QUARRELING OVER *QUARLES*: LIMITING THE EXTENSION OF THE PUBLIC SAFETY EXCEPTION

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I. INTRODUCTION

> *The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.*
> —Justice Tom C. Clark[1]

In the United States, a suspect cannot be compelled to be a witness against himself.[2] Citizens have a constitutional right, under the Fifth Amendment, against self-incrimination.[3] Sometimes, for better or worse, this means that law enforcement is not able to obtain certain types of information. One of the very few ways[4] a suspect can communicate to law enforcement that he does not want to talk with them is to say, "I want to talk to a lawyer." A court should be careful when allowing police to get around this request by allowing continued custodial interrogation after invocation of the right to counsel.[5]

Pursuant to the United States Supreme Court's decision in *Edwards v. Arizona*,[6] police officers are required to stop custodial interrogation[7] when

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[1] Mapp v. Ohio, 367 U.S. 643, 659 (1961).

[2] U.S. CONST. amend. V ("No person . . . shall be compelled in a criminal case to be a witness against himself . . . .").

[3] *Id.*

[4] *See* Smith v. Illinois, 469 U.S. 91, 92 (1984).

[5] *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

[6] 451 U.S. 477 (1981).

[7] *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966); California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)); Rhode Island v. Innis,

an accused has unambiguously[8] invoked his Fifth Amendment right to counsel.[9] Additionally, according to the Court's decision in *New York v. Quarles*,[10] police officers are permitted to intentionally violate *Miranda v. Arizona*[11] by questioning a suspect in custody prior to administering *Miranda* warnings[12] when an immediate threat to the safety of the public or officers is present.[13]

But what happens when a suspect is placed into custody, unambiguously invokes his Fifth Amendment right to counsel, and there is an imminent threat to the safety of the public or the officers? Are police officers permitted to continue asking the suspect questions to eliminate the threat, or must they wait until an attorney has been made available? If the officers continue to interrogate the suspect, and the suspect makes incriminating statements, are the statements admissible at trial? If other evidence is obtained as the result of the officer's questions, is such evidence also admissible at trial?

Consider the following fact pattern.[14] A woman claiming to have just been raped approaches two police officers. She tells them that the individual has just entered a supermarket carrying a handgun. While one officer radios for backup, the other officer enters the store and sees a man matching the description offered by the woman. Upon seeing the officer, the suspect runs toward the back of the store. During his pursuit, the officer loses sight of the suspect for a moment. The officer regains visual contact and orders the suspect to stop. After frisking the suspect, the officer finds an empty shoulder holster and places the suspect in handcuffs.

Without being read his *Miranda* rights, the suspect tells the officer, "I want to talk to a lawyer." Before the suspect has the chance to consult with

446 U.S. 291, 301 (1980).

[8] *See* Davis v. United States, 512 U.S. 452, 459 (1994) ("[T]he suspect must unambiguously request counsel . . . [a] suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.").

[9] *See Edwards*, 451 U.S. at 484–85 (1981); *see also infra* Part II. B.

[10] New York v. Quarles, 467 U.S. 649 (1984).

[11] *Miranda*, 384 U.S. 436.

[12] *See id.* at 479 (The Court held that the Fifth and Fourteenth Amendments' prohibition against self-incrimination required police officers to administer four specified warnings to a suspect prior to custodial interrogation that he has the right to remain silent, anything he says may be used against him, that he also has the right to the presence of an attorney during questioning, and that an attorney will be appointed for him if he cannot afford one.).

[13] *See Quarles*, 467 U.S. at 655–57; *see also* Part II.C.

[14] The fact pattern is based principally on the facts of New York v. Quarles, 467 U.S. 649 (1984), modified slightly to incorporate the central issue addressed in this paper.

an attorney, however, the officer questions the suspect about the location of the missing gun. Nodding in the direction of some empty cartons, the suspect responds, "The gun is over there." The officer locates the gun, places the suspect under arrest, and reads him his *Miranda* rights.

Had the suspect not asked to speak with an attorney, it is undisputed that the *Quarles* public safety exception[15] would allow both the suspect's statements and the gun to be admissible at trial. However, given the suspect's invocation prior to custodial interrogation, the following questions persist: Was the suspect's Fifth Amendment right to counsel violated by the police officer's continued interrogation about the location of the gun? Are the suspect's statements about the gun's location admissible at trial? Is the gun admissible at trial? The Court's rulings in *Edwards* and *Quarles* have left these questions unanswered.[16]

This article addresses the issue of whether the *Quarles* public safety exception applies after a suspect invokes his Fifth Amendment right to counsel.[17] Due to the lack of guidance in the *Quarles* opinion, lower courts have expressed confusion as to whether the public safety exception applies to *Edwards*. Several courts have extended the exception, including the U.S. Court of Appeals for the Fourth[18] and Ninth Circuits,[19] while some state appellate courts have declined to do so.[20]

Part II of this article provides the requisite background for understanding *Miranda*'s Fifth Amendment right to counsel, the *Edwards* rule, and the *Quarles* public safety exception. Section II.A of this article lays the foundation of the Fifth Amendment right to counsel enunciated in *Miranda* and its constitutionality addressed in *Dickerson*. Section II.B builds off of *Miranda*'s right to counsel by explaining the *Edwards* rule, which requires police officers to cease custodial interrogation when a suspect unambiguously invokes his right to counsel. Section II.C considers the *Quarles* public safety exception to *Miranda*, which allows a police officer to intentionally violate *Miranda* by questioning a suspect in custody prior to administering *Miranda* warnings when there is an immediate danger to the public or the

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[15] *Id.* at 657–58.

[16] *See* Edwards v. Arizona, 451 U.S. 477, 478–79 (1981) (addressing an arrest where the defendant invoked his right to counsel after being Mirandized); New York v. Quarles, 467 U.S. 649, 652 (1984) (addressing an arrest where no assertion of the right to counsel was made).

[17] This issue has previously been described as a rather "knotty issue." *See* Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?* 10 ST. THOMAS L. REV. 461, 494 (1998).

[18] United States v. Mobley, 40 F.3d 688, 692–93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995).

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

[20] *See, e.g.*, People v. Laliberte, 615 N.E.2d 813, 822–23 (Ill. App. Ct. 1993), *cert. denied*, 622 N.E.2d 1218 (Ill. 1993); People v. Zanini, No. F038571, 2003 WL 103464, at *8 (Cal. Ct. App. Jan. 10, 2003).

officers.

Part III of this article addresses the current conflict between courts over whether the *Quarles* public safety exception applies to *Edwards* and divides the two competing approaches into the Extension Approach and the Non-Extension Approach. Section III.A analyzes the Extension Approach and three cases in which courts have extended the exception. Section III.B analyzes the Non-Extension Approach and two cases in which courts have declined to extend the public safety exception.

Given the Supreme Court's rulings in *Edwards* and *Quarles*, Part IV of this article endorses the view that the public safety exception, as narrowly constructed, should not be extended to situations where an accused has invoked his Fifth Amendment right to counsel.[21] Thus, adhering to the rule announced in *Edwards*, when a court is confronted with this issue, any statement made after a suspect invokes his Fifth Amendment right to counsel is inadmissible, unless used only for impeachment purposes. This article concludes that this approach is not only consistent with current law, but also is substantiated by public-policy concerns.

II. THE FIFTH AMENDMENT'S RIGHT TO COUNSEL AND THE PUBLIC SAFETY EXCEPTION

A. *Miranda*'s Right to Counsel and Its Constitutionality

Unlike the Sixth Amendment,[22] the Fifth Amendment contains no explicit language pertaining to a suspect's right to counsel. Under the Sixth Amendment, a suspect's right to counsel attaches at the commencement of adversarial judicial proceedings.[23] In the late 1950s, some Justices discussed the existence of the right to counsel prior to a suspect's arraignment

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[21] *Cf.* M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 271–86 (2002) (an argument in favor of extending the *Quarles* public safety exception to situations where a suspect invokes his Fifth Amendment right to counsel).

[22] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

[23] *See* Powell v. Alabama, 287 U.S. 45, 57–58 (1932); *see also* McNeil v. Wisconsin 501 U.S. 171, 175 (1991) ("[The Sixth Amendment right to counsel] does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)); Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

or indictment;[24] however, it wasn't until 1964 that the Court issued an opinion on whether or not the right to counsel exists prior to the initiation of adversarial judicial criminal proceedings.[25]

In *Escobedo v. Illinois*, the Court extended the right to counsel to pre-indictment interrogation.[26] According to the Court, when police investigation has

> begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "The Assistance of Counsel" in violation of the Sixth Amendment to the Constitution . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[27]

One year after *Escobedo*, the Court held a conference to consider which of the 101 *Escobedo* cases it would choose to clarify the Sixth Amendment right to counsel.[28] The Court consolidated four cases on appeal, collectively referred to as *Miranda v. Arizona*.[29] Instead of clarifying it's opinion in *Escobedo*, however, the Court strayed away from the Sixth Amendment right to counsel and shifted its focus to the Fifth Amendment guarantee against compulsory self-incrimination.[30]

In *Miranda*, the Court concluded that when an individual is subjected to custodial interrogation[31] on behalf of the police, the Fifth Amendment privilege against self-incrimination[32] is jeopardized, and there must be some

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[24] *See* Crooker v. California, 357 U.S. 433, 448 (1958) (Douglas, J. dissenting) ("[the] demands of our civilization expressed in the Due Process Clause require that the accused who wants a counsel should have one at any time after the moment of arrest."); Spano v. New York, 360 U.S. 315, 327 (1959) ("Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station.").

[25] *See* Escobedo v. Illinois, 378 U.S. 478, 479 (1964).

[26] *Id.* at 490–91; *see also* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION 447 (5th ed. 2010).

[27] *Escobedo*, 378 U.S. at 490–91.

[28] DRESSLER, *supra* note 26, at 447 (citing Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979)).

[29] Miranda v. Arizona, 384 U.S. 436, 440 (1966).

[30] *See* U.S. CONST. amend. V, VI.; *see also* YALE KAMISAR ET AL., BASIC CRIMINAL PROCEDURE 656–57 (12th ed. 2008).

[31] *Miranda*, 384 U.S. at 444
(Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way").

[32] U.S. CONST. amend. V ("No person shall be compelled in a criminal case to be a witness against him-

"procedural safeguards" to protect that privilege.[33] To achieve this protective purpose, the Court held that a suspect must be warned prior to police interrogation that he

> has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[34]

The admissibility of any custodial confession is conditioned on warning the suspect of his *Miranda* rights;[35] the failure to administer *Miranda* warnings and obtain a waiver of those rights before custodial interrogation generally requires exclusion of any statements made by the suspect.[36]

As it pertains to a suspect's Fifth Amendment right to counsel, the Court in *Miranda* acknowledged that "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege [against self-incrimination]."[37] Thus, the Court found that the "need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."[38] Under *Miranda*, when a suspect invokes his right to counsel, police must stop the interrogation until an attorney has been made available to the suspect and after allowing the suspect the opportunity to speak with the attorney.[39] If a statement is obtained after the suspect's invocation but without the presence of counsel, the government bears a "heavy burden" to show that the defendant knowingly and intelligently waived both his privilege against self-incrimination and his right to counsel.[40]

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act.[41] Section 3501 of the Act sought to return the law governing confes-

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self . . . .").

[33] *Miranda*, 384 U.S. at 478–79.

[34] *Id.* at 479.

[35] *Id.*

[36] *See id.* at 444; *see also* Missouri v. Seibert, 542 U.S. 600, 608 (2004).

[37] *Miranda*, 384 U.S. at 469.

[38] *Id.* at 470 ("[t]he presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial").

[39] *Id.* at 474.

[40] *Id.* at 475.

[41] 42 U.S.C. § 3711 (1968); *see* DRESSLER *supra* note 26, at 462; *see also* KAMISAR, *supra* note 30, at

sions to the traditional "totality-of-the-circumstances" voluntariness test employed by the Court prior to *Miranda*. [42] While the Act purported to overrule *Miranda*, it sat dormant for nearly three decades.[43] Additionally, the Court proceeded to define the rights announced in *Miranda* as merely "prophylactic" and not guaranteed by the Constitution itself.[44] Both § 3501 and these "prophylactic" cases placed *Miranda*'s constitutional fate in question.[45]

In *Dickerson v. United States*,[46] the Court confronted § 3501 (along with the *Miranda* progeny). In that case, the police failed to inform Defendant Dickerson of his *Miranda* rights, and he sought to suppress statements made during custodial interrogation.[47] The Fourth Circuit, concluding that *Miranda* was not a constitutional holding, applied § 3501 and determined that Dickerson's statements were voluntary.[48]

The Supreme Court reversed, holding that *Miranda* was a constitutional decision, which cannot be overruled by a legislative act.[49] Writing for the

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[42] 18 U.S.C. § 3501 states, in pertinent part:

In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances. (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[43] *See* DRESSLER, *supra* note 26, at 463.

[44] *See, e.g.*, Davis v. United States, 512 U.S. 452, 457 (1994); Withrow v. Williams, 507 U.S. 680, 690–91 (1993); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); Oregon v. Elstad, 470 U.S. 298, 306–07 (1985); New York v. Quarles, 467 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974). In regards to the Court characterizing *Miranda* as "prophylactic," *see also* Richard H. W. Maloy, *Can a Rule Be Prophylactic and Yet Constitutional?*, 27 WM. MITCHELL L. REV. 2465, 2471–75 (2001).

[45] Maloy, *supra* note 44, at 2466.

[46] Dickerson v. United States, 530 U.S. 428 (2000). *See generally* Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387 (2001).

[47] *Dickerson*, 530 U.S. at 432.

[48] *Id.*

[49] *Id.* at 444.

majority, Chief Justice Rehnquist[50] observed that *Miranda*, as a "constitutional decision,"[51] announced a "constitutional rule."[52] The Court attempted to reconcile the "prophylactic" line of cases with *Miranda*'s constitutionalization by stating that such cases

> illustrate the principle–not that *Miranda* is not a constitutional rule–but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.[53]

While the *Dickerson* decision has received criticism,[54] for purposes of this article, it is sufficient to understand that *Miranda* was a constitutional decision when considering the *Edwards* rule and the *Quarles* public safety exception.

B. The *Edwards* Rule

In *Edwards v. Arizona*,[55] the Court established a bright-line rule that after a suspect has invoked his Fifth Amendment right to counsel, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[56]

In that case, Defendant Edwards was arrested and taken to the police station, where he was informed of his *Miranda* rights and subsequently questioned.[57] After finding out that another suspect in custody had implicated him in the crime, Edwards told the police that "[he] want[ed] an attorney

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[50] Rehnquist was also the author of *Tucker, Barett*, and *Quarles*. For a great strategic explanation for Chief Justice Rehnquist's behavior in *Dickerson*, *see generally* Daniel M. Katz, *Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on Dickerson v. United States*, 22 J.L & POL. 303 (2006).

[51] *Dickerson,* 530 U.S. at 432.

[52] *Id.* at 437–38.

[53] *Id.* at 441; *see also* Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, CHAP. L. REV. 579, 586–603 (2007). *But see Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting).

[54] *See, e.g.*, Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071–77 (2001).

[55] Edwards v. Arizona, 451 U.S. 477 (1981).

[56] *Id.* at 484–85. For clarification on "further communication, exchanges, or conversations," *see* Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality opinion) (Unlike "inquiries or statements . . . relating to routine incidents of the custodial relationship," any inquiry or statement that can "be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation" constitutes initiation for purposes of the *Edwards* rule.).

[57] *Id* at 478.

before making a deal."[58] The interrogation ceased and Edwards was taken to the county jail.[59] The next morning, two detectives came to see Edwards.[60] Initially, Edwards did not want to talk, but later met with the detectives after the detention officer informed Edwards that "he had" to.[61] The detectives reread Edwards his *Miranda* rights, and after agreeing to talk, Edwards implicated himself in the crime.[62]

In reversing the Arizona Supreme Court, the United States Supreme Court held that when a suspect is subjected to custodial[63] interrogation[64] and has "expressed his desire to deal with the police only through counsel," the police must stop questioning until the suspect has the opportunity to meet with an attorney or unless the suspect reinitiates communication with the police.[65] According to the majority, "*Miranda* itself indicated that the assertion of the right to counsel was a *significant event* and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'"[66] Because Edwards neither met with an attorney nor reinitiated conversation with the authorities,[67] the Court ruled that his statement was inadmissible.[68]

Pre-*Dickerson*, the Court described the *Edwards* rule as a "second layer of prophylaxis for the *Miranda* right to counsel"[69] that was "designed to prevent police from badgering a defendant into waiving his previously as-

[58] *Id.* at 479.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] A person is "in custody" for purposes of receiving *Miranda* warnings if "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).
[64] *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) ("The term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.")
[65] *Edwards*, 451 U.S. at 484–85.
[66] *Id.* at 485 (emphasis added) (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)); *see* Fare v. Michael C., 442 U.S. 707, 719 (1979) ("[A]n accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *see also Innis*, 446 U.S. at 297–98 (citing *Miranda*, 384 U.S. at 473–74).
[67] *Id.* at 487.
[68] *Id.*
[69] *See* Davis v. United States, 512 U.S. 452, 458 (1994) (citing McNeil v. Wisconsin, 501 U.S. 171, 176 (1991)); *see also* Solem v. Stumes, 465 U.S. 638, 645 (1984) ("The *Edwards* rule is . . . a prophylactic rule, designed to implement pre-existing rights."); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (The *Edwards* rule's prohibition on continued interrogation "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.").

serted *Miranda* rights."[70] To achieve this purpose, the Court has expanded upon the protection of the rule announced in *Edwards*, holding that once a suspect has invoked his Fifth Amendment right to counsel, police officers cannot question the suspect regarding *any* offense, even if it is unrelated to the original charge, [71] unless an attorney is *actually present*.[72]

When faced with an *Edwards* violation, under the exclusionary rule, a suspect's answers to an officer's continued custodial interrogation after an invocation of his right to counsel should not be admitted at trial in the government's case-in-chief;[73] however, the Court has held that *Miranda* violations do not prevent the government from introducing elicited statements for impeachment purposes, provided that the statements are not otherwise involuntary.[74] Additionally, in a plurality opinion, the Court has reaffirmed that "physical fruit of a *Miranda* violation need not be suppressed."[75] Similarly, noncoerced statements are also admissible under the *Quarles* public safety exception.[76]

C. The *Quarles* Public Safety Exception

Continuing in the post-*Miranda* and pre-*Dickerson* "prophylactic" line of cases, the Court established in *New York v. Quarles* a "narrow" public safety exception,[77] allowing police officers to intentionally violate *Miranda*'s requirement that officers administer *Miranda* warnings prior to custodial interrogation when there is an immediate danger to the public.[78]

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[70] *Davis*, 512 U.S. at 458 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)); *accord* Smith v. Illinois, 469 U.S. 91, 98 (1984).

[71] *Davis*, 512 U.S. at 458 (citing Arizona v. Roberson, 486 U.S. 675, 677–78 (1988)).

[72] *See id.* (citing Minnick v. Mississippi, 498 U.S. 146, 153 (1990)).

[73] *See* New York v. Harris, 495 U.S. 14, 20 (1990).

[74] *See* Harris v. New York, 401 U.S. 222, 224–25 (1971); *see* Oregon v. Hass, 420 U.S. 714, 723 (1975).

[75] *See* United States v. Patane, 542 U.S. 630, 638 (2004) (Thomas, J., plurality opinion, joined by Rehnquist, C.J. and Scalia, J.). But given *Dickerson*'s constitutional "clarification" of *Miranda*, there is some debate over whether the "fruit of the poisonous tree" doctrine would hold that physical evidence obtained as a direct result of the questioning should also be suppressed. *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, 201–03 (2007). *Compare.* Wong Sun v. United States, 371 U.S. 471, 484–85 (1963), *with* United States v. Patane, 542 U.S. 630 (2004); Oregon v. Elstad, 470 U.S. 298, 303–04 (1985).

[76] New York v. Quarles, 467 U.S. 649, 655 (1984). *See generally* Section II.C.

[77] *Quarles*, 467 U.S. at 658.

[78] *Id.* at 655–56; *see also* Berkemer v. McCarty, 468 U.S. 420, 429 n. 10 (1984) (the Supreme Court further explains the *Quarles* public safety exception: "When the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may, without informing him of his con-

In *Quarles*, a young woman approached two police officers at night, claiming that a man carrying a gun who recently entered a supermarket had just raped her.[79] While one officer radioed for assistance, the other officer entered the store and saw an individual who matched the woman's description.[80] After seeing the officer, Defendant Quarles quickly ran toward the rear of the supermarket.[81] During the foot pursuit, the officer temporarily lost sight of Quarles. [82] Upon regaining visual contact, the officer ordered Quarles to stop.[83] The officer frisked Quarles, only to find that Quarles's shoulder holster was empty.[84]

After placing him in handcuffs, but before administering *Miranda* warnings, the officer asked where the missing gun was.[85] Nodding in the direction of some empty cartons, Quarles responded, "[t]he gun is over there."[86] The officer retrieved the gun, placed Quarles under arrest and read him his *Miranda* rights.[87] Quarles waived his rights, agreed to answer questions without an attorney present, and admitted owning the gun.[88] In relying on the Court's decision in *Miranda*, the trial court excluded both the statement "the gun is over there" and the gun because of the officer's failure to read Quarles his *Miranda* rights.[89] The lower appellate courts affirmed the trial court's decision.[90]

In reversing the New York Court of Appeals,[91] the United States Supreme Court held that there are certain "kaleidoscopic"[92] situations where "concern[s] for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[93] While agreeing that the facts fell within the ambit of *Miranda*,[94] the Court reiterated that

stitutional rights, ask questions essential to elicit information necessary to neutralize the threat to the public.").

[79] *Quarles*, 467 U.S. at 651–52.

[80] *Id.* at 652.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Quarles*, 467 U.S. at 652.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 652–53.

[90] *Id.* at 653.

[91] *Quarles*, 467 U.S. at 651.

[92] *Id.* at 656.

[93] *Id.* at 653.

[94] The Court acknowledged that Quarles was in police custody when the questioning took place. New York v. Quarles, 467 U.S. 649, 655 (1984).

the "prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"[95]

According to the Court, when police officers are confronted with an immediate necessity of discovering and neutralizing a danger to the public or themselves, officers are given the latitude to ask questions reasonably prompted by that safety concern before giving *Miranda* warnings.[96] The majority reasoned that if officers were required to administer *Miranda* warnings in these situations, suspects like Quarles would be deterred[97] from responding to police questioning[98]; the lack of response would potentially pose an increased danger to the public.[99] Additionally, officers should not have to decide between asking questions without *Miranda* warnings, rendering subsequent probative evidence inadmissible, or administering the warnings, but possibly weakening their ability to obtain that evidence and eliminate the threat.[100] Thus, the exception is meant to not "second-guess" the on-scene judgment of the police, which allows the officers to follow their "legitimate instincts when confronting situations presenting a danger to the public safety."[101]

In the dissent's opinion, the facts of the case failed to show that there was any risk to the public during Quarles's interrogation[102]—prior to the interrogation, Quarles had been reduced to a condition of physical powerlessness,[103] there were no facts that would suggest Quarles ever had an accomplice,[104] and the store was apparently deserted except for some store clerks at the checkout counter.[105] In creating a public safety exception, there will inevitably be disagreements over the scope of the public safety exception and mistakes in its application;[106] the end result will be "a firespun new doctrine of public safety exigencies incident to custodial interrogation, com-

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[95] *Id.* at 654 (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

[96] *See id.* at 656.

[97] In that case, Quarles was eventually read his *Miranda* rights, but in fact waived those rights and continued to answer the officer's questions. *Id.* at 652.

[98] *See id.* at 657.

[99] *Id.* (the Court hypothesized that an accomplice or customer might find the gun).

[100] *Quarles*, 467 U.S. at 657–58.

[101] *Id.* at 659.

[102] *Id.* at 675 (Marshall, J., dissenting).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 676 (Marshall, J., dissenting) (internal citations omitted).

[106] For analysis concerning the scope of the exception and the circuit split on the issue, *see generally* Rorie A. Norton, Note, *Matters of Public Safety and the Current Quarrel Over the Scope of the Quarles Exception to Miranda*, 78 FORDHAM L. REV. 1931 (2010).

plete with the hairsplitting distinctions that currently plague our Fourth Amendment jurisprudence."[107] In referring back to *Miranda*, the dissent argued that the majority incorrectly applied a "judicial balancing act," weighing the social utility over a prophylactic rule.[108]

According to the dissent, the majority failed to account for the fact *Miranda* was a decision concerning coerced confessions, not public safety: "Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the public safety exception and remain faithful to the logic of *Miranda v. Arizona*."[109] Moreover, the public safety exception would invite police officers to coerce defendants to make incriminating statements and permit the government to introduce those statements at trial; allowing this would be a departure from the principle that coerced confessions are inadmissible in criminal prosecutions.[110]

Presently, the continued legitimacy of the *Quarles* public safety exception is at issue, given the Court's decision in *Dickerson*:[111] "If one looks at how the Fifth Amendment privilege against compelled self-incrimination has been applied outside the interrogation context, one finds that the Supreme Court 'ordinarily does not balance the government's interest in obtaining information against the individual's interest in avoiding compulsion.' The latter interest prevails."[112] However, it seems as though the public safety exception announced in *Quarles* will prevail in light of *Dickerson*. To justify the continued applicability of the public safety exception, a court will most likely hang its hat on Justice Rehnquist's opinion that *Quarles* "illustrate[s] the principle–not that *Miranda* is not a constitutional rule–but that no constitutional rule is immutable."[113]

However, some Justices have stated their disagreement over recognizing the *Quarles* public safety exception in light of *Dickerson*.[114] In response to

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[107] *Quarles*, 467 U.S. at 680 (citing *Quarles*, 467 U.S. at 663–64 (O'Connor, J., concurring in the judgment in part and dissenting in part)).

[108] *Id.* at 681.

[109] *Id.* at 684.

[110] *See id.* at 686.

[111] *See* Dickerson v. United States, 530 U.S. 428, 441 (2000).

[112] DRESSLER, *supra* note 26, at 488; *see also* Jeffery Standen, *The Politics of Miranda*, 12 CORNELL J.L. & PUB. POL'Y 555, 563–64 (2003) (recognizing that if *Miranda* was a constitutional decision, then the *Quarles* public safety exception would violate the Fifth Amendment, and thus be unconstitutional).

[113] *Dickerson*, 530 U.S. at 441. *But see id.* at 445–46 (Scalia, J., dissenting) ("[T]his Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States. That is an immense and frightening antidemocratic power, and it does not exist.").

[114] *See id.* at 455 (Scalia, J., dissenting).

Justice Rehnquist's statement, above, Scalia stated:

> The issue . . . is not whether court rules are "mutable"; they assuredly are. It is not whether, in the light of "various circumstances," they can be "modifi[ed]"; they assuredly can. The issue is whether, *as mutated and modified,* they must *make sense.* The requirement that they do so is the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.[115]

Justice Scalia wrote that if confessions "procured in violation of *Miranda* are confessions 'compelled' in violation of the Constitution," then the post-*Miranda* line of cases, including *Quarles*, "do not make sense."[116]

III. COURTS' ENCOUNTERING THE EXCEPTION'S EXTENSION

A. The Extension Approach

i. The Ninth Circuit

In *United States v. DeSantis*,[117] the Ninth Circuit was asked to decide whether the *Quarles* public safety exception applies to a situation in which an accused has asserted his right to counsel. The court noted that this was a case of first impression that required the determination of whether the underlying considerations of *Quarles* called for a relaxation of the "procedural safeguards enunciated in *Edwards* . . . ."[118]

On September 13, 1985, two inspectors went to Defendant DeSantis's apartment to execute an arrest warrant.[119] After entering the living room and identifying themselves as U.S. marshals, one inspector cursorily searched DeSantis, while the other conducted a brief security sweep of the apartment.[120] The inspectors then read DeSantis his *Miranda* rights, and DeSantis asked to call his attorney.[121] When he was told he would be going to court, DeSantis asked if he could change his clothes.[122] In response to DeSantis's request, one inspector asked whether there were weapons in the

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115 *Id.*
116 *Id.*
117 United States v. DeSantis, 870 F.2d 536, 538 (9th Cir. 1989).
118 *Id.*
119 *Id.* at 537.
120 *Id.*
121 *Id.* There was some dispute over whether DeSantis actually asked to speak with his attorney. For purposes of the decision, the court adopted DeSantis's version of events. *Id.* at 538 n.1.
122 *Id.* at 537.

bedroom, to which DeSantis responded, "there was a gun on the shelf in the closet."[123] The inspectors escorted a non-handcuffed DeSantis to the bedroom and seized the gun from the closet shelf.[124] DeSantis sought to suppress both the gun and his statements but failed in both attempts.[125] Both the gun and the statements were admitted in a bench trial, and the district court found DeSantis guilty of being a felon in possession of a firearm.[126]

In upholding DeSantis's conviction, the Ninth Circuit recognized that the *Edwards* rule typically requires police officers to cease interrogation when the suspect has expressed a desire to speak with counsel;[127] however, certain exigencies require the relaxation of rules that act as "prophylactic safeguards," including the *Edwards* rule.[128] According to the court, the rationale underlying the exception to providing *Miranda* warnings also allows the police to continue questioning a suspect after he invokes his right to counsel: "Society's need to procure the information about the location of a dangerous weapon is as great after, as it was before, the request for counsel."[129] When faced with a threat to public safety, an officer's questions are motivated by the need to secure either his own or the public's safety and not to elicit testimonial evidence.[130] Because the Ninth Circuit concluded that the marshal's questions fell within the broadening scope of the public safety exception, a court should disregard the "*Edwards* prophylactic rule" and instead focus on whether the statements were coerced.[131] Having found that DeSantis's statements were not coerced, the court held that both the gun and the statements were properly admitted at trial.[132]

ii. The Fourth Circuit

In *United States v. Mobley*,[133] the Fourth Circuit relied heavily on the Ninth Circuit's decision in *DeSantis* in considering whether the *Quarles* public safety exception should be extended to situations where *Miranda* rights have been given and a suspect has invoked his right to counsel.

123 *DeSantis*, 870 F.2d at 537.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.* at 538 fn. 2.
128 *Id.* at 540–41.
129 *DeSantis*, 870 F.2d at 540–41.
130 *Id.*
131 *Id.*
132 *Id.*
133 40 F.3d 688 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995).

In *Mobley*, approximately eight F.B.I. specials agents arrived at Defendant Mobley's house to execute both a valid arrest warrant and search warrant.[134] When Mobley opened the front door, it was readily apparent to the agents that he was unarmed, given that he was naked.[135] After conducting a security sweep of the apartment, Mobley was allowed to get dressed under surveillance.[136] Upon returning to the living room, Mobley was formally arrested, read his *Miranda* rights, and he invoked his right to counsel.[137] One of the agents then asked Mobley if there were any weapons in the apartment, to which he responded that there was a weapon on one of the closet shelves in the bedroom.[138] Mobley's motion to suppress the statement in violation of *Miranda* and its progeny was denied, and he was subsequently convicted as a felon in possession of a firearm.[139]

The Fourth Circuit acknowledged that, in the absence of some exception, the *Edwards* rule would require a court to suppress Mobley's statement.[140] In dicta, after considering the reasoning advanced in the *DeSantis* decision (that the danger persists regardless of a suspect's invocation of his right to counsel),[141] the court held that the *Quarles* public safety exception applies to an *Edwards* situation.[142] A majority of the court recognized that the public safety exception should be construed narrowly, and applies "only where there is 'an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon.'"[143]

While the Fourth Circuit agreed with the Ninth Circuit about the exception's extension to *Edwards*, given the facts of the case,[144] the court found

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[134] *Id.* at 690.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 691.
[139] *Mobley*, 40 F.3d at 691.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 692. While some commentators refer to the Fourth Circuit's statements in *Mobley*, pertaining to the public safety exception's extension, as a holding because the Fourth Circuit ultimately held that the evidence was admissible via inevitable discovery, and the facts did not fall within the public safety exception, the court's opinion concerning the exception's extension has been criticized as obiter dictum. *Compare* Elizabeth Williams, Annotation, *What Circumstances Fall Within Public Safety Exception to General Requirement, Pursuant to or as Aid in Enforcement of Federal Constitution's Fifth Amendment Privilege Against Self-Incrimination, to Give* Miranda *Warnings Before Conducting Custodial Interrogation-post-Quarles Cases*, 142 A.L.R. FED. 229, 252 (1997), *with* People v. Zanini, No. F038571, 2003 WL 103464, at *6 fn. 3 (Cal. Ct.. App. Jan. 10, 2003).
[143] *Id.* at 693 (citing New York v. Quarles, 467 U.S. 649, 659 (1984)).
[144] *Id.* at 692 ("There is nothing that separates these facts from those of an ordinary and routine arrest scenario. There was no explanation at any time as to what extraordinary circumstances prompted this [the agent's] question [about the existence of weapons], and we must conclude that there were none.")

there was no "'immediate need' that would validate protection under the *Quarles* exception in this instance."[145] According to the Fourth Circuit, in the absence of an "objectively reasonable concern for *immediate danger* to police or public," the court must follow the *Edwards* rule.[146] Despite the *Edwards* violation, the court affirmed Mobley's conviction because the gun would have been inevitably discovered given the agents' search warrant, and the introduction of Mobley's statement was harmless beyond a reasonable doubt.[147]

iii. The District of Columbia Court of Appeals

In *Trice v. United States*,[148] the District of Columbia Court of Appeals, following in the footsteps of the Ninth and Fourth Circuits, held that the public safety exception applies after a suspect invokes his right to counsel, and statements made by the suspect are admissible under the exception.[149]

In that case, a shooting victim identified Defendant Trice as a suspect allegedly involved in an attempted armed robbery.[150] Four days after the incident, a detective arrested Trice at his home pursuant to a warrant.[151] While effectuating the arrest, the detective saw Trice's mother and several small children.[152] The detective transported Trice to the police station, where he was read his *Miranda* rights and booked.[153]

After Trice invoked his right to counsel, the detective spent the next twenty minutes asking him questions about his personal background.[154] The detective then asked, "I'd like to know where the shotgun is. There are little kids in the house. I don't want anyone to get hurt."[155] Trice responded, "It's okay. I gave it back to the person I borrowed it from."[156] Despite the fact that the detective waited over an hour to ask about the location of the gun,[157] the trial court ruled that the question and response were admissible

145 *Mobley*, 40 F.3d at 693.
146 *Id.* (emphasis added).
147 *Id.* at 693–94.
148 Trice v. United States, 662 A.2d 891 (D.C. 1995).
149 *Id.* at 892.
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.*
154 *Trice*, 662 A.2d at 892.
155 *Id.*
156 *Id.*
157 *Id.*

under the public safety exception.[158]

In deciding whether the *Quarles* exception applies to *Edwards*, the D.C. Court of Appeals relied on the reasoning applied by the Ninth Circuit in *DeSantis*.[159] Agreeing with the Ninth Circuit, the court held that the exception could logically be extended to situations where a suspect has invoked his right to counsel for the "straightforward reason that the danger does not abate with *Miranda* warnings and assertions. Very simply, there is no temporal relationship between the ongoing exigency and the timing of a *Miranda* refusal."[160]

Thus, as long as the officer's question was attributed to an "objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon," a suspect's response would be admissible as evidence at trial.[161] The court concluded that the detective's question was "reasonably prompted by a concern for the public safety," and was properly admitted at trial.[162]

B. The Non-Extension Approach

i. The Appellate Court of Illinois

In *People v. Laliberte*,[163] the Appellate Court of Illinois declined to extend the public safety exception to situations where a suspect has immediately and unambiguously invoked his Fifth Amendment right to counsel.[164] Despite this, the court found that the Fifth Amendment right against self-incrimination alone does not provide a constitutional right to counsel independent of *Miranda*'s procedural safeguards.[165]

In *Laliberte*, an armed abductor kidnapped a one-year-old child, placed him in a duffel bag, left him in a wooded area, and demanded a ransom

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158 *Id.* at 896.

159 *Id.* at 895.

160 *Trice*, 662 A.2d at 895.

161 *Id.* (quoting New York v. Quarles, 467 U.S. 649, 659 n.8 (1984)).

162 *Id.* at 896 (quoting *Quarles*, 467 U.S. at 656) (noting the "strong circumstantial evidence" – the victim was wounded with a shotgun, Trice was identified by the victim as a suspect, the shooting took place one block away from Trice's residence, and the detective had no evidence that the shotgun had been taken to someplace other than Trice's home - the court concluded that the detective's belief that the weapon may be located somewhere in the home where several children were present was "objectively reasonable").

163 People v. Laliberte, 615 N.E. 2d 813 (Ill. App. Ct. 1993).

164 *Id.* at 817

165 *Id.*

from his family later that same day.[166] After making several telephone calls to the child's home, the defendant directed the child's father to three locations before the father left the money at a mailbox on an island in a shopping center.[167] While under FBI surveillance, the defendant retrieved the money on his motorcycle.[168] He then led the officers on a high-speed chase before being bumped from his motorcycle by an officer's squad car.[169]

While on the ground, officers demanded that the defendant reveal the location of the missing child, to which the defendant responded, "Fuck you, I want a lawyer."[170] The defendant was handcuffed, placed in a squad car, and subjected to "intense questioning" by one of the FBI agents.[171] Throughout the interrogation, the defendant repeatedly asked for an attorney.[172] After approximately forty minutes of custodial interrogation, the defendant agreed to direct the police to the woods where he left the child earlier that morning.[173] Later that evening, the child was found alive lying outside of the duffel bag.[174]

The defendant sought to suppress the statements made during the initial interrogation concerning the whereabouts of the child.[175] The motion was denied, and the statements were introduced at trial.[176] The defendant was subsequently convicted of aggravated kidnapping for ransom.[177]

In their efforts to decide whether or not to apply the *Quarles* public safety exception,[178] the court examined a Wisconsin case[179] concerning a child kidnapping.[180] Although the court recognized the similarity of facts and Wisconsin Court of Appeal's persuasive analysis in applying the public safety exception,[181] the court simply declined to apply the *Quarles* public safety exception for Illinois state criminal matters, or its extension to *Ed-*

166 *Id.*
167 *Id.*
168 *Id.*
169 *Laliberte*, 615 N.E.2d at 817.
170 *Id.*
171 *Id.*
172 *Id.*
173 *Id.*
174 *Laliberte*, 615 N.E.2d at 817.
175 *Id.* at 817.
176 *Id.*
177 *Id.*
178 *Id.* at 820, 822–23 (the court agreed with the government in principle concerning Illinois's acceptance of the *Quarles* public safety exception but declined to apply the exception in this case).
179 *Id.* at 816 (citing State v. Kunkel, 404 N.W.2d 69 (Wis. Ct. App. 1987)).
180 *See Laliberte*, 615 N.E.2d at 820–821.
181 *Id.*

wards, thereby skirting the issue of whether there should be an extension altogether.[182] Like many pre-*Dickerson* decisions, the court acknowledged the difference between a violation of a constitutional right and a prophylactic rule, as well as the applicability of the "fruit of the poisonous tree" doctrine in such situations.[183]

ii. The California Fifth District Court of Appeal

In the unpublished opinion of *People v. Zanini*,[184] the California Fifth District Court of Appeals held that police questions concerning the location of a dangerous weapon after the suspect had invoked his *Miranda* right to counsel violated *Edwards*, and thus the statements should have been inadmissible at trial;[185] however, the court's reasoning for the non-extension of the exception attached a peripheral concern.

In that case, Defendant Zanini stabbed the victim in the abdomen.[186] While in an ambulance but still at the scene, the victim identified Zanini as the person who stabbed him.[187] The next day, Zanini was arrested, taken to the local police department, and read his *Miranda* rights.[188] Zanini invoked his right to counsel, at which point the officers stopped their initial interrogation.[189]

Given the presence of blood evidence at the crime scene, Zanini was transported to a medical center to have blood drawn.[190] Prior to taking the blood sample, an officer informed Zanini that several witnesses saw him stab the victim with an object.[191] After voicing his concern over a young

[182] *Id.* at 820, 822–23. (in dicta, the court acknowledged that the *Quarles* opinion addressed the narrow issue of police questioning without administering *Miranda* warnings, while the case at hand dealt with questioning after a suspect's invocation of his right to counsel, raising the question of whether the invocation of one's right to counsel is a constitutional right or a prophylactic procedural rule. According to the court, the federal constitution "affords a right to counsel only by way of the *Miranda* procedural safeguards" and "an exception to those safeguards would be viable.").

[183] *Id.* at 818–19. (according to the court, "where the police violate the prophylactic rules developed in *Miranda*, but do not actually violate the defendant's fifth amendment [*sic*] privilege against self-incrimination, the fruit of the poisonous tree doctrine will not be applied to exclude physical or testimonial evidence derived from the defendant's statements.").

[184] People v. Zanini, No. F038571, 2003 WL 103464 at *1 (Cal. Ct. App. Jan. 10, 2003).

[185] *Id.* at *1.

[186] *Id.* at *2.

[187] *Id.*

[188] *Id.* at *3.

[189] *Id.*

[190] *Zanini*, 2003 WL 103464 at *3.

[191] *Id.*

child or innocent bystander finding the dangerous weapon and injuring himself, an officer asked Zanini where the object was located.[192] Zanini stated that he did not want to incriminate himself.[193] When the officer reassured Zanini that "it was just for matters of public safety," Zanini told the officer that the knife was located "on top of a church."[194] Zanini then described the characteristics of the knife and directed the officer to the location where he discarded the knife.[195] The officer subsequently found a knife on the top of the roof that matched Zanini's description.[196] Both the knife and Zanini's statements were admitted at trial, and Zanini was convicted of attempted murder and assault with a dangerous weapon.[197]

In addition to examining both the *Edwards* rule and the *Quarles* public safety exception,[198] the court addressed the holdings in *DeSantis*, *Mobley*, and *Trice*.[199] While acknowledging that there may be situations where inadmissible statements under an *Edwards* violation would nevertheless be admissible because of the public safety exception,[200] the court concluded that the exception did not warrant the admission of Zanini's statements.[201] According to the court, when the officer stated "it was just for matters of public safety," the officer impliedly represented that Zanini's statements would not be introduced at trial for incrimination purposes.[202] The officer's implied representation is the direct opposite of the part of *Miranda* warnings that "anything you say can and say will be used against you in a court of law."[203] Hesitant to provide officers the incentive to explicitly or implicitly negate portions of the *Miranda* warnings, the court held that the admission of Zanini's statements made after he had invoked his right to counsel were in violation of *Edwards*.[204]

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192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Zanini*, 2003 WL 103464 at *3.
197 *Id.* at *1.
198 *Id.* at *4–5.
199 *Id.* at *6–7.
200 *Id.* at *7.
201 *Id.*
202 *Zanini*, 2003 WL 103464 at *3, *7.
203 *Id.* at *7, (*citing* People v. Memro, 905 P.2d 1305 (Cal. 1995)); *see* Miranda v. Arizona, 384 U.S. 436, 479 (1966).
204 *Id.* at *7.

IV. ENDORSING A NON-EXTENSION APPROACH

A. A Better Approach to Non-Extension: How and Why Both Approaches Got It Wrong

Under both approaches addressed in this article, the courts gave too little deference to the narrow language of the *Quarles* opinion.[205] The United States Supreme Court in *Quarles*, while acknowledging that the decision might cause problems concerning the clarity of *Miranda*,[206] created a "narrow" exception to *Miranda*.[207] That narrow exception only allows police officers to question suspects in custody without reading them their *Miranda* rights when there is an immediate danger to the public or the officers.[208] Although the Court recognized that officers would inevitably encounter "kaleidoscopic situation[s],"[209] there is no language in the *Quarles* decision that would imply that exception applies after a suspect invokes his Fifth Amendment right to counsel.[210] *Quarles* should be thought of as only creating an exception to the requirement that *Miranda* warnings be administered prior to custodial interrogation, not to the substantive rights articulated in *Miranda*.

While the *Quarles* text itself fails to support the Extension Approach, the Extension Approach adopted the *Quarles* reasoning. The lower appellate courts recognized that the "prophylactic" nature of *Miranda* would suggest a logical extension of the public safety exception to situations where a suspect has invoked his right to counsel.[211] It is readily apparent that if *Miranda* is merely prophylactic, then it would be rational, given the Supreme Court's reasoning in *Quarles*, that the exception could be applied to an *Edwards*-type situation.[212]

That being said, all of the Extension Approach cases mentioned in this article were decided pre-*Dickerson*.[213] According to the Court's opinion in

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[205] While *Mobley* recognized that *Quarles* was a narrowly written decision, it ignored that *Quarles* was narrowly written only as an exception to the reading of *Miranda* rights and not the *Miranda* opinion as a whole. *See* Mobley v. United States, 40 F.3d 688, 692–93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995).

[206] New York v. Quarles, 467 U.S. 649, 658 (1984).

[207] *Id.*

[208] *Id.* at 653, 656.

[209] *Id.* at 656 (referring to the varying types of danger that the officers may confront).

[210] *See generally id.* at 649.

[211] *See* Trice v. United States, 662 A.2d 891, 895 (D.C. Cir. 1995); Mobley v. United States, 40 F.3d 688, 692 (4th Cir. 1994); United States v. DeSantis, 870 F.2d 536, 540–41 (9th Cir. 1989).

[212] *See supra* note 69 and accompanying text.

[213] *Dickerson* was decided in 2000, while *DeSantis* was decided in 1989, *Mobley* was decided in 1994,

Dickerson, *Miranda* was not prophylactic, but a constitutional decision.[214] Even if the public safety exception survives *Dickerson*, because the *Quarles* Court based its holding on the nonconstitutional, prophylactic nature of the *Miranda* warnings, [215] courts in the future cannot use that same reasoning to substantiate the extension of the public safety exception to *Edwards*.

The Extension Approach also failed to distinguish the importance between a police officer informing a suspect of his *Miranda* rights, and a suspect's invocation of those rights. *Miranda* warnings merely inform the suspect of his constitutional rights;[216] invoking those rights demonstrates that the suspect already possesses some knowledge about his rights, and wishes to exercise them. According to the Court, it is a "significant event" when a suspect invokes his right to counsel.[217] By invoking that right, the accused expresses his intention to exercise his Fifth Amendment privilege against self-incrimination.[218] As the *Miranda* Court wrote,

> any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the *privilege has been once invoked*.[219]

If officers were given the ability to continue their interrogation of a suspect after invocation, they would essentially be compelling a suspect to forego his previous decision not to incriminate himself, much more coercive than manipulating a suspect who has not been read his *Miranda* rights. This surely cannot be what the Fifth Amendment or the public safety exception meant to allow.

Aside from the legal reasoning, *DeSantis*, *Mobley*, and *Trice* represent cases of bad facts making bad law.[220] In both *DeSantis* and *Mobley*, the facts do not seem to even implicate the public safety exception.[221] In these

and *Trice* was decided in 1995.

214 Dickerson v. United States, 530 U.S. 428, 444 (2000).

215 *Quarles*, 649 U.S. at 654.

216 *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

217 Edwards v. Arizona, 451 U.S. 477, 485 (1981) (citing *Miranda*, 384 U.S. at 474); *see supra* note 64 and accompanying text.

218 *Miranda*, 484 U.S. at 473–74.

219 *Id.* at 474 (emphasis added).

220 *See supra* Part III.A. *But cf.* Jim Weller, Comment, *The Legacy of Quarles: A Summary of the Public Safety Exception to Miranda in the Federal Courts*, 49 BAYLOR L. REV. 1107, 1115 (1997) ("DeSantis should be viewed as a case of bad facts making good law."). *See generally* Trice v. United States, 62 A.2d 891 (D.C. Cir. 1995); United States v. Mobley, 40 F.3d 688 (4th Cir. 1994); United States v. DeSantis, 870 F.2d 536 (9th Cir. 1989).

221 *Compare Mobley*, 40 F.3d at 693 (holding the public safety exception did not apply to the facts of

two cases, officers secured the premises and the defendants were under police surveillance.[222] In neither of the cases were there extraordinary circumstances that would prompt the officers' questions about the presence of weapons.[223] There is nothing that would separate the facts of *DeSantis* and *Mobley* from that of a run-of-the-mill, routine arrest situation.

The facts of *Trice* came close,[224] but again, the court should not have applied the exception. In *Trice*, the officer arrested the defendant at his home.[225] Knowing that a shotgun was used in the crime for which the defendant was arrested, and witnessing small children at the defendant's residence, the officer could have instinctively inquired into the whereabouts of the weapon.[226] Part of the *Quarles* rationale for admitting statements in response to questioning about matters of public safety is to avoid second-guessing the on-scene judgment of a police officer about the timing of the *Miranda* warnings.[227] It seems as though the instincts of the arresting officer would have given rise to reasonably prompted questions concerning the location of the shotgun while at the residence. Instead, the officer waited approximately an hour after the arrest to ask about the gun.[228] The defendant had already been booked, read his *Miranda* rights, and invoked those rights.[229] Extended temporal proximity would suggest that the danger might not have been immediate for purposes of the public safety exception.

Additionally, in all three cases under the Extension Approach the police read the suspects their *Miranda* rights.[230] The *Quarles* Court feared that the police might be less likely to keep the public safe if suspects are advised of their *Miranda* rights.[231] While there could inevitably be times when not advising an accused of his rights is constitutionally permissible,[232] once the decision has been made to read the suspect his *Miranda* rights, the exercise of those rights must be respected.[233]

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the case), *with DeSantis*, 870 F.2d at 541 (concluding the public safety exception did apply to the facts of the case).

222 *Mobley*, 40 F.3d at 690; *DeSantis*, 870 F.2d at 537.

223 *See* Part III.A.

224 *Mobley*, 40 F.3d at 693; *see also supra* Part III.A.

225 *Trice*, 62 A.2d at 892–93.

226 *See id.* at 892.

227 *Id.*; *see* New York v. Quarles, 467 U.S. 649, 656 (1984).

228 *Trice*, 662 A.2d at 896.

229 *Id.* at 893.

230 *DeSantis*, 870 F.2d at 538; *Mobley*, 40 F.3d at 690; *Trice*, 662 A.2d at 892.

231 *Quarles*, 467 U.S. at 657.

232 *See* Part II.C.

233 *But see DeSantis*, 870 F.2d at 541 (holding the public safety exception applied, even after the suspect asserted his *Miranda* rights); *Trice*, 662 A.2d at 896.

The only substantive argument put forth by the Extension Approach is that the immediacy of the danger does not change just because a suspect invokes his right to counsel.[234] Thus, as long as the officer's questions are attributed to an objectively reasonable need to protect the public or the police from an immediate danger, a suspect's statements made in response to those questions should be admissible in the government's case-in-chief.[235] If a court were to adhere to the *Edwards* rule, the police would have to engage in a balancing test, which the *Quarles* Court felt was unreasonable.[236] But, as aptly stated by Justice O'Connor,

> *Miranda* had never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such question are asked and answered: the defendant or the State. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State.[237]

There seems to be a visceral, misconceived notion associated with the suppression of evidence as the remedy for a *Miranda-Edwards* violation; if the evidence will be suppressed, that means the police cannot question the suspect further after invoking the right to counsel. And if officers are unable to question the suspect, the harm will inevitably persist, possibly causing even greater harm. However, such postulations should not exist within a vacuum. The harm need not persist merely because the law requires suppression. Police officers can continue their questioning of the suspect, using their learned skills of interrogation, and elicit information from the suspect needed to extinguish that harm. According to the Court's plurality opinion in *United States v. Patane*, if the police obtain physical evidence as "fruit" of this *Miranda-Edwards* violation, it need not be suppressed at trial.[238] As pointedly stated by Justice Marshall in his *Quarles* dissent, "[a]ll the Fifth Amendment forbids is the introduction of coerced statements at trial."[239]

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234 *See DeSantis*, 870 F.2d at 540–41; *Mobley*, 40 F.3d at 692–93; *Trice*, 662 A.2d at 895.

235 *See DeSantis*, 870 F.2d at 540–41; *Mobley*, 40 F.3d at 692–93; *Trice*, 662 A.2d at 895.

236 *See Quarles*, 467 U.S. at 657–58.

237 *Id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part).

238 542 U.S. 630, 638 (2004) (Thomas, J., plurality opinion, joined by Chief Justice Rehnquist and Justice Scalia).

239 *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting).

Returning to the hypothetical presented in the Introduction of this article,[240] the suspect's fate appears relatively determined. If a court does not extend the *Quarles* public safety exception after a suspect invokes his right to counsel, then the officer's questions were in violation of *Edwards*. At trial, the suspect's statements about the gun's location should be suppressed in the government's case-in-chief. However, pursuant to *Patane*, the gun found in the empty cartons of the supermarket would most likely be admissible at trial.

B. Further Extension and The Public Safety Exception's Practicality

Despite the narrow construction of *Quarles*, *Dickerson*'s (re)constitutionalization of *Miranda*, and the difference between the administration of *Miranda* warnings and invoking *Miranda* rights, if a court concludes that the public safety exception applies to *Edwards*, there would be far-reaching negative policy implications. While reluctant to employ a "slippery-slope" argument, the exception's extension would cause greater harm to the fundamentals of constitutional law than acknowledged by both the Extension and Non-Extension Approaches in Part III.

What if, instead of invoking his right to counsel, a suspect unambiguously invokes his right to remain silent? 241 If the Quarles public safety exception applies to Edwards v. Arizona, then should the exception not also apply to Michigan v. Mosley?[242]

According to *Miranda* and *Mosley*, when a suspect invokes his right to remain silent, custodial interrogation must cease.[243] However, this does not mean the police cannot reinitiate interrogation. In *Mosley*, the Court held that "the admissibility of statements obtained after the person in custody has decided to remain silent depends on whether his 'right to cut off questioning' was 'scrupulously honored.'"[244] As long as the suspect's right to remain silent was "scrupulously honored," police officers may reinitiate cus-

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[240] The fact pattern is based principally on the facts of New York v. Quarles, 467 U.S. 649 (1984), modified slightly to incorporate the central issue addressed in this paper.

[241] *See* Berghuis v. Thompkins, 130 S.Ct. 2250, 2260 (2010) (citing Davis v. United States, 512 U.S. 452, 459 (1994), in which the Court applied the "unambiguous" requirement of asserting the right to counsel to situations in which a suspect invokes their right to remain silent.).

[242] 423 U.S. 96 (1975); *see also* Trice v. United States, 662 A.2d 891, 894–95 (D.C. 1995) (hinting that the public safety exception will also apply under circumstances where a suspect has invoked his right to remain silent).

[243] *See Mosley*, 423 U.S. at 100–01 (citing Miranda v. Arizona, 384 U.S. 436, 473–74 (1966)).

[244] *Mosley*, 423 U.S. at 104.

todial interrogation.[245]

If the public safety exception were extended to situations where a suspect has invoked his right to remain silent, officers could intentionally violate both *Miranda* and *Mosley*; they need no longer "scrupulously honor"[246] a suspect's exercise of his Fifth Amendment right. As previously addressed in this article, when one exercises his *Miranda* rights, he is intending to exercise his Fifth Amendment privilege against compulsory self-incrimination.[247] If a court were to provide the police the extreme latitude to pressure a suspect into making incriminating statements after his invocation of the right to remain silent, the Fifth Amendment privilege against self-incrimination would be eviscerated.

If a court were to allow the police to violate *Edwards* and *Mosley* under the guise of public safety, what constitutional guarantees, if any, would ever survive the exception? Where will the line be drawn in the name of securing the public? If officers can continue custodial interrogation after a suspect invokes his rights, what other techniques may they use to obtain information?[248]

Given two recent terrorist attacks, both concerns for national security and the *Quarles* public safety exception are in the spotlight of public debate.[249] President Obama's legal advisors, including Attorney General Eric Holder, have proposed allowing the government to permit interrogators to withhold *Miranda* warnings from terrorism suspects for lengthy periods:[250] "The goal . . . would be to open a window of time after an arrest in which interrogators could question a terrorism suspect without an interruption that might cause the prisoner to stop talking."[251]

In practice, however, such concerns are merely theoretical and misplaced. As a suspect in the attempted Times Square car bombing, Faisal Shahzad was questioned by the F.B.I. without being read his *Miranda*

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[245] *Id.*

[246] *Id.*

[247] *See Miranda*, 484 U.S. at 473–74.

[248] *Compare* Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 203 (2004), *with* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2004), *and* John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option*, 63 U. PITT. L. REV. 743 (2002).

[249] *See* Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. TIMES, May 4, 2010, www.nytimes.com/2010/05/05/nyregion/05arrest.html?_r=1&emc=eta1.

[250] Charlie Savage, *Proposal Would Delay Hearings in Terror Cases*, N.Y. TIMES , May 14, 2010, www.nytimes.com/2010/05/15/us/politics/15miranda.html?_r=1&emc=eta1.

[251] *Id.*

rights.[252] While Shahzad was eventually read his rights after the F.B.I. determined that there was no continuing threat, Shahzad chose to voluntarily waive those rights and continue talking.[253] Despite conservative criticism,[254] Democrats stated that "the Shahzad case dispels the idea that constitutional protections need to be tossed aside in cases of terrorism."[255]

In the case of the "underwear bomber," Umar Farouk Abdulmutallab was also questioned under the public safety exception.[256] Like Shahzad, Abdulmutallab also chose to waive his *Miranda* rights and continue providing information to authorities.[257] Even Eric Holder observed that "the giving of *Miranda* warnings has not stopped these terror suspects from talking to us. They have continued to talk even though we have given them a *Miranda* warning."[258] These cases illustrate that terror suspects are not necessarily dissuaded from talking with officers when read their *Miranda* rights.

V. CONCLUSION

Assuming that the *Quarles* public safety exception survives *Dickerson*'s constitutional "clarity" of *Miranda*, its continued applicability should only warrant police officers to question suspects to neutralize an imminent threat to public safety without administering *Miranda* warnings. The exception should not be extended to *Edwards*.

In declining to extend the public safety exception, courts should appreciate the narrowly written opinion of *Quarles*. The Court only created an exception to the requirement that officers administering *Miranda* warnings prior to custodial interrogation when there is an immediate danger to the public or the police.[259] Neither the language of the opinion[260] nor the prophylactic reasoning used in its creation[261] allow courts to justify extension.

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[252] *Id.*

[253] Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. TIMES, May 4, 2010, www.nytimes.com/2010/05/05/nyregion/05arrest.html?_r=1&emc=eta1

[254] *Id.*

[255] *Id.* (Representative Adam Smith (D-WA): "We have proven in this country for a long, long time that you can get very valuable information out of people after you Mirandize them.").

[256] Emily Berman, *You Still Have the Right to Remain Silent*, CNN OPINION (June 2, 2010), http://articles.cnn.com/2010-06-02/opinion/Berman.Miranda.supreme.court_1_miranda-warning-miranda-protections-umar-farouk-abdulmutallab?_s=PM:OPINION.

[257] *Id.*

[258] *Id.*

[259] New York v. Quarles, 467 U.S. 649, 657 (1984).

[260] *Id.*

[261] *Id.* at 658.

Courts should also take into account the difference between the police informing a suspect of his rights and the suspect invoking those rights. Once a suspect has exercised the "significant event"[262] of invoking his right to counsel, officers must abide by the *Edwards* rule; the police must cease all custodial interrogation until an attorney has been made available to the suspect.[263] Adherence to this rule does not mean that police officers are prevented from continuing their custodial interrogation of the suspect, but only that any statements made by the suspect in violation of *Edwards* should be deemed inadmissible in the government's case-in-chief.[264] The *Miranda* Court held that this burden falls squarely on the shoulders of the State.[265]

Were *Quarles* to apply to *Edwards*, the exception's extension could be expanded even further. A suspect's right to remain silent would no longer be respected if there was an immediate danger to the public; this would be in clear opposition of what the Self-Incrimination Clause of the Fifth Amendment was meant to prevent. The Court established a bright-line rule concerning a suspect's right to counsel in *Edwards*[266] and, for the reasons provided in this article, lower courts should adhere to it.

[262] Edwards v. Arizona, 451 U.S. 477, 485 (1981) (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
[263] *Id.* at 485.
[264] New York v. Harris, 495 U.S. 14, 20 (1990).
[265] Miranda v. Arizona, 384 U.S. 436, 475 (1966)).
[266] *Edwards*, 451 U.S. at 484.