QUARRELLING ABOUT PUBLIC SAFETY: HOW A REVERSE *MIRANDA* WARNING WOULD PROTECT THE PUBLIC AND THE CONSTITUTION

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I. INTRODUCTION

A suspect's Fifth Amendment rights are among the most important—and fundamental—guarantees available to defendants in the criminal justice system.[1] Various caveats and exceptions to the *Miranda* requirement have been created in the decades since *Miranda* was decided. One of the most significant wrinkles in the *Miranda* doctrine allows the government to conduct an un-Mirandized interrogation pursuant to a public-safety exception articulated by the Supreme Court in 1984.[2] This Article argues that the public safety exception has grown inappropriately from its original form and that the public safety exception to *Miranda* should not exist at all. It argues that to balance law enforcement's need for critical information in response to public safety emergencies with a defendant's important constitutional rights, a suspect's statements to police in a public emergency should be inadmissible at his or her trial. Further, to create incentives for the suspect to cooperate in the police investigation and deter police misconduct, the police should inform the suspect of this before questioning. This "reverse *Miranda* warning"[3] would incentivize cooperation with law enforcement and, to be taken seriously by the public, would require changes to several law enforcement

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1. *See* Miranda v. Arizona, 384 U.S. 436, 468 (1966) (stating that "[t]he Fifth Amendment privilege is so fundamental to our system of constitutional rule").

2. *See* New York v. Quarles, 467 U.S. 649, 655 (1984) (holding that there is a "'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence").

3. A reverse *Miranda* warning, which would not be constitutionally required, would inform suspects that because the police were trying to end an imminent threat to public safety, the suspect's responses would only be used to end the crisis and not as evidence against the suspect at trial.

practices.[4] These changes would help law enforcement respond to emergencies and protect suspects' rights. Most importantly, this would restore balance to a criminal justice system that currently gives disproportionate power to prosecutors, results in the conviction of innocent people, and causes innocent people to plead guilty because of the prosecutor's tremendous leverage.[5] What is more, the "pressure of the situation may cause an innocent defendant to make a less-than-rational appraisal of his chances for acquittal and thus decide to plead guilty when he not only is actually innocent but also could be proven so."[6]

Miranda does not prevent the police from interrogating suspects without warning; it bars the government from introducing responses obtained by a defendant during the interrogation into evidence at his or her trial.[7] Under *Quarles*, the police may question a suspect without a *Miranda* warning when necessary to ensure the public's safety and may later use that un-Mirandized statement against the suspect in court.[8] The theory of the reverse *Miranda* warning is that while police should be able to question un-Mirandized suspects to prevent immediate danger to the public, the statement should not be introduced at trial against the suspects because of the Fifth Amendment protections. Using such statements against a defendant in court strays too far from the government's interest in ensuring public safety. Government use of exculpatory statements in court bears too attenuated a relationship to justify introducing the evidence of un-Mirandized questioning triggered by the initial crisis.

4. For example, to convince people that the reverse *Miranda* warning was not a police trick, law enforcement officers would have to stop tricking suspects into confessing in other circumstances. The Supreme Court has held that "*Miranda* forbids coercion, not mere strategic deception." Illinois v. Perkins, 496 U.S. 292, 297 (1990).

5. *See generally* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty (describing circumstances when a defendant pleads guilty to avoid the possibility of facing a higher sentence and the Supreme Court's acceptance of *Alford* pleas, which permit a defendant to plead guilty while maintaining his or her innocence).

6. *Id.*

7. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (implicitly holding that the government could interrogate suspects without warning them of their right to an attorney, but the evidence gathered from such an interrogation would be inadmissible at trial).

8. New York v. Quarles, 467 U.S. 649, 657–60 (1984).

II. THE MIRANDA *DECISION*

A. The General Rule

Historically, the Fifth Amendment offered only meager protections to criminal defendants.[9] That changed under the Warren Court,[10] where to safeguard the right to counsel and the right against self-incrimination, the 1966 *Miranda* decision mandated that suspects be given a set of warnings prior to custodial interrogation.[11] As a result, suspects are informed that they do not need to respond to law enforcement interrogations and have the right to have counsel present during questioning.[12]

The *Miranda* Court's language is unambiguous: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[13] A waiver must be voluntary, knowing, and intelligent; the "mere fact that [the suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries."[14] The right against self-incrimination "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, [the Court] will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."[15] After an interrogation without an attorney, the government bears a heavy burden; "a valid waiver will not be presumed

9. *See, e.g.*, Betts v. Brady, 316 U.S. 455, 466 (1942) ("[I]t is evident that the constitutional provisions to the effect that a defendant should be 'allowed' counsel . . . were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant."). Also, the slow and halting process of reverse incorporation turned the state and federal systems into unequal systems of justice. Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1971–72 (1984).

10. *See* Griffin v. California, 380 U.S. 609, 615 (1965) (reversing a state court conviction after the trial judge suggested that the jury could draw an adverse inference from the defendant's failure to testify since "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt" (footnote omitted)).

11. *Miranda*, 384 U.S. at 444.

12. *Id.*

13. *Id.*

14. *Id.* at 445.

15. *Id.* at 468.

simply from . . . the fact that a confession was in fact eventually obtained."[16]

The Court also anticipated the argument that ultimately prevailed in *Quarles*, that "society's need for interrogation outweighs the privilege."[17] In rejecting that objection, the Court stated that "an individual cannot be compelled to be a witness against himself" and that such a fundamental "right cannot be abridged."[18] If a suspect "desires to exercise his privilege, he has the right to do so."[19] The government ought not capitalize on a defendant's ignorance of his rights: "The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel."[20] Similarly, the government should not exploit those who cannot afford an attorney simply because it would be easy to do so: "While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice."[21]

The *Miranda* Court was deeply concerned about police coercion of suspects.[22] The Court took account of the challenges that the new regime would present to law enforcement, though the majority believed them to be exaggerated.[23] The Court's holding was simultaneously prophylactic and constitutional.[24]

16. *Id.* at 475.
17. *Id.* at 479.
18. *Id.*
19. *Id.* at 480.
20. *Id.* at 470–71. The Court further noted that "[t]he defendant who does not ask for counsel is the very defendant who most needs counsel." *Id.* at 471 (internal quotations omitted) (quoting People v. Dorado, 398 P.2d 361, 369–70 (Cal. 1965)).
21. *Id.* at 472 (footnote omitted).
22. *Id.* at 467 (stating "[the Court has] concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").
23. *Id.* at 474, 477–78. The majority's skepticism that the newly created warnings would staunch police work was well founded as very few suspects apprised of their *Miranda* rights actually invoke them. *See* George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 3 (2000) (describing the theory that "most suspects still talk to police and still incriminate themselves").
24. Dickerson v. United States, 530 U.S. 428, 432 (2000) ("*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.").

B. Exceptions to *Miranda*

What the Court giveth, it can taketh away.[25] *Miranda*'s compatibility with law enforcement has not stemmed the flow against the rights of the accused.[26] *Miranda* required warnings for *custodial* interrogation,[27] and in later years the Court has defined custodial interrogations rather narrowly. For example, a traffic stop that involves police questioning does not place the civilian "'in custody' for the purposes of *Miranda*."[28] A defendant who meets with his probation officer is also not in custody for *Miranda* purposes.[29] And there is no interrogation unless law enforcement engages in "express questioning or its functional equivalent," which is limited to "words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[30] The Court has required that the suspect affirmatively invokes his or her rights and has approved the use of un-Mirandized statements made to jailhouse informants.[31] Further, *Miranda* does not require the exclusion of a suspect's responses to basic biographical questions: such questions "fall outside the protections of *Miranda* and the answers thereto need not be suppressed."[32] While the Court held that a suspect is not required to answer such questions, it held that the introduction of the suspect's answers need not require a waiver.[33] And when the police violate a suspect's *Miranda* rights, the resulting statement is not always subject to exclusion; however, the statement can be introduced at trial to impeach

25. Ken Blackwell, *The Supreme Court Giveth, the Supreme Court Taketh Away*, TOWNHALL.COM (July 16, 2007) http://townhall.com/columnists/kenblackwell/2007/07/16/the_supreme_court_giveth_the_supreme_court_taketh_away.

26. *See* Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (holding there is a "'routine booking question'" exception to the *Miranda* rule); Illinois v. Perkins, 496 U.S. 292, 300 (1990) (holding there is a jailhouse informant exception to the *Miranda* rule); New York v. Quarles, 467 U.S. 649, 655 (1984) (identifying the "'public safety'" exception to the *Miranda* rule).

27. *Miranda*, 384 U.S. at 444.

28. Berkemer v. McCarty, 468 U.S. 420, 440 (1984).

29. Minnesota v. Murphy, 465 U.S. 420, 430–31 (1984).

30. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (footnote omitted).

31. *See Perkins*, 496 U.S. at 297 (describing the lack of a coercive atmosphere and stating the purpose of *Miranda* was not to protect defendants who believe they are talking with cellmates).

32. Pennsylvania v. Muniz, 496 U.S. 582, 601–02 (1990) (holding a defendant's responses to law enforcement's biographical questions, which did not follow a *Miranda* warning, to be "admissible because the questions fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services'" (internal quotations omitted)).

33. *Id.*

a defendant's testimony by showing the existence of a prior inconsistent statement.[34]

These *Miranda* exceptions may not actually be exceptions. Each is at least *arguably* consistent with *Miranda* and its underlying rationale, which emphasized the importance of restricting coercive police practices.[35] *Miranda* was a response to police efforts that served "no purpose other than to subjugate the individual to the will of his examiner."[36] But the exceptions still work to minimize deterrence by underscoring the fact that unwarned interrogations are not themselves barred, creating avenues for their introduction at a trial.

III. THE QUARLES *DECISION*

Since *Miranda*, a key exception has been carved out in emergency situations that allows officers to obtain potentially admissible testimony without providing the suspect an opportunity to hear his or her rights under *Miranda*.[37] The government may conduct an un-Mirandized custodial interrogation when "police officers ask questions reasonably prompted by a concern for the public safety."[38] The *Quarles* Court reasoned that while the "enlarged protection for the Fifth Amendment privilege" was worth the "cost to society in terms of fewer convictions of guilty suspects," it was not worth the cost of "further danger to the public."[39]

In *Quarles*, a rape victim approached a police car with two officers inside and described her assailant, who she claimed was carrying a gun.[40] After seeing a man matching the victim's description, the police gave chase.[41] Upon apprehending the suspect, the police found his holster empty and asked where the gun was.[42] The suspect motioned in the

34. Harris v. New York, 401 U.S. 222, 226 (1971) ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.").

35. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 445–47 (1966) (describing various techniques police used to coerce and trick suspects into confession, even after the suspect had asked for an attorney or refused to discuss the matter with police).

36. *Id.* at 457.

37. New York v. Quarles, 467 U.S. 649, 657–60 (1984).

38. *Id.* at 656.

39. *Id.* at 657.

40. *Id.* at 651–52.

41. *Id.* at 652.

42. *Id.* It appears that at the time the suspect was questioned, he was surrounded by at least four police officers and was handcuffed. *Id.* at 655.

direction of some empty cartons and stated that "the gun [was] over there."[43] The gun was found, and the defendant was arrested.[44]

The Court sanctioned the un-Mirandized questioning in this case out of fear that the warnings might deter the suspect from responding to the police questions about the location of the missing gun.[45] Such safeguards, Justice Rehnquist stated, were acceptable "when the primary social cost of those added protections is the possibility of fewer convictions," but not when the cost is "something more than merely the failure to obtain evidence useful in convicting [the suspect]."[46] The majority held that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[47]

This departure from *Miranda* was not intended to be all-encompassing.[48] The officer asked only one question immediately upon apprehending the suspect, which was aimed at resolving a dangerous situation.[49] No further questions were asked of the suspect prior to securing the weapon and providing *Miranda* warnings.[50] What's more, the Court explicitly distinguished its holding from its decision fifteen years prior in *Orozco v. Texas*.[51] In *Orozco*, the police questioned a man at his house without a *Miranda* warning, four hours after a shooting occurred outside a restaurant.[52] The *Quarles* Court expressed approval of the decision made in *Orozco* to suppress the defendant's statements because the questions were "clearly investigatory" and unrelated to "any immediate danger associated with the weapon."[53] Justice Rehnquist said, "[The *Orozco* holding] is in no sense inconsistent with our disposition of this case."[54]

43. *Id.* at 652 (internal quotations omitted).
44. *Id.*
45. *Id.* at 657.
46. *Id.*
47. *Id.*
48. *See id.* at 658 (describing the holding as "recognizing a narrow exception to the *Miranda* rule in this case").
49. *Id.* at 659.
50. *Id.*
51. *Id.* at 659 n.8 (citing Orozco v. Texas, 394 U.S. 324 (1969)).
52. *Id.*
53. *Id.*
54. *Id.*

A. The *Quarles* Decision Wrongly Evaluates the Competing Interests

Justice Rehnquist incorrectly described the competing interests at stake when the police question a suspect in the midst of an ongoing threat. He implied that the police, absent the public safety exception, must choose between Mirandizing the suspect (and risking the defendant actually invoking his rights and stifling the investigation) and questioning the suspect without issuing a warning (increasing the likelihood that the dangerous situation is safely defused). The police face no such choice[55] because they can engage in un-Mirandized questioning and later prosecute the suspect, though the un-Mirandized responses cannot be used in the case-in-chief.[56] Where the police have sufficient evidence that a particular suspect has information to help resolve an ongoing threat, the police also have enough to make a conviction or favorable plea bargain reasonably likely.[57] Stated another way, all of the evidence that led the police to ask Mr. Quarles about the location of the gun was also evidence admissible to show guilt at trial. Additionally, nontestimonial fruits of the investigation can be useful as well.[58]

As an initial matter, the risk that a Mirandized suspect will stop talking is low.[59] Indeed, one prominent study showed that "more than half of those who were given some warning incriminated themselves," while less than one-third of unwarned suspects gave incriminating evidence.[60] "About four out of five custodial suspects in the United States who are asked to submit to interrogation do so," and the twenty percent who decline generally do so when first warned.[61] Counterintuitively, warning suspects may "*induce* [them] to talk rather than to remain silent" because "[t]he warnings implicitly suggest to the suspect that the police are respectful of the suspect's rights."[62] Importantly, it is likely that

55. *See, e.g.*, United States v. Patane, 542 U.S. 630, 637 (2004) (stating "[t]he *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn"). Violations of a suspect's rights can occur "only upon the admission of unwarned statements into evidence at trial." *Id.* at 641.

56. *Id.* at 639.

57. *Quarles*, 467 U.S. at 687 (Marshall, J., with Brennan and Stevens, JJ., dissenting).

58. *Id.* at 660 (majority).

59. *See* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1565 (1967) (discussing the results of an empirical study where both warned suspects and unwarned suspects made incriminating statements). The concern that *Miranda* warnings would stifle investigations is as old as *Miranda* itself. *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966) (discussing the potential impact *Miranda* warnings would have on interrogation procedures).

60. Wald et al., *supra* note 59, at 1565.

61. Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 555 (2007).

62. *Id.* at 558 (emphasis in original).

Miranda's omnipresence means "the small number of suspects who are induced to remain silent by the administration of the warnings is getting even smaller while the number encouraged to talk is at least remaining stable."[63]

Most importantly, the suppression of unwarned statements at trial does not interfere with law enforcement operations because the police do not violate the Constitution by engaging in un-Mirandized custodial interrogation. *Miranda* itself does not prevent "the police from asking questions to secure the public safety"; it merely holds that unwarned answers must "be presumed compelled and that they be excluded from evidence at trial."[64] Only the introduction of those statements at trial violates the Constitution.[65] Justice Rehnquist ignores the fact that excluding the statement from a defendant's trial does not disallow the police from relying on it to obtain information to solve a public emergency. The Self-Incrimination Clause is not violated "absent use of the compelled statements in a criminal case against the witness."[66] "[F]ailure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues."[67] Even deliberate failures to warn a suspect create a constitutional violation only upon the admission of unwarned statements at trial, and at that point exclusion is a complete remedy.[68] "Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."[69]

B. The Public Safety Exception Has Been Expanded

The *Quarles* exception originally allowed the police to ask a single question about a known threat to a suspect immediately after apprehending him.[70] While lower courts infrequently encounter

63. *Id.* at 560.

64. New York v. Quarles, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part).

65. There are, of course, separate ways for warned or unwarned interrogation to violate the Constitution, but those are not at issue here.

66. Chavez v. Martinez, 538 U.S. 760, 769 (2003).

67. *Id.* at 789 (Kennedy, J., with Stevens, J., joining, and Ginsburg, J., joining as to Parts II and III, concurring in part and dissenting in part).

68. United States v. Patane, 542 U.S. 630, 641 (2004) (stating that "[o]ur cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule").

69. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990).

70. New York v. Quarles, 467 U.S. 649, 657.

government attempts to invoke the exception,[71] it has been expanded over time.

More recently, the United States Second Circuit Court of Appeals has provided a three-pronged test for use in evaluating *Quarles*' applicability.[72] First, questioning must relate to an objectively reasonable need to protect the police or public from an immediate danger.[73] Second, the questions may not be investigatory or designed to elicit testimonial evidence.[74] Third, such questioning is not to occur routinely and is allowable only when supported by the totality of the circumstances.[75]

However, the same court has stated that the *Quarles* Court's desire to narrow the public safety exception takes a back seat to the need to give police officers flexibility.[76] The Ninth Circuit has applied the *Quarles* exception to a suspected assault, allowing the introduction of a suspect's affirmative response to a police officer's inquiry into whether he had a gun in the car.[77] The court did so to help the police officer "control a dangerous situation" where there may have been a gun present.[78] The Seventh Circuit has applied the *Quarles* exception to cases involving the sale of a kilogram of cocaine, reasoning that "drug dealers are known to arm themselves, particularly when making a sale, in order to protect themselves, their goods and the large quantities of cash often associated with such transactions."[79] As a result, the investigating detective could properly inquire into whether a suspected drug dealer had a weapon that might pose a threat.[80]

Quarles has been applied to questions asked in the regular course of an arrest.[81] For example, in the Ninth Circuit, a police officer asked a suspect whether "he had any drugs or needles on his person" prior to conducting a search.[82] The suspect responded: "No, I don't use drugs, I sell them."[83] Introduction of the suspect's incriminating statement was upheld.[84] In another context, police officers executed a search warrant

71. United States v. Reyes, 353 F.3d 148, 152 (2d Cir. 2003) (stating the court has "had few opportunities to address the public safety exception").
72. United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005).
73. *Id.*
74. *Id.*
75. *Id.*
76. *Reyes*, 353 F.3d at 152.
77. United States v. Brady, 819 F.2d 884, 885 (9th Cir. 1987).
78. *Id.* at 888 (noting that if the suspect had a gun, there would be an immediate danger).
79. United States v. Edwards, 885 F.2d 377, 384 (7th Cir. 1989).
80. *Id.*
81. United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994).
82. *Id.*
83. *Id.* (internal quotations omitted).
84. *Id.* at 1050.

and handcuffed the lone resident of an apartment, leaving him on his bed.[85] The Eighth Circuit sanctioned questioning of the suspect under *Quarles*, reasoning that

> [a]lthough [the suspect's] hands were cuffed behind his back when the officers asked him if they needed to be aware of anything else, 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. Similarly, the officers could not have known 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.[86]

The expanded exception has turned nearly every criminal investigation into a public safety crisis. Under the current doctrine, the mere possibility of a weapon's presence is sufficient to justify a failure to Mirandize a suspect.[87] The possible presence of a weapon need not even be particularized to the circumstances at hand; it is enough that the type of crime unfolding is one that, in the court's estimation, typically involves weapons.[88] And the public safety exception allows the police to question a suspect after he has been read, and declined to waive, his *Miranda* rights.[89]

The judicial expansion of the public safety exception fails to fully capture the contours of its scope in other contexts. Not all suspects facing unwarned questions will have the government attempt to use their statements in court, and not all of those who do will seek to exclude them. The executive branch's interpretation of the public safety exception determines frequency of un-Mirandized interrogations.[90]

A 2010 Federal Bureau of Investigation (FBI) memo shows that the agency viewed the public safety exception expansively.[91] It advised its

85. United States v. Williams, 181 F.3d 945, 947–48 (8th Cir.1999).

86. *Id.* at 953–54 (footnote omitted).

87. *See, e.g.*, United States v. DeSantis, 870 F.2d 536, 539 (9th Cir.1989) (stating "[t]he fact that the inspectors had no reason to believe that DeSantis was armed and dangerous, as did the police in *Quarles,* [was] of no consequence" because the search was reasonably necessary to ensure officer safety).

88. United States v. Lackey, 334 F.3d 1224, 1228 (10th Cir. 2003); *DeSantis*, 870 F.2d at 539.

89. *DeSantis*, 870 F.2d at 541 (noting that "[t]he same considerations that allow the police to dispense with providing *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel").

90. *See* Charlie Savage, *Delayed* Miranda *Warning Ordered for Terror Suspects*, N.Y. TIMES (Mar. 24, 2011), http://www.nytimes.com/2011/03/25/us/25miranda.html?_r=1 (discussing the broad interpretation of the public safety exception allowed in terrorism cases).

91. *F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/25/us/25miranda-text.html.

agents that "the circumstances surrounding an arrest of an operational terrorist may warrant significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case."[92] It further stated that "agents should ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents without advising the arrestee of his *Miranda* rights."[93] The FBI also decided that

> [t]here may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and that the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.[94]

A United States Justice Department spokesman claimed the memo and these procedures "clarif[ied] existing flexibility in the rule."[95]

An example of the application of these procedures is seen in the investigation into the 2013 Boston Marathon bombing. Dzhokhar Tsarnaev, the surviving bomber, was questioned for over thirty-six hours approximately twenty hours after arriving at Beth Israel Deaconess Medical Center.[96] In that case, the "federal authorities invoked a public safety exemption . . . and questioned Dzhokhar Tsarnaev . . . without telling him that he had the right to remain silent."[97] While "[l]ying grievously wounded in a hospital bed," Mr. Tsarnaev made an admission to "specially trained [FBI] agents who had been waiting outside his hospital room for him to regain consciousness" immediately after waking up in the hospital.[98]

92. *Id.*
93. *Id.*
94. *Id.* (footnote omitted).
95. Savage, *supra* note 90.
96. Aaron Katersky, *Boston Bombing Suspect 'Begged for Rest' During Questioning After Nearly Dying*, ABC NEWS (May 8, 2014), http://abcnews.go.com/Blotter/boston-bombing-suspect-begged-rest-questioning-dying/story?id=23640268.
97. Ethan Bronner & Michael S. Schmidt, *In Questions at First, No Miranda for Suspect*, N.Y. TIMES (Apr. 22, 2013), http://www.nytimes.com/2013/04/23/us/miranda-rights-withheld-for-marathon-suspect-official-says.html.
98. Katharine Q. Seelye, Michael S. Schmidt & William K. Rashbaum, *Boston Suspect Is Charged and Could Face the Death Penalty*, N.Y. TIMES (Apr. 22, 2013), http://www.nytimes.com/2013/04/23/us/boston-marathon-bombings-developments.html?pagewanted=all.

C. The Expansion Is Unreasonable

The public safety exception's expansion is bad law. *Quarles* represented a principled, limited departure from an important constitutional rule.[99] *Quarles* involved limited questioning by law enforcement in response to a known threat that occurred immediately after law enforcement arrived.[100]

By allowing the public safety exception to apply when there is a possibility of a threat, the judiciary has caused the exception to nearly swallow the rule. Almost every police investigation involves the possibility of a weapon or presence of an unknown confederate.[101] This expanded version of *Quarles* allows the police to question suspects who are already in custody, may or may not possess a weapon, and unlikely pose an immediate risk to anybody.[102] Applying *Quarles* to circumstances where there is a potential threat means applying it to every interaction between the police and civilians. Because many street crimes involve a weapon, does *Quarles* apply whenever the police are called to respond to reports of such crimes? Nearly every police call involves a conceivable threat to someone's safety, either because of the underlying conduct that gave rise to the call for help or because a suspect might try to avoid capture.

Judicially sanctioned un-Mirandized questioning is also an unreasonable expansion of the exception. The *Quarles* exception's exclusion of investigatory or testimonial questioning[103] should be formalized. Rather than approving broad questions that ask suspects whether they have any information useful to the police, courts should require that law enforcement ask specific questions. Broad questions suggest the police are searching for general information rather than responding to an actual emergency. Further, minutes are precious in the chaos of an emergency, and open-ended questions[104] are generally

99. New York v. Quarles, 649 U.S. 649, 658–59 (1984).

100. *Id.* at 652.

101. Courts even accept the threat of an unknown coconspirator to justify questioning after the police have swept the premises and found nothing. *See, e.g.*, United States v. Williams, 181 F.3d 945, 953–54 (8th Cir. 1999) (holding the police officers acted reasonably in conducting the search of the suspect's home following the detention of the suspect).

102. *See supra* text accompanying notes 70–89 (discussing the consequences of expanding the public safety exception).

103. *See* United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005) (clarifying that the public safety exception does not allow questions that are "investigatory in nature or designed solely to elicit testimonial evidence").

104. Here, I use "open-ended question" to mean a general inquiry such as "is there anything else we should know about?" I consider this line of questioning distinguishable from a situation where

insufficient to allow for a rapid response. The distinction between investigatory questions and an emergency response is elusive, but critical. The police make an end-run around that distinction when they ask broad questions (which appear responsive to emergency situations) that invite specific, testimonial answers that would be useful to a prosecutor, but not an investigator.

The public safety exception should, as a general rule, apply only to questioning that occurs immediately after a suspect is found in a dangerous situation. Questioning that occurs far later is likely unrelated to an ongoing threat; where serious public threats exist, the police do not wait around before questioning a suspect. The passage of time without further incident strongly suggests that no emergency poses an immediate threat to public safety. Where courts engage only in highly deferential review of law enforcement's actions, police power is enhanced.[105] If the police have the functional authority to decide *when* the public safety exception can be invoked, and *what* course of conduct they can take in response, they have nearly unchecked authority to ignore key constitutional rights. This structural problem needs a self-limiting mechanism in order to prevent law enforcement from expanding the exception.

The *Quarles* exception is a prudential deviation from otherwise-settled law. It is not a constitutional requirement, and therefore its ineffectiveness and underlying tension with the Constitution make rejecting it reasonable.

IV. THE PUBLIC SAFETY EXCEPTION SHOULD NOT EXIST AT ALL

The public safety exception does not meaningfully aid law enforcement investigations. The police are free to question any suspect without providing *Miranda* warnings if they need to do so to prevent an imminent terrorist attack, to determine whether there is an unsecured weapon in the vicinity, or for no reason at all.[106] A Fifth Amendment violation occurs not upon unwarned police questioning, but upon the

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the police ask a bombing suspect narrowly tailored questions such as "who else have you been working with?"

105. *See* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 422, 436 (2002) (stating "as we enter the twenty-first century, American police enjoy unprecedented power to arrest, and hence search, individuals for any and all violations").

106. United States v. Williams, 181 F.3d 945, 953–54 (8th Cir. 1999) (concluding that officers were permitted to ask about hazardous weapons); Seelye et al., *supra* note 98 (discussing the questioning of the Boston bombing suspect to determine if more attacks were planned).

introduction of a defendant's responses at trial.[107] The proper question to ask is whether the police should be able to use the information they obtain to secure the public's safety in an emergency situation against a suspect at trial. They should not be allowed to do so.

Suspects generally have a right to decline to speak with the police or to speak only through their counsel.[108] Waivers of these rights must be knowing and voluntary.[109] It is no response to say that society should encourage suspects to talk to the police to help solve crimes. Clearly that is true in the abstract. But our Constitution protects people from forced self-incrimination.[110] That constitutional mandate applies with particular force to protect people from the "cruel trilemma of self-accusation, perjury or contempt."[111] But the trilemma is particularly acute for guilty suspects because innocent suspects do not face similar pressures regarding the prospect of self-incrimination or perjury.[112] That is not to say that innocent suspects do not also value their right to remain silent; for them, this right offers protection from potential misconduct at the hands of police officers who are incredulous with the suspects' denial of wrongdoing. Further, innocent defendants may find that the story they tell police is likely to change, as they attempt to determine what the police want to hear and then provide an acceptable story.[113] But the cruel trilemma is especially difficult for guilty suspects who cannot rely on the truth to set them free. What is more, the exclusion of statements made by a defendant in the heat of the moment is unlikely to impede investigations or prevent the government from obtaining convictions.[114] Self-incriminating statements made at the crime scene are not needed to obtain convictions.[115]

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107. United States v. Patane, 542 U.S. 630, 641 (2004).

108. Miranda v. Arizona, 384 U.S. 436, 467–69 (1966).

109. North Carolina v. Butler, 441 U.S. 370, 373 (1979) (stating "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case").

110. U.S. CONST. amend. V (providing that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself").

111. Michigan v. Tucker, 417 U.S. 433, 456–57 n.2 (1974) (Brennan, J., with Marshall, J., concurring).

112. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 452 (2000) (describing the desire for innocent suspects to speak out, while guilty suspects generally wish to remain silent). The Fifth Amendment obviously protects the innocent—especially those who have little corroborating evidence of their own. *Id.* at 452–53.

113. *Id.* at 443.

114. Daniel Brian Yeager, Note, *The Public Safety Exception to* Miranda *Careening Through the Lower Courts*, 40 U. FLA. L. REV. 989, 1034 (1988).

115. *Id.* (stating "[t]he *Quarles* [C]ourt failed to consider whether the prosecution really needs self incriminating statements to preserve convictions" (footnote omitted)).

The tension Justice Rehnquist acknowledged in *Quarles* reflects an underlying assumption that suspects will be less willing to talk when informed of their rights.[116] This assumption is appealing but overstated.[117] When the government attempts to elicit information pursuant to the public safety exception, society's need for such information is at its apex. If a suspect can help end a threat to public safety by talking to police, the law should facilitate the flow of information to law enforcement. Rendering such information inadmissible incentivizes suspect cooperation.[118]

The costs of exclusion are easy to overstate. Exclusion matters most at trials, which are rare.[119] Further, the exclusion of important evidence will not make defendants more likely to go to trial, since most decisions to plead guilty are motivated by a desire to avoid the most serious offense charged, to get credit for cooperation, and to avoid the expense and potential embarrassment that accompanies criminal litigation.[120] While the admissibility of unwarned statements might in some cases be a factor in a defendant's decision to plead guilty, it is unlikely the most important factor. The power imbalance between the prosecution and the defendant largely comes from the fact that the prosecutor "can effectively dictate the sentence by how he publicly describes the offense," meaning, "it is the prosecutor, not the judge, who effectively exercises the sentencing power" which becomes "cloaked as a charging decision."[121]

The admissibility of evidence may be a factor both in a defendant's decision on whether to plead guilty and the prosecutor's decision on what plea bargain to offer, but because plea bargains tend to happen early in the adversarial process, neither party truly knows what evidence will be admitted at trial. But the prospect of a reverse *Miranda* warning will have a beneficial effect on the plea bargaining process, which has caused, by an extremely conservative estimate, over twenty thousand false guilty pleas.[122]

116. New York v. Quarles, 467 U.S. 649, 656 (1984).

117. Duke, *supra* note 61, at 557–58.

118. The police could, if they chose to, seriously strengthen these incentives by affirmatively notifying suspects that statements made at that time would not be introduced at trial and would only be used to resolve the existing crisis. Although suspects might hesitate to believe the police if this type of reverse *Miranda* warning was offered, the police could improve their perceived integrity by not engaging in deception elsewhere.

119. Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, BUREAU JUST. ASSISTANCE, U.S. DEP'T J. 1 (Jan. 24, 2011), *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (estimating that between ninety and ninety-five percent of state and federal cases are resolved through plea negotiations, rather than trial).

120. *Id.* at 2–3.

121. Rakoff, *supra* note 5.

122. *Id.*

To ensure public safety in known dangerous situations, the police should instead be able to immediately engage suspects by asking a limited number of questions about the crisis without obtaining a *Miranda* waiver. A suspect's responses to such questions should not be admissible as exculpatory evidence.[123]

Abolishing the public safety exception incentivizes law enforcement to limit un-Mirandized questioning by creating an unambiguous cost to such interrogations: exclusion from trial. Where the police know their questions will not yield admissible evidence, they will engage in unwarned questioning only when truly necessary.[124] This outcome is good for society as well. Society wants (or ought to want) law enforcement to prevent harm when they are well-positioned to stop illegal activity before it happens, and also wants to preserve constitutional rights and the prophylaxis that protects them.

Why abolish the exception rather than limit it so that its application strays less from the circumstances presented in *Quarles*? Examination of post-*Quarles* doctrine shows the futility of efforts to limit the exception. The nature of the exception invites expansion because doctrinal application is inherently difficult and involves judicial judgment calls.[125] Where courts must decide whether a particular set of facts involves a threat to public safety, some courts will inevitably find increasingly more facts that present a legitimate threat. Those cases, in turn, will invite courts not only to find a legitimate threat on similar facts *but also* to reason that the presence of prior expansions in the law justifies further

123. For purposes of this Article, I do not decide whether introduction of those statements would be appropriate for impeachment purposes. It is likely that the Court's rationale for sanctioning the introduction of otherwise inadmissible statements for impeachment purposes would apply here as well. Because in such circumstances the statements are introduced not for their truth (and are thus not truly self-incriminating), but for their propensity to show the speaker's untrustworthiness, this practice is slightly less objectionable. However, allowing the government to use un-Mirandized statements for impeachment would seem to incentivize such conduct. In *Harris*, the Court stated that the privilege against self-incrimination "cannot be construed to include the right to commit perjury" and introduction of un-Mirandized statements to impeach the defendant "did no more than utilize the traditional truth-testing devices of the adversary process." Harris v. New York, 401 U.S. 222, 225 (1971). But in doing so, the government took advantage of information that should not have been in its possession.

124. *See generally* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 911 (1989) (providing that "a police officer who knows that unconstitutionally obtained evidence will be admissible would have an incentive [to utilize certain interrogation techniques] that is absent in an officer who knows that such evidence is inadmissible").

125. *See generally* 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 (2013) (discussing the expansion of the public safety exception to *Miranda* warnings, and the likelihood that this expansion would be applied to the accused suspect in the 2013 Boston Marathon bombings, thereby limiting his rights).

expansions. Where the court is in for a penny, it is in for a pound. Commitment to a limited exception requires commitment to a more expansive exception.

Abolishing the public safety exception would not prevent law enforcement from questioning suspects in emergencies, but will limit the acceptable uses of those statements. The police have no reason to cease questioning just because the suspect's responses are inadmissible.[126] In the search and seizure context, the prospect of exclusion does little to limit police conduct, even when the police's only incentive is to uncover evidence for the prosecution.[127]

What would law enforcement's response to an emergency situation look like post-*Quarles*? Ideally, the structure of such interactions would maximize the likelihood that the questions lead to crisis-ending information. To accomplish this, police could offer a reverse *Miranda* warning that informed the suspect that because the police were responding to a public emergency, any information the suspect provided would be inadmissible in court. Where the *Miranda* warning incentivizes silence (which impedes ongoing investigations), the reverse *Miranda* warning incentivizes cooperation with law enforcement.

Clearly there is no basis, constitutional or otherwise, to require a reverse *Miranda* warning. But law enforcement agencies would be well-advised to utilize them, because such warnings would facilitate more effective investigations. For these warnings to be effective, however, the police would have to overcome a perception, present in the minds of at least *some* Americans, that interrogators will say *anything* in pursuit of a confession. In fact, only forty-eight percent of Americans view the honesty and ethical standards of the police as "very high" or "high," and only twenty-three percent of nonwhites do.[128] The police can, and sometimes do, lie or exaggerate to encourage suspect cooperation—though *Miranda* does not allow the police to use trickery to obtain a waiver.[129] But once a waiver is obtained, the police can make appeals to

126. *See* Loewy, *supra* note 124, at 921–22 (arguing police can gain valuable information such as corroboration of the victim's identity or identification of codefendants that may be useful in furthering the police investigation).

127. *Id.* at 911–12.

128. Jeffrey M. Jones, *Drop Among Nonwhites Drives U.S. Police Honesty Ratings Down*, GALLUP.COM (Dec. 18, 2014), http://www.gallup.com/poll/180230/drop-among-nonwhites-drives-police-honesty-ratings-down.aspx.

129. Miranda v. Arizona, 384 U.S. 436, 476 (1966) ("[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.").

a defendant's hopes or fears to encourage discussion.[130] There are surely at least some individuals, likely racial minorities, who would view a reverse *Miranda* warning with skepticism.[131] Law enforcement can most effectively combat this problem by altering their practices to make them less deceptive, so that the public—and, importantly, each suspect—is more likely to view the quasi-immunity of a reverse *Miranda* warning as a legitimate offer.

Opponents will likely argue that it would be unreasonable to upend traditional law enforcement practices in this manner. A little trickery (after obtaining a *Miranda* waiver) is essential to getting suspects to talk, they say.[132] And maybe it is. But if these changes are unreasonable in light of their costs, then the benefits of having suspects make unwarned statements to the police must be quite small.[133] If the government really obtains valuable crisis-ending information from such questioning, surely its benefits outweigh the marginal costs of reducing police attempts to mislead suspects after they have waived their *Miranda* rights.

But what happens after the emergency is resolved and the police make the transition from emergency response mode to criminal investigation mode? As always, the police must read the suspect his or her *Miranda* rights and obtain a waiver before beginning an interrogation.[134] By brightening the lines between the reverse *Miranda* warning interrogation and the *Miranda* interrogation, the police diminish the chance that a suspect fails to appreciate the significance of his or her decision to waive *Miranda* and speak to law enforcement. This abrupt shift will clarify to the suspect that his or her statements will be treated differently from the initial part of the interrogation.

The reverse *Miranda* warning will deter police misconduct in other ways. For example, the police often give *Miranda* warnings and then

130. In a 2010 opinion, the Court ruled that a suspect's near-total silence for two hours and forty-five minutes was not an invocation of the right to silence. Berghuis v. Thompkins, 560 U.S. 370, 376, 386 (2010). The Court also described the continued course of police questioning, in which the suspect was asked questions such as "[d]o you believe in God?" and "[d]o you pray to God?" and "[d]o you pray to God to forgive you for shooting that boy down?" as dishonoring the suspect's right to remain silent. *Id.* (internal quotations omitted).

131. *See* Vivian Yee, *Where Stop-and-Frisk Tactic Is Business as Usual, Skepticism Prevails*, N.Y. TIMES (Aug. 12, 2013), http://www.nytimes.com/2013/08/13/nyregion/where-stop-and-frisk-tactic-is-business-as-usual-skepticism-prevails.html?_r=0 (stating that "[d]istrust of the police runs deep in the Brownsville Houses and the Langston Hughes Houses," where there had been over three thousand police stops in the first quarter of 2013, and quoting a resident of Brownsville Houses as dismissing "any possibility of an improvement" because of the racism instilled in the police).

132. *See* Duke, *supra* note 61, at 560 (describing how "[o]nce the police obtain a waiver, the trickery and psychological coercion that the Court noted in *Miranda*, together with any new interrogating tricks learned since then, can continue as before" (footnote omitted)).

133. If the benefits are so small, a departure from *Miranda* at all seems unreasonable.

134. Here, I assume that the police are engaging in a custodial interrogation.

proceed to question a suspect without first obtaining an unambiguous waiver.[135] The presence of a reverse *Miranda* waiver will require law enforcement to obtain from the suspect a clearer renunciation of his or her rights to show that the suspect understood the moment of transitioning to *Miranda* interrogation.[136]

The reverse *Miranda* warning will force law enforcement officers to determine when to transition from the inadmissible to admissible interrogation. As a general guide, the police should only decide to make that transition once the specific emergency that prompted their questioning has been resolved. This might be when the missing gun is found or the kidnapped child is recovered. Though there might be temptation to engage in more robust questioning prior to the crisis' resolution, the inadmissibility of the suspect's responses ought to deter such additional questioning.

The decision about when to transition from one form of questioning to another is significant, and perhaps one that gives much discretion to law enforcement. It is also perhaps the sort of decision that should not generally lie in the hands of the police. But here there is little alternative. Most public emergencies evolve around situations involving a missing firearm or an at-large co-conspirator and will be resolved relatively quickly—without sufficient time to engage a magistrate. Protracting the process by requiring judicial involvement serves nobody's interests.[137] And because the structure of the reverse *Miranda* warning operates in part to protect suspects, the fact that the police may have some discretion should not mean that the entire process is abandoned. What is more, even though the police determine *when* to transition from one type of interrogation to the other, the suspect remains adequately informed of his or her rights at all times. There will not be a situation where the suspect reasonably believes he or she is still in the stage of "inadmissible" interrogation but the police believe otherwise.

The logic of the reverse *Miranda* warning is clear. The government regularly seeks information for use in an investigation and commits itself

135. *See* Davis v. United States, 512 U.S. 452, 461 (1994) (holding that the Fifth Amendment right to counsel was not violated where the defendant made an ambiguous reference to counsel but questioning continued without an attorney); Michigan v. Mosley, 423 U.S. 96, 106–07 (1975) (holding that a defendant's right to silence was respected where he invoked his right with respect to one crime but was questioned two hours later about a different crime).

136. *See* Berghuis v. Thompkins, 560 U.S. 370, 388 (2010) (discussing the importance of establishing an express or implied waiver during the interrogation before admitting a suspect's responses into evidence at trial).

137. *See* Duke, *supra* note 61, at 562 (describing how *Miranda* warnings have rendered judicial decisions to grant or deny motions to suppress confessions much easier and quicker to make).

to not using such information in a prosecution.[138] Indeed, the government sometimes grants use immunity for the purpose of defeating a witness' invocation of his or her Fifth Amendment rights.[139] If the government can commit itself to not using a witness' statements at trial when investigating white-collar crime or examining the distribution of performance-enhancing drugs to Major League Baseball players,[140] it can surely do so to ensure the public safety.

A witness' information can be vitally important in the middle of a complex investigation,[141] and witnesses regularly decline to testify without immunity.[142] A witness' cooperation is even more important when there is insufficient time to develop a complex investigation and the

138. *See* Kastigar v. United States, 406 U.S. 411, 443–47 (1972) (describing, and approving of, the government's utilization of use immunity); *U.S. Attorneys' Manual: Witness Immunity*, U.S. DEP'T JUST., U.S. ATT'YS OFF., http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/23mcrm.htm (last visited Mar. 18, 2016) (describing the United States Justice Department's practices on use immunity).

139. *See Kastigar*, 406 U.S. at 443–47 (discussing the use and purpose of immunity statutes); Steve Eder, *Alex Rodriguez Told Federal Agents of Doping in Bosch Case, Report Says*, N.Y. TIMES (Nov. 5, 2014), http://www.nytimes.com/2014/11/06/sports/baseball/alex-rodriguez-admits-to-doping-in-bosch-case.html (describing how Yankees' third baseman Alex Rodriguez was offered immunity by federal prosecutors investigating the distribution of performance-enhancing drugs); Ilya Grossman, *Former Governor McDonnell's Appeal Cites Broad Bribery Definition*, ABC NEWS (Mar. 3, 2015, 5:08 AM), http://wric.com/2015/03/02/gov-bob-mcdonnells-appeal-filing-released/ (discussing transactional immunity on public corruption charges and securities and tax crimes); David Johnston, *Immunity Deals Offered to Blackwater Guards*, N.Y. TIMES (Oct. 30, 2007), http://www.nytimes.com/2007/10/30/washington/30blackwater.html?_r=0 (discussing use immunity in the Blackwater investigation and the fatal shooting of seventeen Iraqis in September, 2007).

140. Eder, *supra* note 139.

141. *See, e.g.*, Eric N. Berg, *New Tactic in Chicago Inquiry Seen*, N.Y. TIMES (Feb. 14, 1989), http://www.nytimes.com/1989/02/14/business/new-tactic-in-chicago-inquiry-seen.html (describing the grant of use immunity in a Department of Justice investigation into commodity trading practices in Chicago); J. David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html (describing the use of immunity in state proceedings following the choking death of New York City resident Eric Garner); David Stout, *Testing of a President: The Deal; as Long as She Tells the Truth, Lewinsky Will Be off the Hook*, N.Y. TIMES (July 29, 1998), http://www.nytimes.com/1998/07/29/us/testing-president-deal-long-she-tells-truth-lewinsky-will-be-off-hook.html (describing Monica Lewinsky's transactional immunity, which "prosecutors give only when they want someone's testimony very badly"); *Utah Man Accused of Killing Baby Sitter with Drugs*, DAILYMAIL.COM (Feb. 12, 2014, 8:20 PM EST), http://www.dailymail.co.uk/wires/ap/article-2557953/Utah-man-accused-killing-baby-sitter-drugs.html (describing how use immunity was given to a defendant's wife after she killed their child's babysitter and then the two disposed of the body together).

142. *See, e.g.*, Scott Shane, *Ex-C.I.A. Aide Won't Testify on Tapes Without Immunity*, N.Y. TIMES (Jan. 10, 2008), http://www.nytimes.com/2008/01/10/washington/10intel.html (describing how Jose A. Rodriguez, Jr., a former CIA official, refused to testify about the destruction of videotapes that supposedly showed "harsh interrogations of prisoners at a secret site overseas" without immunity). Rodriguez ended up not facing charges. Carrie Johnson, *No Charges in Destruction of CIA Interrogation Tapes*, NPR (Nov. 9, 2010, 10:00 AM ET), http://www.npr.org/templates/story/story.php?storyId=131184938.

stakes are higher because the government risks not just a failed prosecution but an immediate threat to public safety. Government immunity, like the quasi-immunity that would exist under the reverse *Miranda* warning, is fundamentally about obtaining essential testimony without violating the witness' constitutional rights.[143] Prosecutors compel witness testimony when the prosecutors believe it is in their interest.[144] In this sense, the reverse *Miranda* warning functions more like use immunity than transactional immunity because it merely protects the speaker from the in-court consequences of testifying.[145]

The very existence of use immunity demonstrates the advantages of the reverse *Miranda* warning. The contrast between use immunity and transactional immunity indicates that the government can disavow reliance on a defendant's particular statements but not forever abandon hope of prosecution.[146] Indeed, a series of federal immunity statutes came into being after a number of decisions where the Court held witnesses could not be compelled to give potentially incriminating testimony unless the testimony would not be used against the witness.[147]

A. Allowing a Principled Exception

In the alternative, I argue that absent a reversal of *Quarles*, the public safety exception should be narrowly construed. It should only apply where there is a known threat to public safety, the police ask limited questions that prioritize resolving the dangerous situation (and not investigating the suspect's involvement), and the interrogation happens immediately upon police arrival.

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143. Rita Werner Gordon, *Right to Immunity for Defense Witnesses*, 20 CONN. L. REV. 153, 162 (1987).

144. Leonard N. Sosnov, *Separation of Powers Shell Game: The Federal Witness Immunity Act*, 73 TEMP. L. REV. 171, 172–73 (2000).

145. *See* Charles J. Walsh & Steven R. Rowland, *Immunized Testimony and the Inevitable Discovery Doctrine: An Appropriate Transplant of the Exclusionary Rule or an Excuse for a Broken Promise?*, 23 SETON HALL L. REV. 967, 977 (1993) (describing how "[t]he witness would no longer receive the windfall of transactional immunity, but instead would be protected from the consequences of his testimony, thereby leaving him in the same position as if he had remained silent").

146. Russell Dean Covey, *Beating the Prisoner at Prisoner's Dilemma: The Evidentiary Value of a Witness's Refusal to Testify*, 47 AM. U. L. REV. 105, 108 n.8 (1997) ("Use immunity differs from transactional immunity in that a defendant granted transactional immunity can never be prosecuted for the events about which he or she testifies, whereas a defendant testifying under use immunity remains eligible for prosecution as long as the evidence is gathered from separate sources. The scope of immunity under the use immunity statute is coterminous with the scope of the Fifth Amendment privilege." (citation omitted)).

147. *See, e.g.*, Pillsbury Co. v. Conboy, 459 U.S. 248, 275–76 (1983) (Blackmun, J., concurring in the judgment) (describing congressional actions taken since 1983 that provide protection for witnesses compelled to testify) (citing, inter alia, Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 79 (1964), *abrogated by* United States v. Balsys, 524 U.S. 666 (1998)).

The public safety exception should apply only where there is a known threat to public safety, not where there is simply the possibility of a threat. A known threat to the public safety exists where the police know there is a missing gun in a public place, an armed criminal accomplice who is still at large, or some other presently dangerous situation.[148] The arrest of a single drug dealer without anything more does not indicate a presently dangerous situation because there is no *known* threat to public safety, and the potential existence of an armed accomplice is purely speculative. On the other hand, the arrest of a prospective buyer of illegal arms does indicate a presently dangerous situation, since the prospective seller is known to have weapons on hand (for the transaction) and is likely armed and willing to shoot to kill.[149]

Quarles-sanctioned police questioning should be limited in duration and in substance. When the police ask broad questions or attempt to determine the suspect's involvement in the alleged crime, they run the risk of undermining *Miranda* values.[150] Lengthy questioning that meanders through a variety of topics suggests that it is not aimed at resolving a legal emergency. The contours of what constitutes an acceptable duration and scope of questioning will inevitably depend on the emergency being investigated: attempting to find a missing gun in rural Missouri, trying to locate a kidnapped child in downtown Nashville, and disarming a bomb in midtown Manhattan will all require different interrogation techniques. *Quarles* should not deny the police the benefits of their experience and reasoned judgment. But in all circumstances, the questioning should not take longer, or cover more topics, than reasonably necessary.

Finally, the questioning should occur immediately after the police arrive on scene and determine that an emergency exists. This too is a fact-dependent standard: in some situations, the police may want to call in a specialized task force, clear an area of civilians, or provide a suspect with basic medical treatment to ensure his or her survival. But an interrogation should occur at the first reasonable moment and not allow the police to

148. *See supra* text accompanying notes 70–98 (describing the expansion of the public safety exception to *Miranda*).

149. *See* Don Terry, *How Criminals Get Guns: In Short, All Too Easily*, N.Y. TIMES (Mar. 11, 1992), http://www.nytimes.com/1992/03/11/us/how-criminals-get-guns-in-short-all-too-easily.html?pagewanted=all (describing a Chicago resident who admitted participating in the illegal sale of guns, shooting twelve people, and being shot at by gang members repeatedly, and explaining that gangs use intimidation to force others to buy guns at gun shows on their behalf).

150. *See* Elizabeth Nielsen, *The* Quarles *Public Safety Exception in Terrorism Cases. Reviving the Marshall Dissent*, 7 AM. U. CRIM. L. BR. 19, 30–31 (2012) (discussing that in the context of terrorism cases, the public safety exception could render *Miranda* rights meaningless).

wait around for the suspect to be particularly vulnerable. The public safety exception is premised on the notion that there is an immediate crisis; the police undermine that assumption when they fail to immediately take action.[151] Failing to immediately respond suggests that the police are actually concerned with interrogating the suspect and not public safety.

These three limitations reflect an underlying skepticism of the public safety exception. The exception, which surely has a place in police practices, should not swallow the rule laid out in *Miranda*.

B. Once Bitten, Twice Shy?

The suspect who cooperates with police after receiving a reverse *Miranda* warning might decide that he has helped the police enough, and not make a Mirandized statement to the police. This may be particularly true after he then obtains an actual *Miranda* warning and realizes that his statements might be read against him at trial. What happens when the Mirandized suspect stops talking?

This concern is overstated. The suspect-friendly substance of a reverse *Miranda* warning, followed by a *Miranda* warning, very much suggests "to the suspect that the police are respectful of the suspect's rights."[152] Additionally, nearly all suspects are aware of their *Miranda* rights prior to interrogation, and it is not clear that the reverse *Miranda* warning would change their perception of what it would mean to speak to law enforcement.[153] Further, a jury will likely believe a suspect who receives both warnings and makes statements in both instances has not been coerced, meaning that "the suspect's incriminating statements acquire more cogency."[154] Indeed, concerns that utilizing two warnings will cause suspects to immediately clam up and not respond to the reverse *Miranda* warning are overstated. But of course, this might play out differently in practice. Perhaps the reverse *Miranda* warning will cause suspects to truly ponder the future consequences of their actions and choose to render no assistance to the government, thereby impeding efforts to resolve the public emergency and the future prosecution. While experience with *Miranda* suggests that this is unlikely to happen, if this

151. *See* New York v. Quarles, 467 U.S. 649, 668–70 (1984) (O'Connor, J., concurring in the judgment in part and dissenting in part) (describing the immediate threat to public safety that triggered this narrow exception to the *Miranda* rule).

152. Duke, *supra* note 61, at 558.

153. *Id.* at 555, 557–58.

154. *Id.* at 561.

were to happen it might be grounds for abandoning the reverse *Miranda* warning.

Additionally, the confession is not the government's only evidence against the suspect. For example, in *Quarles* the victim described her rapist to the police as

> a black male, approximately six feet tall, who was wearing a black jacket with the name "Big Ben" printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.[155]

The officers then drove to the supermarket and found a suspect matching the victim's description.[156] Exclusion of the suspect's gun and statement about the gun would not impede the rape prosecution, and there could be little question about the suspect's identity (beyond general concerns about the reliability of eyewitness statements). There is also little reason to doubt the persuasiveness of the evidence on the gun possession charge. Not all cases, to be sure, will have such sufficient evidence. But combined with the likelihood that the suspect will talk with law enforcement, the chances of a subsequent *Miranda* warning impeding the investigation are slim.

Why, then, do police departments not already utilize this practice (at least with various forms of un-Mirandized interrogations)? The most likely answer is that law enforcement is reluctant to engage in conduct that *might* reduce a suspect's willingness to participate in an interrogation.[157] And even though warnings do not appear likely to reduce participation,[158] this reality is counterintuitive.[159]

V. CONCLUSION

Judicially created tools designed to allow law enforcement officers to ensure the safety of the public are essential. Without the ability to

155. *Quarles*, 467 U.S. at 651–52 (majority).
156. *Id.* at 652.
157. Duke, *supra* note 61, at 555.
158. *Id.* at 555–56.
159. Additionally, the Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004) might make law enforcement skittish about this tactic, even though the case involves a different sort of police conduct. *Seibert* addressed a similar but distinguishable set of circumstances: the police, as a matter of course, conducted an un-Mirandized interrogation and obtained a confession, then Mirandized the suspect and repeated the process. *Id.* at 604–06. Perhaps the Court would have approved of law enforcement's actions had there been some reason for their initial un-Mirandized questioning or if they had not only later provided a *Miranda* warning but also explicitly stated that the prior confession was inadmissible.

investigate disturbances and follow up on tips, the police would find the job nearly impossible to perform. But the tension between effective police work and a suspect's constitutional rights need not be so problematic. By more fully acknowledging the fact that constitutional violations occur not through un-Mirandized questioning but by the introduction of a suspect's response at trial, courts can encourage effective community policing and the protection of a suspect's rights.