. 1434.

Because *Miranda* is a constitutional right, exceptions to its rule must be minimized as much as possible. The only principled way to deal with the inconsistencies between *Miranda* and *Quarles* is to contain the public safety exception as narrowly as possible, following the approach adopted by the Second, Fourth, Fifth, Sixth, and Tenth Circuits, until the Supreme Court gives further guidance. As the case of Dzhokhar Tsarnaev shows, the narrow approach can simultaneously ensure constitutional rights, protect immediate public safety, and permit successful prosecution of criminal activity.