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THE LANGUISHING PUBLIC SAFETY DOCTRINE

*Brian Gallini**

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It was 7:30 p.m. in Cathedral City, California, on June 10, 2013, when Jessie Macias, a cashier at the Del Taco, called the police to report an armed robbery.[1] Macias described the assailant to the officers and told them he pointed a gun at her and demanded money while wearing a motorcycle helmet.[2] Minutes later, officers stopped Robert Broderick on a motorcycle as he was exiting a mobile home park located adjacent to Del Taco.[3] He was unarmed.[4] Broderick received his *Mi-*

* Associate Dean & Professor of Law, University of Arkansas-Fayetteville School of Law. The author first thanks Spencer Sims for her dedicated research assistance in preparing this Article. Second, the author thanks Professors George Thomas, Peter Henning, and Steven Clowney for their support and helpful comments. Third, the author thanks the University of Arkansas–Fayetteville School of Law's library staff—especially Lorraine Lorne—for their invaluable research assistance. Fourth, the author thanks the School of Law for a summer research grant that provided support for this project. Last, but far from least, the author thanks his wife for her tremendous support.

1. People v. Broderick, No. E060006, 2015 WL 401747, at *1–2 (Cal. Ct. App. Jan. 30, 2015).
2. *Id.* at *2.
3. *Id.*
4. *Id.*

randa warnings and invoked his right to counsel.[5] After officers unsuccessfully searched for the missing firearm for an hour, they finally approached Broderick to ask "where the gun was located."[6] Broderick revealed to officers the location of the firearm.[7]

Because the suspect was in custody, responded to interrogation at the time of his incriminating statement, and invoked counsel, *Miranda* presumably mandated exclusion of Broderick's response.[8] But the Supreme Court in 1984 held in *New York v. Quarles* that a suspect's similar response—"the gun is over there"—was admissible at his trial for criminal possession of a weapon by creating "a 'public safety' exception to" *Miranda*.[9] Relying on *Quarles*, the court in Broderick's case admitted his statement identifying the location of his firearm—despite Broderick's invocation of counsel.[10] Since 1984, courts routinely admit suspects' statements about the location of a missing weapon,[11] although uncertainty persists in the judiciary about applying *Quarles* when a suspect invokes counsel.[12]

Consider now a pair of high-profile examples to more prominently highlight modern interpretive difficulties with *Quarles*. On the evening of July 20, 2012, when James Eagan Holmes walked into an Aurora, Colorado, movie theater and opened fire on the audience.[13] Using a Remington 870 Express Tactical shotgun and a Smith & Wesson M&P15 semi-automatic rifle, among other weapons,[14] Holmes killed twelve peo-

5. *Id.*

6. *Id.* at *3.

7. *Id.*

8. *See* Miranda v. Arizona, 384 U.S. 436, 471–76, 479 (1966) (holding that the failure to notify an individual taken into custody of his or her right to remain silent, that any statements made can be used in a court of law, that he or she has a right to an attorney, and that an attorney will be provided if one cannot be afforded, will result in the inadmissibility of any evidence obtained as a result of the interrogation).

9. New York v. Quarles, 467 U.S. 649, 652, 655 (1984).

10. *Broderick*, 2015 WL 401747, at *2.

11. *See, e.g.*, United States v. Ferguson, 702 F.3d 89, 94 (2d Cir. 2012); United States v. Johnson, 415 F.3d 728, 729 (7th Cir. 2005); Commonwealth v. Bowers, 583 A.2d 1165, 1171 (Pa. Super. Ct. 1990).

12. *Compare Broderick*, 2015 WL 401747, at *3 (concluding that *Quarles* trumped defendant's invocation of counsel), *with* United States v. Fautz, 812 F. Supp. 2d 570, 632 (D.N.J. 2011) (holding that defendant's invocation of counsel required suppression of his incriminating statements despite *Quarles*'s applicability).

13. Nick Carbone, *Colorado Theater Shooter Carried 4 Guns, All Obtained Legally*, TIME (July 21, 2012), http://newsfeed.time.com/2012/07/21/colorado-theater-shooter-carried-4-guns-all-obtained-legally/.

14. James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. TIMES (July 23, 2012), http://www.nytimes.com/2012/07/24/us/aurora-gunmans-lethal-arsenal.html?_r=0.

ple and injured seventy others.[15] A team of officers arrested him without incident almost immediately after the shootings.[16] "It's just me," Holmes said at the time.[17] After hearing his statement, securing the scene, and remanding Holmes to the local stationhouse, officers questioned Holmes two hours after his apprehension and again roughly fifteen hours after the shootings.[18] And although Holmes allegedly requested a lawyer repeatedly,[19] the interrogations continued and Holmes gave incriminating statements.[20]

Reaction to the prosecution's subsequent reliance on *Quarles* as a basis not to provide Holmes with *Miranda* warnings was mixed.[21] "Rarely has this public-safety exemption been as justified[,]" wrote an Editorial Board for *The Denver Post*.[22] In contrast, defense attorneys for Holmes asserted that Holmes's unambiguous request for counsel meant that no further interrogation was permissible.[23]

15. Ana Cabrera et al., *James Holmes Found Guilty of Murder in Colorado Theater Shooting*, CNN (July 17, 2015, 10:18 AM), http://www.cnn.com/2015/07/16/us/james-holmes-trial-colorado-movie-theater-shooting-verdict/.

16. Jordan Steffen, *Aurora Theater Shooting Trial, the Latest from Day* 4, DENVER POST (Apr. 30, 2015, 3:50 AM), http://www.denverpost.com/2015/04/30/aurora-theater-shooting-trial-the-latest-from-day-4/ [hereinafter Steffen, *The Latest from Day 4*].

17. Phil Tenser & Anica Padilla, *Testimony Recaps Arrest of Movie Theater Shooter, James Holmes, Who Told Officers 'It's Just Me*,*'* DENVER CHANNEL (Apr. 30, 2015, 9:55 PM), http://www.thedenverchannel.com/news/local-news/testimony-recaps-arrest-of-movie-theater-shooter-james-holmes-who-told-officers-its-just-me.

18. John Ingold & Jordan Steffen, *Aurora Theater Gunman: "There Weren't Any Children Hurt, Were There?*,*"* DENVER POST (May 4, 2015, 1:10 AM), http://www.denverpost.com/2015/05/04/aurora-theater-gunman-there-werent-any-children-hurt-were-there/ [hereinafter Ingold & Steffen, *"There Weren't Any Children Hurt, Were There?"*].

19. John Ingold & Jordan Steffen, *James Holmes Allowed to Plead Not Guilty by Reason of Insanity*, DENVER POST (June 4, 2013, 2:37 AM), http://www.denverpost.com/2013/06/04/james-holmes-allowed-to-plead-not-guilty-by-reason-of-insanity/ [hereinafter Ingold & Steffen, *James Holmes Allowed to Plead Not Guilty*].

20. Ingold & Steffen, *"There Weren't Any Children Hurt, Were There?"*, *supra* note 18; *see also* Jordan Steffen, *Aurora Theater Shooting Trial, the Latest from Day 6*, DENVER POST (May 5, 2015, 3:16 AM), http://www.denverpost.com/2015/05/05/aurora-theater-shooting-trial-the-latest-from-day-6/.

21. Mike Land & Megan Verlee, *Did Police Violate Aurora Shooting Suspects Rights? And Will that Change His Trial?*, COLO. PUB. RADIO, http://www.cpr.org/news/audio/did-police-violate-aurora-shooting-suspects-rights-and-will-change-his-trial (last visited Aug. 30, 2016); Bill Robles, *Miranda Rights Take Center Stage at James Holmes Trial*, CBS NEWS (Oct. 15, 2013, 10:10 AM), http://www.cbsnews.com/news/miranda-rights-take-center-stage-at-james-holmes-trial/.

22. *In James Holmes Case, Public Safety Before Miranda Rights*, DENVER POST (Nov. 4, 2013), http://www.denverpost.com/2013/11/04/in-james-holmes-case-public-safety-before-miranda-rights/.

23. Mot. to Suppress Mr. Holmes' July 20, 2012 Statement to Special Agent Gumbinner and Detective Appel (D-127) at 3–4, People of the State of Colorado v. James Eagan Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. June 03, 2013) [hereinafter Mot. to

Months later, at 2:49 p.m. on April 15, 2013, the first of two pressure cooker bombs exploded near the finish line of the Boston Marathon.[24] A second bomb 214 yards away exploded between twelve to thirteen seconds later.[25] Collectively, the explosions killed three people and wounded 264 others.[26] At the conclusion of a citywide manhunt that ended at around 7:00 p.m. on April 19, law enforcement apprehended a severely wounded Dzhokar Tsarnaev hiding inside a boat in the city of Watertown.[27] His condition initially deteriorated, prompting medical personnel to intubate him to keep him alive.[28]

But by 7:22 p.m. the next day, a high value FBI interrogation group began questioning Tsarnaev without first reading him his *Miranda* rights.[29] Although citizens openly lined the streets of Boston in celebration of Tsarnaev's capture and in praise of law enforcement,[30] the government nonetheless expressly relied on the public safety exception to

Suppress (D-127)]; Mot. to Suppress Mr. Holmes' July 20, 2012 Statement to Detectives Mehl and Appel (D-126) at 2-4, People of the State of Colorado v. James Eagan Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. June 03, 2013) [hereinafter Mot. to Suppress (D-126)].

24. Jenna Russell & Thomas Farragher, *102 Hours in Pursuit of Marathon Suspects*, BOS. GLOBE (Apr. 28, 2013), http://www.bostonglobe.com/metro/2013/04/28/bombreconstruct/VbSZhzHm35yR88EVmVdbDM/story.html#.

25. *Compare Id.* (suggesting the explosions were twelve seconds apart), *with* Sara Morrison & Ellen O'Leary, *Timeline of Boston Marathon Bombing Events*, BOSTON.COM (Jan. 5, 2015), http://www.boston.com/news/local/massachusetts/2015/01/05/timeline-boston-marathon-bombing-events/qiYJmANm6DYxqsusVq66yK/story.html (reporting the explosions as thirteen seconds apart).

26. Scott Malone, *Boston Marathon Bombing Injury Total Climbs to 264, Officials Say*, HUFFINGTON POST (Apr. 23, 2013, 8:18 AM), http://www.huffingtonpost.com/2013/04/23/boston-marathon-bombing-injury-total_n_3138159.html.

27. Morrison & O'Leary, *supra* note 25; Katharine Q. Seelye, et al., *2nd Bombing Suspect Caught After Frenzied Hunt Paralyzes Boston*, N.Y. TIMES (Apr. 19, 2013), http://www.nytimes.com/2013/04/20/us/boston-marathon-bombings.html?hp&_r=0; Russell Goldman, *Boston Bomber Dzhokhar Tsarnaev Was Shot in Face, Say Doctors*, ABC NEWS (Aug. 20, 2013), http://abcnews.go.com/US/boston-bomber-dzhokhar-tsarnaev-shot-face-doctors/story?id=20012945.

28. Milton J. Valencia, *Lawyers Say Tsarnaev's Hospital Remarks Were Involuntary*, BOS. GLOBE (May 7, 2014), http://www.bostonglobe.com/metro/2014/05/07/dzhokhar-tsarnaev-alleged-marathon-bomber-asks-judge-rule-out-statements-made-hospital/uCQd9PETLWJVqeJuQhSdeL/story.html.

29. *Id.*

30. Tyler Kingkade, *College Students Celebrate in Boston After Capture of Bombing Suspect Dzhokhar Tsarnaev*, HUFFINGTON POST (Apr. 20, 2013, 11:58 AM), http://www.huffingtonpost.com/2013/04/20/college-students-boston-celebration_n_3120859.html; Jaclyn Reiss et al., *Residents Cheer Capture of Marathon Bombing Suspect*, BOS. GLOBE (Apr. 20, 2013), http://www.bostonglobe.com/metro/2013/04/19/watertown-residents-cheer-capture-dzhokhar-tsarnaev-boston-marathon-bombing-suspect/M8FwdarJzTCVrww6PNc81N/story.html.

justify questioning Tsarnaev without giving him *Miranda*.[31] And although he was heavily sedated, repeatedly requested a lawyer, and asked investigators to leave him alone,[32] the interrogation continued for at least sixteen hours, during which Tsarnaev provided several incriminating statements.[33] Only after judicial intervention was Tsarnaev read his *Miranda* warnings.[34]

As was the case with Holmes, reaction to the government's reliance on *Quarles* as a basis not to provide Tsarnaev, a naturalized citizen, with *Miranda* warnings was again mixed.[35] Agreeing with the government's decision, Senator Lindsey Graham said on social media, "The last thing we may want to do is read [the] Boston suspect [his] Miranda Rights telling him to 'remain silent.'"[36] In contrast, former prosecutor Gerard T. Leone Jr., who had terrorism case experience, commented, "You'd be hard-pressed not to say that to allow these statements in would require a wide expansion of the law as it presently exists."[37]

Application of *Quarles* to Holmes and Tsarnaev highlights with precision the need for more clarity in the context of applying the public safety exception.[38] It is not that courts and scholars have wholly ignored

31. Brian Beutler, *DOJ Official: No Miranda Rights for Boston Bombing Suspect Yet*, TALKING POINTS MEMO (Apr. 19, 2013, 10:18 PM), http://talkingpointsmemo.com/livewire/doj-official-no-miranda-rights-for-boston-bombing-suspect-yet; Josh Gerstein, *Terror Suspect: 5 Legal Questions*, POLITICO (Apr. 19, 2013, 10:06 PM), http://www.politico.com/story/2013/04/no-miranda-rights-for-now-for-bombing-suspect-90362.html?hp=f1.

32. Valencia, *supra* note 28.

33. *Boston Marathon Bombing Suspect Dzhokhar Tsarnaev Silent After Read Miranda Rights*, CBS NEWS (Apr. 25, 2013, 4:59 PM), http://www.cbsnews.com/news/boston-marathon-bombing-suspect-dzhokhar-tsarnaev-silent-after-read-miranda-rights/ (providing duration of interrogation); *see* Government's Opposition to Defendant's Motion to Suppress Statements at 7, United States v. Tsarnaev, No. 13-10200-GAO (D. Mass. May 21, 2014), ECF No. 319.

34. Devlin Barrett et al., *Judge Made Call to Advise Suspect of Rights*, WALL ST. J. (Apr. 25, 2013, 7:40 PM), http://www.wsj.com/articles/SB10001424127887323789704578444940173125374.

35. *See, e.g.*, Ken Dilanian & Brian Bennett, *Legal Questions Surround Boston Bombing Suspect*, L.A. TIMES (Apr. 20, 2013), http://articles.latimes.com/2013/apr/20/nation/la-na-boston-bombings-legal-20130421; Deon J. Hampton, *Boston Marathon Bombing Suspect Not Read* Miranda *Rights; Justice Department's Decision Spurs Debate*, NEWSDAY (Apr. 20, 2013, 9:30 PM), http://www.newsday.com/news/nation/boston-marathon-bombing-suspect-not-read-miranda-rights-justice-department-s-decision-spurs-debate-1.5112089; Charlie Savage, *Debate Over Delaying of Miranda Warning*, N.Y. TIMES (Apr. 20, 2013), http://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html.

36. Glenn Greenwald, *What Rights Should Dzhokhar Tsarnaev Get and Why Does It Matter?*, GUARDIAN (Apr. 20, 2013, 09:24 AM), http://www.theguardian.com/commentisfree/2013/apr/20/boston-marathon-dzhokhar-tsarnaev-mirnada-rights.

37. Valencia, *supra* note 28.

38. "There will be more instances like this, and we will need to have a much better

Quarles.[39] To the contrary, scholars have even considered the public safety exception's applicability to terror cases.[40] Most recently, I have argued elsewhere that if the government's interpretation of *Quarles* in the context of the Tsarnaev interrogation is correct, then "*Miranda* should become the exception to *Quarles* and officers should assume a threat to public safety following even a routine arrest."[41]

But this Article seeks to push the conversation further by more narrowly focusing on the need for the Supreme Court to re-examine *Quarles*—particularly the application of *Quarles* to Holmes, a state-based investigation. The modern Court has recently examined intricate questions surrounding *Miranda* custody,[42] *Miranda* waiver,[43] and even

understanding about what is appropriate," House Intelligence Committee Chairman Mike Rogers said shortly after Tsarnaev's interrogation ended. Barrett et al., *supra* note 34.

39. *See, e.g.*, Aaron J. Ley & Gordie Verhovek, *The Political Foundations of* Miranda v. Arizona *and the* Quarles *Public Safety Exception*, 19 BERKELEY J. CRIM. L. 206, 241–42 (2014) (comparing the manner in which federal courts apply *Quarles*); Alan Raphael, *The Current Scope of the Public Safety Exception to* Miranda *Under* New York v. Quarles, 2 N.Y.C. L. REV. 63, 69–81 (1998) (discussing the limits on the public safety exception); Andrew T. Winkler, *Quarreling Over* Quarles*: Limiting the Extension of the Public Safety Exception*, 16 RICH. J. L. & PUB. INT. 349, 352 (2013) (addressing "the current conflict between courts over whether the *Quarles* public safety exception applies" after a suspect has invoked his right to counsel); 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, 1934–35 (2010) (arguing that there is a "broad" and "narrow" approach to the public safety exception).

40. *See, e.g.*, Bruce Ching, *Mirandizing Terrorism Suspects? The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome*, 64 CATH. U. L. REV. 613, 637–46 (2015); Ley & Verhovek, *supra* note 39, at 245–49; 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, 140–46 (2013); Randall Blowers, Note, Miranda *Rights for Terrorists: The Obama Administration's New Policy and What It Means for the War on Terror*, 28 CONN. J. INT'L L. 321, 323–25 (2013); H. Joshua Rivera, Note, *At Least Give Them* Miranda*: An Exception to Prompt Presentment as an Alternative to Denying Fundamental Fifth Amendment Rights in Domestic Terrorism Cases*, 49 AM. CRIM. L. REV. 337, 339–41 (2012).

41. Brian Gallini, *The Unlikely Meeting Between Dzokhar Tsarnaev and Benjamin Quarles*, 66 CASE W. RES. L. REV. 393, 398 (2015). In *Unlikely Meeting*, I focus almost exclusively on the federal response to the Marathon Bombings. Portions of the research and language of that article are reprinted here, most prominently in Part II, with permission from the *Case Western Reserve Law Review*.

42. Howes v. Fields, 132 S. Ct. 1181, 1193–94 (2012) (holding that being in prison, without more, is not enough to establish *Miranda* custody); Maryland v. Shatzer, 559 U.S. 98, 117 (2010) (finding that the custodial interrogation of an inmate ended when, after a sufficient amount of time, he returned to normal prison life).

43. Berghuis v. Thompkins, 560 U.S. 370, 380–82 (2010) (finding that an inmate did not invoke his right to remain silent because he failed to unambiguously state either that he wished to remain silent or that he did not want to talk to the police and that his answer to a detective's question indicated waiver of his right to remain silent).

invocation of the right to silence.[44] But, quizzically, in the intervening years since *Quarles*'s issuance, and despite numerous opportunities,[45] the Court has not similarly confronted critical questions surrounding the public safety exception's scope and limits.

As the Holmes example specifically illustrates, the need for Supreme Court review has never been more important. Consider that federal authorities thought Tsarnaev was a terrorist in a way that state authorities did not think about Holmes.[46] To the extent that the views of state prosecutors in Holmes foretell a change in state investigations (where the majority of *Quarles* litigation takes place), then that matters in a way different from what may happen in a comparatively smaller number of federal terror investigations.

Part I focuses on the Aurora Movie Theater shooting in detail, after which it briefly reviews the Marathon Bombing. Part II then seeks in particular to place the Holmes interrogation in the context of modern judicial constructions of the public safety exception. Doing so firmly illustrates that, like the Tsarnaev interrogation, the Holmes interrogation was and is unsupported by judicial precedent.

Part III demonstrates that the Court never considered anything beyond applying the public safety exception to concern about a missing weapon at the time of Benjamin Quarles's arrest. Thus, Part III contends that that straightforward approach has gone unaltered since *Quarles* was decided in 1984. Since then, despite numerous opportunities, the Court has never seen fit to update, interpret, or otherwise reexamine the public safety doctrine—unlike almost every other facet of *Miranda*. This Article concludes that the modern Court should reexamine *Quarles*.

44. Salinas v. Texas, 133 S. Ct. 2174, 2183–84 (2013) (holding that the privilege against self-incrimination must be asserted and that it is not invoked simply by standing mute).

45. In preparing this Article, the author compiled various appendices to compliment the piece. Appendix 1 lists every case involving the public safety exception in which the United States Supreme Court denied certiorari. *See* Brian Gallini, *The Languishing Public Safety Doctrine*, 68 RUTGERS U. L. REV. app. 1 (2016) [hereinafter Gallini app. 1], http://www.rutgerslawreview.com/wp-content/uploads/2016/09/Gallini-Appendix-1.pdf [https://perma.cc/EZ22-U52X].

46. *Compare* Press Release, U.S. Dep't of Justice, Suspect in Boston Marathon Attack Charged with Using a Weapon of Mass Destruction (Apr. 22, 2013), https://www.justice.gov/opa/pr/suspect-boston-marathon-attack-charged-using-weapon-mass-destruction, *with* Michele Richinick, *Why Aren't Mass Shootings Called Terrorism?*, MSNBC (Jan. 29, 2014, 10:45 AM), http://www.msnbc.com/morning-joe/why-arent-mass-shootings-called-terror#49938.

I.

This Part primarily considers the interrogation of James Holmes and thereafter briefly reviews the interrogation of Dzohkar Tsarnaev.[47] Born in San Diego, California on December 13, 1987, James "Jimmy"[48] Eagan Holmes grew up in the middle-class neighborhood of Oak Hills near Castroville, California.[49] Holmes is the son of well-educated parents. His father, Robert M. Holmes Sr., earned degrees from Stanford, UCLA, and Berkeley, and his mother, Arlene Rosemary Holmes, worked as a registered nurse.[50] Growing up alongside his sister, Chris, Holmes attended Castroville Elementary School and enjoyed what, by all accounts, was a privileged childhood.[51] But when Holmes turned twelve, he and his family relocated 400 miles south to the San Diego area, a move that Holmes expressed his disagreement with by trying to cut his wrist with cardboard.[52]

Following the family's relocation, described later by his father as a "pivotal time" in Holmes's life,[53] Holmes became more socially withdrawn despite his mother going door-to-door in their new neighborhood in an effort to find playmates.[54] Holmes nonetheless remained engaged in his academic and extra-curricular life; he played trumpet in middle school, later ran for the cross-country team, and played both football and soccer.[55] "He was happiest when he was playing soccer when he

47. For a complete review of the Marathon Bombing and Tsarnaev interrogation, see Gallini, *supra* note 41, at 399–411.

48. Daniel Wallis & Keith Coffman, *Water Parks and Piano Class: Colorado Movie Gunman's Childhood*, YAHOO! NEWS (July 30, 2015), http://news.yahoo.com/water-parks-piano-class-colorado-movie-gunmans-childhood-101526865.html.

49. *James Holmes Biography*, BIOGRAPHY, http://www.biography.com/people/james-holmes-20891561 (last visited Aug. 30, 2016); Ann O'Neill, *The Terror From Within: What Drives a 'Perfect' Boy to Kill?*, CNN (July 27, 2015), http://www.cnn.com/2015/07/24/us/13th-juror-james-holmes-aurora-shooting/index.html.

50. Peter Rowe & John Wilkens, *Quiet, Unassuming San Diegan Accused of Mass Murder*, SAN DIEGO UNION-TRIB. (July 20, 2012, 8:25 PM), http://www.sandiegouniontribune.com/news/2012/jul/20/quiet-unassuming-and-deadly-san-diegan-accused-mas/.

51. *Id.*

52. Wallis & Coffman, *supra* note 48.

53. Katrina Lamansky, *From Witness Stand, James Holmes' Dad Tries to Bridge an Unfathomable Gulf*, WQAD (July 29, 2015, 9:35 AM), http://wqad.com/2015/07/29/from-witness-stand-james-holmes-dad-tries-to-bridge-an-unfathomable-gulf/.

54. Ann O'Neill, *James Holmes' Life Story Didn't Sway Jury*, CNN (Aug. 11, 2015, 4:20 PM), www.cnn.com/2015/08/02/us/13th-juror-james-holmes-aurora-shooting/.

55. *Id.*; Bill Whitaker, *Colo. Suspect James Holmes "Smart" But "Quiet," Teachers and Neighbors Say*, CBS NEWS (July 20, 2012), http://www.cbsnews.com/news/colo-suspect-james-holmes-smart-but-quiet-teachers-and-neighbors-say/.

was a young kid," Holmes's father would later say.[56] Described by those who knew him as "reserved," "a great team player," and "really sweet," Holmes completed his high school education at Westview High School.[57] While there, apart from his extra-curricular activities, Holmes excelled in the classroom. Described by classmates as "crazy smart,"[58] Holmes graduated from high school in 2006 and enrolled that fall in the University of California, Riverside as a scholarship student.[59]

Holmes stood out for all the right reasons at UC-Riverside. "Academically, he was at the top of the top," said Chancellor Timothy P. White.[60] Holmes declared as a neuroscience major where, by all accounts, he fit in with his classmates.[61] He took snowboarding trips to nearby mountains, went to dinner with friends, and generally "was no different from any other neuroscience student at UCR."[62] Ironically, and sadly, his program of study focused on "how we all behave."[63] He graduated in 2010 with highest honors and a bachelor's degree in neuroscience,[64] and without incident.[65]

Despite having assembled a deeply successful academic background, Holmes struggled to find a job after graduating.[66] At first, he lingered around his house playing video games and staying up late until his mom, Arlene, demanded that he either find a job or move out.[67] Differing reports suggest that Holmes took a part-time job at McDonald's for "a year or so,"[68] though at some point, he got a job working at a pill

56. Lamansky, *supra* note 53.

57. Wallis & Coffman, *supra* note 48.

58. *Id.*

59. Mariano Castillo & Chelsea J. Carter, *Background of Colorado Shooting Suspect Full of Contrasts,* CNN, http://www.cnn.com/2012/07/20/us/colorado-theater-suspect-profile/ (last updated July 22, 2012, 10:46 AM). Following his time at Westview, but prior to college, Holmes completed an eight-week internship at a boot camp for the Salk Institute and Miramar College. Rowe & Wilkens, *supra* note 50. Holmes had difficulty fitting in at the boot camp, where one classmate said, "A lot of us didn't get along very well with him." *Id.*

60. Castillo & Carter, *supra* note 59.

61. Rowe & Wilkens, *supra* note 50.

62. *Id.*

63. *Id.*

64. *Id.*

65. Castillo & Carter, *supra* note 59.

66. Rowe & Wilkens, *supra* note 50.

67. Elizabeth Hernandez & Larry Ryckman, *Aurora Theater Shooting Trial, the Latest from Day 58*, DENVER POST (July 28, 2015, 3:03 AM), http://www.denverpost.com/2015/07/28/aurora-theater-shooting-trial-the-latest-from-day-58/.

68. Adam Martin, *What We Know About Colorado Shooting Suspect James Holmes*, THE WIRE (July 20, 2012, 1:35 PM), http://www.thewire.com/national/2012/07/what-we-know-about-colorado-shooter-james-holmes/54844/. *Compare* Arthur Delaney, *James Holmes: Was the Alleged Aurora Shooter Collecting Unemployment Insurance?*, HUFFING-

factory working on a machine that helped to coat the pills.[69] His precise employment history aside, though, Holmes began to struggle; neighbors, and his mom, grew concerned that Holmes was "troubled and lonely."[70] He applied to a series of graduate schools, but received no offers of admission.[71] Meanwhile, co-workers at the pill factory indicated that Holmes often "looked spaced out" and "didn't socialize much with anyone."[72]

Holmes persisted in his quest for admission to graduate school. After sending a second wave of applications, he was admitted to the University of Colorado-Denver's Ph.D. neuroscience program and enrolled in June 2011.[73] As part of his admission, he received a $21,600 grant from the National Institute of Health and a $5,000 stipend from the university.[74] But unlike his prior academic successes, Holmes struggled in the classroom for the first time.[75] He came home over the semester break sick with mononucleosis, though by then he had found his first girlfriend—Gargi Datta.[76] The pair would date until February 2012 when Datta terminated their relationship because, she said, "I told him I saw no future for us . . . [;] He never had highs and lows of emotion."[77]

Holmes was distraught after the breakup,[78] though the two still maintained contact.[79] During one Google Chat on March 25, 2012,

TON POST (July 27, 2012, 10:12 AM), http://www.huffingtonpost.com/2012/07/27/james-holmes-unemployment-insurance_n_1707367.html (reporting that McDonald's spokeswoman Julie Pottebaum stated that Holmes never worked for the company), *with Profile: Aurora Cinema Shooting Killer James Holmes*, BBC (July 17, 2015), http://www.bbc.com/news/world-us-canada-18937513 (reporting that Holmes worked part-time at McDonald's after graduation).

69. Jordan Steffen, *Aurora Theater Shooting Trial, the Latest from Day 39,* DENVER POST (June 29, 2015, 2:54 AM), http://www.denverpost.com/2015/06/29/aurora-theater-shooting-trial-the-latest-from-day-39/ [hereinafter Steffen, *The Latest from Day 39*].

70. Rowe & Wilkens, *supra* note 50.

71. O'Neill, *supra* note 54.

72. Steffen, *The Latest from Day 39*, *supra* note 69.

73. Nicholas Riccardi, *CU Officials Defend Doctoral Program but Remain Mum on Theater Shooting Suspect*, AURORA SENTINEL, http://www.aurorasentinel.com/news/cu-officials-mum-on-theater-shooting-suspect/ (last updated July 24, 2012, 8:46 AM).

74. *James Holmes Received Thousands from Grad-School Grants Ahead of Deadly Aurora Shooting*, CBS NEWS (Sept. 19, 2012, 4:24 PM), http://www.cbsnews.com/news/james-holmes-received-thousands-from-grad-school-grants-ahead-of-deadly-aurora-shooting/.

75. O'Neill, *supra* note 54.

76. Hernandez & Ryckman, *supra* note 67; *'I Didn't See a Future with Him': Dark Knight Shooter's Girlfriend Tells Court She Dumped Him After He Took Her to a Horror Movie*, DAILY MAIL (June 10, 2015, 5:55 PM), http://www.dailymail.co.uk/news/article-3117938/Release-jurors-shooting-case-shows-media-hard-avo*Id*.html.

77. *'I Didn't See a Future with Him'*, *supra* note 76.

78. Jack Healy, *James Holmes's Ex-Girlfriend Recalls Awkwardness and Ghoulish Remarks*, N.Y. TIMES (June 11, 2015), http://www.nytimes.com/2015/06/12/us/at-james-homes-colorado-theater-shooting-trial-ex-girlfriend-recalls-unnerving-comments.

Holmes wrote to her about "doing evil."[80] He also wrote to her about his "human capital" philosophy—a philosophy that, he believed, would cure his depression by adding to his human worth through the subtraction of human lives.[81] Datta at first thought Holmes was joking, but she grew concerned as their exchange progressed;[82] she advised Holmes to get help.[83]

Unbeknownst to Datta, Holmes had already begun seeing a psychiatrist—Lynne Fenton—on March 21, 2012.[84] Holmes had previously called student mental health services for help with what he said was social anxiety.[85] When he confessed homicidal thoughts to a social worker, though, he was referred to Fenton, then the medical director.[86] Fenton immediately began to worry when, in that first session, Holmes admitted to her that he thought about homicide three to four times per day.[87] That worry, however, was insufficiently specific for Fenton to commence commitment proceedings.[88] The two therefore continued to meet for about four hours spread across seven visits, the last two of which included one of Fenton's senior colleagues.[89] Although Fenton did not initially perceive Holmes as a threat, her opinion changed by the date of their final session, June 11, when Holmes said he was dropping out of school, began making paranoid statements, and said he was "reading the writings of the Unabomber."[90]

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html?_r=0.

79. *Id.*

80. Maria La Ganga, *James Holmes' Girlfriend Testifies: Horror Movies, Google Chat, 'Doing Evil,'* L.A. TIMES (June 11, 2015, 5:21 PM), http://www.latimes.com/nation/la-na-james-holmes-girlfriend-20150611-story.html.

81. *Id.*

82. *Id.*

83. *James Holmes' Ex-Girlfriend Asked Him to See a Therapist Before Aurora Shooting,* N.Y. DAILY NEWS (June 11, 2015), http://www.nydailynews.com/news/national/james-holmes-asked-therapist-shooting-article-1.2255548.

84. Matthew Nussbaum et al., *Aurora Theater Shooting Gunman Told Doctor: "You Can't Kill Everyone"*, DENVER POST (June 16, 2015, 2:10 AM), http://www.denverpost.com/2015/06/16/aurora-theater-shooting-gunman-told-doctor-you-cant-kill-everyone/.

85. *Id.*

86. *Id.*

87. *Id.*

88. Ann O'Neill & Sara Weisfeldt, *Psychiatrist: Holmes Thought 3-4 Times a Day About Killing*, CNN, http://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/ (last updated June 17, 2015, 9:58 AM).

89. Nussbaum et al., *supra* note 84.

90. *Id.*; *see also* Anica Padilla et al., *Aurora Theater Shooting Gunman James Holmes' Psychiatrist Dr. Lynne Fenton: Gunman Hated 'Sheeple'*, DENVER CHANNEL (June 16, 2015, 4:44 AM), http://www.thedenverchannel.com/news/movie-theater-shooting/aurora-movie-theater-shooting-gunman-james-holmes-psychiatrist-dr-lynne-fenton-to-testify.

By the time of that June 11 session, Holmes had recently failed a June 7 oral exam, purchased a high-powered AR-15 semi-automatic assault rifle that same day, bought two tear gas grenades on May 10,[91] and then began withdrawing from school on June 10.[92] At the end of his final session with Fenton, which Holmes cut short,[93] he walked out of her office without saying goodbye or shaking her hand.[94] Fenton felt uncomfortable enough after that final session, during which Holmes exhibited an "an angry edge,"[95] that she broke confidentiality by contacting the campus threat assessment team.[96]

Holmes's June 10 purchase of that AR-15 added to a growing arsenal that he began stockpiling on May 22 using his grant stipend to fund the purchases.[97] Indeed, by the time Holmes purchased the AR-15, he had already bought a Remington 870 Express Tactical 12-gauge shotgun at a Bass Prop Shop and the first of two Glock pistols at Gander Mountain in Aurora.[98]

Holmes would continue to stockpile weapons, tactical gear, and ammunition. He purchased a scope and non-firing dummy bullets on July 1.[99] Then, on July 2, 2012, Holmes placed an online order with TacticalGear.com for an urban assault vest, a triple pistol magazine, an M16 magazine pouch, and a silver knife.[100] His $306.99 bill included extra for two-day shipping.[101] Then, on July 6, he returned to Bass Pro

91. Dan Elliot, *James Holmes: Hand Puppets, Online Dating, and Tear-Gas Grenades*, CHRISTIAN SCI. MONITOR (Jan. 9, 2013), http://www.csmonitor.com/USA/Latest-News-Wires/2013/0109/James-Holmes-Hand-puppets-online-dating-and-tear-gas-grenades.

92. Victoria Cavaliere, *James Holmes Bought Assault Rifle the Same Day He Failed Exam*, N.Y. DAILY NEWS (July 25, 2012, 10:56 AM), http://www.nydailynews.com/news/national/james-holmes-bought-assault-rifle-day-failed-exam-article-1.1121463.

93. Nussbaum et al., *supra* note 84.

94. O'Neill & Weisfeldt, *supra* note 88.

95. *Id.*

96. *Id.*; Mark Greenblatt et al., *James Holmes' Psychiatrist Contacted University Police Weeks Before Movie-Theater Shooting: ABC Exclusive*, ABC NEWS (Aug. 6, 2012), http://abcnews.go.com/US/james-holmes-psychiatrist-contacted-university-police-weeks-movie/story?id=16943858.

97. Anna Susman, *James Holmes, Aurora Theater Gunman, May Have Used Federal Student Grants to Fund Shooting*, HUFFINGTON POST (July 25, 2012, 02:21 PM), http://www.huffingtonpost.com/2012/07/25/james-holmes-nih-student-grants-shooting_n_1702740.html.

98. *Suspected Shooter Bought Guns Legally, Avoided Gun-Reporting Requirement*, SEATTLE TIMES (July 20, 2012, 10:05 AM), http://www.seattletimes.com/nation-world/suspected-shooter-bought-guns-legally-avoided-gun-reporting-requirement/.

99. Elliot, *supra* note 91.

100. Thom Patterson, *Police Chief: Suspect Bought Over 6,000 Rounds of Ammunition Through Internet*, CNN, http://www.cnn.com/2012/07/20/justice/colorado-shooting-weapons/index.html (last updated July 21, 2012, 11:37 AM).

101. *Id.*

Shops to purchase a second Glock pistol.[102] During this same period, Holmes also purchased nearly 6300 rounds of ammunition through online retailers, beam laser lights, bomb-making materials, and handcuffs.[103] Finally, he bought chemicals from a science store that he could combine to create sparks.[104] Once complete, UPS had delivered roughly ninety packages to Holmes's apartment.[105] All of his purchases were lawful.[106]

With his arsenal complete, there was next the matter of his composition notebook. Characterized later by the *New York Times* as "a road map to murder,"[107] the notebook detailed Holmes's plans to carry out a "mass murder spree."[108] After rejecting an airport bombing because, he wrote, airports have "too much of a terrorist history," Holmes, after weighing the pros and cons, settled on "mass murder at the movies."[109] Other pages contain maps of the Century 16 movie theater in Aurora, Colorado, including theaters nine, ten, and twelve.[110] In one troubling passage, Holmes implied which movie would accompany his attack:

> I was fear incarnate. Love gone, motivation directed to hate and obsessions, which didnt [sic] disapear [sic] for whatever reason with the drugs . . . . No consequences, no fear, alone, isolated, no work for distractions, no reason to seek self - actualization. Embraced the hatred, a dark knight rises.[111]

102. *Suspected Shooter Bought Guns Legally*, *supra* note 98.

103. Carol McKinley & Christina Ng, *James Holmes Legally Bought Arsenal of Guns, Chemicals*, ABC NEWS (Jan. 8, 2013), http://abcnews.go.com/blogs/headlines/2013/01/james-holmes-legally-bought-arsenal-of-guns-chemicals/.

104. Elliot, *supra* note 91.

105. *James Holmes Built Up Aurora Arsenal of Bullets, Ballistic Gear Through Unregulated Online Market*, CBS NEWS (Sept. 19, 2012, 4:27 PM), http://www.cbsnews.com/news/james-holmes-built-up-aurora-arsenal-of-bullets-ballistic-gear-through-unregulated-online-market/.

106. *Id.*

107. Jack Healy, *Colorado Killer James Holmes's Notes: Detailed Plans vs. 'a Whole Lot of Crazy'*, N.Y. TIMES (May 28, 2015), http://www.nytimes.com/2015/05/29/us/james-holmess-notebook-and-insanity-debate-at-aurora-shooting-trial.html?_r=0.

108. Charlotte Atler, *Colorado Gunman's Notebook of Ramblings Becomes Evidence*, TIME (May 27, 2015), http://time.com/3899063/james-holmes-diary-aurora-theater-shooting/.

109. *Id.*; Claudia Koerner, *Here's What James Holmes Wrote in His Notebook Before the Aurora Theater Shooting*, BUZZFEED (May 27, 2015, 7:31 PM), http://www.buzzfeed.com/claudiakoerner/heres-what-james-holmes-wrote-in-his-notebook-before-the-aur#.at6qw6rPxD.

110. Steve Almasy, *In Notebook Read to Jury, James Holmes Wrote of 'Obsession'*, CNN (May 27, 2015), http://www.cnn.com/2015/05/26/us/james-holmes-trial-notebook/.

111. Atler, *supra* note 108.

Addressed initially to his mother, father, and sister, Holmes would ultimately send its contents—twenty-nine pages in all—to his former psychiatrist, Lynne Fenton, on July 19.[112]

Just hours later, Holmes purchased a ticket to the Century 16 movie theater's midnight screening of the film *The Dark Knight Rises* in theater nine.[113] Holmes got up roughly twenty minutes into the movie and left the theater through an emergency exit door, which he propped open using a plastic tablecloth holder.[114] After visiting his car, Holmes returned to the theater "dressed in black and wearing a ballistic helmet and vest, ballistic leggings, throat and groin protectors, and gas mask and black tactical gloves."[115] He threw two canisters of tear gas and opened fire using his shotgun, AR-15, and Glock pistol.[116] Although the AR-15 ultimately malfunctioned,[117] he managed to fire sixty-five shots from it to go along with five from the handgun and six from the shotgun.[118] His seventy-six total shots killed twelve people and injured seventy others.[119]

112. Almasy, *supra* note 110; Dan Elliot & Nicholas Riccardi, *Holmes Psychiatrist Warned of Threat Before Attack*, U.S. NEWS & WORLD REP. (Apr. 4, 2013, 9:33 PM), http://www.usnews.com/news/us/articles/2013/04/04/colo-judge-orders-release-of-documents-on-holmes; Maria L. La Ganga, *What Will Dr. Lynne Fenton Say About Her Former Patient James Holmes?*, L.A. TIMES (June 4, 2015, 1:08 PM), http://www.latimes.com/nation/la-na-dr-lynne-fenton-james-holmes-20150603-story.html.

113. Melanie Asmar, *James Holmes: Read Timeline of His Actions Before and After Aurora Theater Shooting,* WESTWORD (Jan. 10, 2013, 1:15 PM), http://www.westword.com/news/james-holmes-read-timeline-of-his-actions-before-and-after-aurora-theater-shooting-5880120.

114. *Id.*

115. Sarah Burnett & Jessica Fender, *Aurora Shooting Suspect Left Apartment "Booby Trapped," Music Blaring*, DENVER POST (July 20, 2012, 12:50 AM), http://www.denverpost.com/2012/07/20/aurora-shooting-suspect-left-apartment-booby-trapped-music-blaring-2/.

116. Maria L. La Ganga, *James Holmes Wanted to Kill 'as Many People as Possible' in Colorado Theater Rampage*, L.A. TIMES (June 2, 2015, 8:54 PM), http://www.latimes.com/nation/la-na-james-holmes-20150602-story.html.

117. Mike Parker, *Rifle Failure that Stopped Yet More Batman Carnage*, EXPRESS (July 23, 2012, 12:00 AM), http://www.express.co.uk/news/world/334642/Rifle-failure-that-stopped-yet-more-Batman-carnage.

118. Phil Tenser, *Aurora Police Testify in James Holmes' Trial: 240 Ballistic Impacts After Theater Shooting*, KJRH (May 14, 2015, 12:38 PM), http://www.kjrh.com/news/national/aurora-police-testify-in-james-holmes-trial-240-ballistic-impacts-found-after-theater-shooting.

119. Jeane MacIntosh, *12 People Killed, 70 Injured in Shooting at 'Dark Knight Rises' Screening in Colorado*, N.Y. POST (July 20, 2012, 8:42 AM), http://nypost.com/2012/07/20/12-people-killed-70-injured-in-shooting-at-dark-knight-rises-screening-in-colorado/.

The first 9-1-1 call came over police radios at 12:39 a.m. and officers responded to the theater in less than one minute.[120] Officers were never supposed to arrive so quickly. In an effort to delay officers' arrival on the scene, Holmes had previously set more than twenty homemade explosives in his apartment.[121] Holmes set loud techno music to begin playing twenty-five minutes after he left for the theater that, he hoped, would prompt a neighbor to file a noise complaint.[122] That complaint, Holmes hoped, would cause an officer to open his door into a fishing line tripwire, which would set off the explosives.[123] Although a neighbor did knock on his door to complain, she did not open it and did not report the music to the police.[124] The explosives, therefore, never detonated.[125] Despite residents at the apartment complex remaining unharmed, officers found "complete chaos" and "[p]eople covered in blood" when they arrived at the theater.[126] They apprehended Holmes at about 12:45 a.m.[127]

Months later, Patriots' Day on April 15, 2013, called for the 117th running of the Boston Marathon.[128] More than two hours after the winners crossed the finish line and with roughly 5700 runners still on

120. *Aurora Theater Shooting: Police and Fire Department Scanner Traffic Audio Archive*, DENVER POST (Nov. 28, 2012, 5:58 AM), http://www.denverpost.com/2012/07/20/aurora-theater-shooting-police-and-fire-department-scanner-traffic-audio-archive/.

121. Anastasiya Bolton, *Inside Colo. Theater Shooter James Holmes' Booby Trapped Apartment*, USA TODAY (Sept. 10, 2015), http://www.usatoday.com/story/news/nation-now/2015/09/10/james-holmes-aurora-theater-shooting-booby-trapped-apartment/71996544/.

122. Keith Coffman, *Colorado Movie Massacre Gunman Booby-Trapped Home with Bombs, Trial Hears*, REUTERS (May 5, 2015, 6:12 PM), http://www.reuters.com/article/2015/05/05/us-usa-shooting-denver-idUSKBN0NQ24P20150505; Meg Wagner, *SEE IT: Aurora Movie Theater Shooter James Holmes Booby Trapped Apartment with Jars of Napalm, Homemade Bombs*, N.Y. DAILY NEWS, http://www.nydailynews.com/news/national/james-holmes-booby-trapped-apartment-article-1.2354863 (last updated Sept. 11, 2015, 12:21 PM). Holmes also left a remote control car and accompanying remote control near his apartment door in the hopes that someone might play with the car. Ashley Collman, *Gunpowder, Fuse, and Jars of Bullets: Inside the Booby-Trapped Apartment of Aurora Shooter James Holmes*, DAILY MAIL (Sept. 10, 2015, 07:51 AM), http://www.dailymail.co.uk/news/article-3229163/Gunpowder-fuse-jars-bullets-Inside-booby-trapped-apartment-Aurora-shooter-James-Holmes.html. No one d*Id. Id.* If a passerby had played with the car, the remote control held a remote detonator that, upon the car's use, would have ignited the explosives in the apartment. *Id.*

123. Wagner, *supra* note 122.

124. Collman, *supra* note 122.

125. *Id.*

126. Steffen, *The Latest from Day 4*, *supra* note 16.

127. *Aurora, Colo Theater Shooting Timeline, Facts,* KABC-TV (July 26, 2012, 9:28 AM), http://abclocal.go.com/kabc/story?section=news/world_news&id=8743134.

128. Ethan Grant, *Boston Marathon 2013: Route, Start Time, Date and TV Info*, BLEACHER REP. (Apr. 12, 2013), http://bleacherreport.com/articles/1602617-boston-marathon-2013-route-start-time-date-and-tv-info.

course,[129] the first of two bombs went off at 2:49 p.m. EDT.[130] Between twelve and thirteen seconds later and roughly a block away, a second explosion occurred.[131] The blasts killed three people.[132] More than 260 others were also wounded including sixteen people who lost legs, the youngest of whom was a seven-year-old girl.[133] After securing the scene, more than 1000 members of state, federal, and local law enforcement immediately began investigating who was responsible.[134]

The FBI then released pictures of two male suspects to the public at approximately 5:00 p.m. on Thursday, April 18.[135] The manhunt for Tsarnaev lasted through that Friday, by now April 19, as officers went door-to-door in Watertown searching for Tsarnaev.[136] That evening, shortly after Governor Patrick lifted the citywide lockdown, Dave Henneberry went outside his home to check on his boat.[137] He saw "a good amount of blood" inside and promptly called 9-1-1.[138] Thousands of officers converged on Henneberry's residence along with a police helicopter that used a thermal imaging camera to determine that Tsarnaev was inside the boat.[139] Following an exchange of gunfire and police use of flash-bang grenades, law enforcement employed a robotic arm to lift the tarp covering the boat.[140] Tsarnaev then stood up and lifted his shirt

129. Scott Malone & Aaron Pressman, *Triumph Turns to Terror as Blasts Hit Boston Marathon,* REUTERS (Apr. 15, 2013, 8:42 PM), http://www.reuters.com/article/2013/04/16/us-athleticsmarathon-boston-blast-witne-idUSBRE93F00Q20130416.

130. Russell & Farragher, *supra* note 24.

131. *Id.*; Morrison & O'Leary, *supra* note 25.

132. Malone, *supra* note 26.

133. *Id.*; Jennifer Levitz, *Boston Pays Tribute a Year After the Marathon Bombing*, WALL ST. J., http://www.wsj.com/articles/SB10001424052702303887804579502071001811960 (last updated Apr. 15, 2014, 10:43 PM).

134. Russell & Farragher, *supra* note 24.

135. Greg Botelho, *Timeline: The Boston Marathon Bombing, Manhunt and Investigation*, CNN (May 2, 2013, 9:09 AM), http://www.cnn.com/2013/05/01/justice/boston-marathon-timeline/.

136. Wayne Drash, *From Fear to Cheers: The Final Hours that Paralyzed Boston*, CNN, http://www.cnn.com/2013/04/26/us/boston-manhunt-recap/ (last updated Apr. 28, 2013, 11:05 AM).

137. *Id.*

138. *Id.*; *see also* Wendy Ruderman et al., *Officer's Killing Spurred Pursuit in Boston Attack*, N.Y. TIMES (Apr. 24, 2013), http://www.nytimes.com/2013/04/25/us/officers-killing-spurred-pursuit-in-boston-attack.html?ref=us&_r=0.

139. Drash, *supra* note 136; Melissa Gray, *Police Chief: Boston Manhunt Began with Intense Firefight in Dark Street*, CNN, http://www.cnn.com/2013/04/20/us/boston-details/index.html (last updated Apr. 22, 2013, 5:32 AM).

140. Chelsia Rose Marcius et al., *Boston Marathon Bombing Suspect Remains Hospitalized in 'Serious Condition,' Unable to be Questioned About Motives*, N.Y. DAILY NEWS, http://www.nydailynews.com/news/national/boston-marathon-bombing-suspect-dzhokhar-tsarnaev-serious-condition-hospital-article-1.1322801 (last updated Apr. 21, 2013, 11:43 AM).

to demonstrate that he was not wearing an explosive vest.[141] Police finally took him into custody at approximately a quarter to nine in the evening.[142] Residents took to the streets in celebration of law enforcement's successful investigative efforts.[143]

II.

As discussed in detail below, investigators interrogated Holmes three separate times, sometimes without *Miranda* warnings, and sometimes in preemptive reliance on *Quarles*'s public safety exception despite Holmes requesting counsel.[144] For his part, the government questioned Tsarnaev without *Miranda* warnings in preemptive reliance on *Quarles*'s public safety exception despite Tsarnaev requesting counsel and seeking to remain silent.[145] The government moreover planned to *continue* interrogating Tsarnaev without providing warnings were it not for judicial intervention.[146] How did we get to that point—a point where state actors decide that a citizen is not entitled to warnings by unilaterally and generously interpreting *New York v. Quarles*? This Part attempts an answer.

The Holmes and Tsarnaev interrogations were not the first time, of course, that law enforcement—in reliance on *Quarles*—interrogated high-profile suspects without first providing *Miranda* warnings.[147] Recent years are indeed replete with important illustrations.[148] But what happened in Aurora and Boston was something different. The Holmes and Tsarnaev interrogations represent the culmination of an increasingly expansive view of *Quarles* taken by law enforcement. That viewpoint, which began to aggressively expand in 2009, interprets *Quarles* extremely—but perhaps appropriately.

141. Drash, *supra* note 136.
142. Gray, *supra* note 139.
143. Reiss et al., *supra* note 30.
144. *See infra* Part II.C.1.
145. *See infra* Part II.C.2.
146. Luke Johnson, *Dzhokhar Tsarnaev Receives Miranda Rights After Delay for Public Safety Exception*, HUFFINGTON POST (Apr. 22, 2013, 07:05 PM) http://www.huffingtonpost.com/2013/04/22/dzhokhar-tsarnaev-miranda_n_3134745.html.
147. *See, e.g.*, Elizabeth Nielsen, *The* Quarles *Public Safety Exception in Terrorism Cases: Reviving the Marshall Dissent*, 7 AM. U. CRIM. L. BRIEF 19, 28–29 (2012) (highlighting three high-profile terrorism cases).
148. Appendix 2 includes cases involving the public safety exception. For a chart of every case involving the public safety exception, see Brian Gallini, *The Languishing Public Safety Doctrine*, 68 RUTGERS U. L. REV. app. 2 at tbl. 1, 1–54 (2016) [hereinafter Gallini app. 2], http://www.rutgerslawreview.com/wp-content/uploads/2016/09/Gallini_Appendix-2.pdf [https://perma.cc/42P2-GPTB].

Section A considers increasingly expansive law enforcement applications of *Quarles* to federal and state suspects. Although law enforcement interprets *Quarles* to allow lengthy interrogations of suspects without *Miranda* warnings, that approach—even if correct—neglects the many unanswered questions about the scope of *Quarles* that arose in the Holmes and Tsarnaev interrogations.

Section B considers the judiciary's modern approach to *Quarles*. Section C focuses on the Holmes interrogation against the contextual backdrop provided by Sections A and B. Doing so illustrates that the government's aggressive reliance on *Quarles* during and before the Holmes interrogation was, by any measuring stick, a dramatic expansion of the judiciary's guidance on *Quarles*-based interrogations.

A. Expanding Law Enforcement Interpretations of Quarles

On October 21, 2010, the FBI internally circulated an unsigned Department of Justice memorandum titled *Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States*.[149] Expressly and solely relying on *Quarles*, the memorandum provided in relevant part as follows:

> Identifying and apprehending suspected terrorists, interrogating them to obtain intelligence about terrorist activities and impending terrorist attacks, and lawfully detaining them so that they do not pose a continuing threat to our communities are critical to protecting the American people. The Department of Justice and the FBI believe that we can maximize our ability to accomplish these objectives by continuing to adhere to FBI policy regarding the use of Miranda warnings for custodial interrogation of operational terrorists who are arrested inside the United States:
>
> > 1. If applicable, *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*.
> >
> > 2. After all applicable public safety questions have been exhausted, agents should advise the arrestee of his Mi-

149. *See F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/25/us/25miranda-text.html?_r=0.

> randa rights and seek a waiver of those rights before any further interrogation occurs, absent exceptional circumstances described below.
>
> 3. There 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.[150]

Without additional supporting citation, the memorandum added this:

> In light of the magnitude and complexity of the threat often posed by terrorist organizations, particularly international terrorist organizations, and the nature of their attacks, *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*.[151]

Understanding the genesis of this memorandum is tricky. The memorandum's generous interpretation of *Quarles* arguably dates back to July 1997 when the New York City Police Department received a tip that Abu Mezer and Khalil planned to detonate bombs in a crowded subway or bus terminal.[152] After raiding their apartment and wounding both in a gunfight, officers questioned Mezer without first providing him *Miranda* warnings some unknown time later for an unspecified duration at the hospital where he received treatment.[153] In reliance only on *Quarles*, the Second Circuit's 2000 opinion in *United States v. Khalil* took just two sentences to uphold the denial of Mezer's motion to suppress incriminating statements he made during that interrogation.[154]

Khalil was the first case ever to apply *Quarles* to an interrogation that (1) lasted for an unspecified duration beyond just a few minutes, and (2) seemingly required officers to ask more than just one or two

150. *Id.* (emphases added) (footnotes omitted).
151. *Id.* (emphasis added).
152. *See* United States v. Khalil, 214 F.3d 111, 115 (2d Cir. 2000).
153. *See Id.* at 121.
154. *See Id.*

questions.[155] The door was thus suddenly open for expansive interpretations of *Quarles*, and questions therefore persisted about how far precisely *Quarles* could go.[156]

One former FBI agent thought then—and still thinks—that *Quarles* has far-reaching applicability.[157] After the attacks on September 11, 2001, agent Coleen Rowley wrote to then FBI Director Robert Mueller in May 2002 criticizing the Bureau's investigation into Zarcarias Moussaoui prior to the attacks.[158] The thirteen-page letter included the following passage:

> [I]f prevention rather than prosecution is to be our new main goal, (an objective I totally agree with), *we need more guidance on when we can apply the Quarles "public safety" exception* to *Miranda's 5th Amendment requirements. We were prevented from even attempting to question Moussaoui on the day of the attacks when, in theory, he could have possessed further information about other co-conspirators*.[159]

The letter, published on *Time Magazine*'s website,[160] received widespread attention,[161] earned Coleen Rowley the 2002 Persons of the Year honor from *Time Magazine*,[162] and thrust *Quarles* back into the spotlight.[163]

155. *See Id.* ("Following the raid on Abu Mezer's apartment, officers questioned Abu Mezer that morning at the hospital about the construction and stability of the bombs . . . ."). For a chart of every case involving the public safety exception, see Gallini app. 2, *supra* note 148, at tbl. 1, 1–54.

156. *Accord In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 203 n.19 (2d Cir. 2008) (assuming the applicability of *Quarles* to an "un-warned interrogation in order to protect the public").

157. Coleen Rowley, *Quarles Public Safety Exception—Constitutional and Proven Effective!*, HUFFINGTON POST (July 5, 2010, 05:12 AM), http://www.huffingtonpost.com/coleen-rowley/quarles-public-safety-exc_b_564138.html; Coleen Rowley, *Quarles Public Safety Exception to Miranda: The Ethical, Legal and Effective Answer to "Ticking Time Bombs"*, HUFFINGTON POST (May 18, 2010, 12:42 PM), http://www.huffingtonpost.com/coleen-rowley/quarles-public-safety-exc_b_580218.html.

158. *Coleen Rowley's Memo to FBI Director Robert Mueller*, AM. PATRIOT FRIENDS NETWORK (May 21, 2002), http://www.apfn.org/apfn/wtc_whistleblower1.htm.

159. *Id.* (first emphasis added).

160. Julian Borger, *Agent Accuses FBI of 'Sabotage'*, GUARDIAN (May 27, 2002, 9:29 PM), http://www.theguardian.com/world/2002/may/28/september11.usa.

161. *See, e.g.*, Kevin Johnson, *Letter Shifts Heat to FBI*, USA TODAY (May 28, 2002), http://usatoday30.usatoday.com/news/nation/2002/05/28/letter-fbi.htm.

162. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME MAG., Dec. 30, 2002, at 32.

163. *See, e.g.*, Jonathan Turley, *Wrong, as a Matter of Law*, L.A. TIMES (May 30, 2002), http://articles.latimes.com/2002/may/30/opinion/oe-turley30.

Flash forward to Christmas Day 2009 when Nigerian-born Umar Farouk Abdulmutallab—better known as the "Underwear Bomber"—boarded Northwest Airlines flight 253 from Amsterdam to Detroit.[164] After a failed attempt to detonate an explosive device on the plane as it approached Detroit, federal law enforcement took Abdulmutallab into custody and interrogated him for approximately fifty minutes without first providing *Miranda* warnings.[165] He quickly confessed,[166] but later moved to suppress his incriminating statements by arguing that he should have received *Miranda* warnings.[167]

Relying on *Khalil*, the district court denied his motion.[168] Citing just *Khalil* and *Quarles*, it held "the logic of *Quarles* extends to the questioning of Defendant, a terrorism suspect at the time of his December 25, 2009 questioning."[169] But fascinatingly, the government at the time of Abdulmutallab's interrogation was not so confident about its decision not to Mirandize him. Five hours after the fifty-minute interrogation, federal officials sent in a "clean team" to read Abdulmutallab his *Miranda* rights and begin the questioning anew.[170] When Abdulmutallab said nothing more,[171] the media chastised the government's decision to give Abdulmutallab warnings *at all*.[172]

164. Richard Sisk et al., *U.S. Officials Investigating How Abdulmutallab Boarded Flight 253 as More Missed Red Flags Surface*, N.Y. DAILY NEWS (Jan. 2, 2010, 9:49 PM), http://www.nydailynews.com/news/national/u-s-officials-investigating-abdulmutallab-boarded-flight-253-missed-red-flags-surface-article-1.457102.

165. United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

166. Precisely how quickly Abdulmutallab confessed is not clear. *'Underwear bomber' Umar Farouk Abdulmutallab Handed Life Sentence*, GUARDIAN (Feb. 16, 2012, 3:42 PM), http://www.theguardian.com/world/2012/feb/16/underwear-bomber-sentenced-life-prison ("He quickly confessed after he was hauled off the plane.").

167. *Abdulmutallab*, 2011 WL 4345243, at *5.

168. *Id.* at *1.

169. *Id.* at *5. The Sixth Circuit upheld Abdulmutallab's convictions on appeal, but did not reach the *Quarles* question because "he waived any right to challenge the suppression of his statements when he entered the guilty plea." United States v. Abdulmutallab, 739 F.3d 891, 904 (6th Cir. 2014).

170. Devlin Barrett, *Details of Arrest of Bombing Suspect Disclosed*, WASH. POST (Jan. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/23/AR2010012302678.html.

171. *See Id.*

172. *See Abdulmutallab in 50 Minutes: The More We Learn About His 'Interrogation,' the Worse White House Policy Looks,* WALL STREET J., http://www.wsj.com/articles/SB10001424052748703808904575025231056290438 (last updated Jan. 26, 2010, 12:01 AM) ("This talky terrorist should have been questioned for 50 hours, not 50 minutes."); Stephen F. Hayes, *Abdulmutallab's Encounter with the "Clean Team"*, WEEKLY STANDARD (Jan. 23, 2010, 8:11 PM), http://www.weeklystandard.com/blogs/abdulmutallabs-encounter-clean-team ("If Abdulmutallab provided such valuable intelligence on AQAP and its role in his attack in just 50 minutes, why would the Justice Department allow him

The fifty-minute interrogation of Abdulmutallab without *Miranda* warnings seems brief when compared to the May 2010 hours-long, *Miranda*-less interrogation of Faisal Shahzad. At approximately 6:28 p.m. EDT on May 1, Shahzad drove a 1993 Nissan Pathfinder into Times Square for the purpose of detonating explosive devices.[173] Explosives in the vehicle failed to detonate and Shahzad escaped.[174] He was arrested at 11:45 p.m. two days later—on May 3—attempting to board a flight out of the country at John F. Kennedy International Airport.[175] After taking him into custody, the FBI questioned Shahzad for approximately three hours without first providing *Miranda* warnings.[176] During that time, he provided what the FBI called, "valuable intelligence and evidence."[177] Unlike Abdulmutallab, though, Shahzad waived *Miranda* once he received his warnings and continued talking.[178] Some were nevertheless again still quick to criticize the decision to read Shahzad—an American citizen[179]—his rights.[180]

to be Mirandized."); Kasie Hunt, *GOP Rips Holder on Miranda Rights*, POLITICO (Jan. 27, 2010, 11:14 AM), http://www.politico.com/news/stories/0110/32073.html (reporting Republican discontent associated with the government's decision to read Abdulmutallab *Miranda* rights).

173. *See* William K. Rashbaum & Al Baker, *Smoking Car to an Arrest in 53 Hours*, N.Y. TIMES (May 4, 2010), http://www.nytimes.com/2010/05/05/nyregion/05tictoc.html?pagewanted=all.

174. *See Id.*

175. *See* Alison Gendar et. al, *Faisal Shahzad, Times Sq. Bomb Suspect, Nabbed Within 'Minutes' of Escape; 2 Held in Pakistan*, N.Y. DAILY NEWS, http://www.nydailynews.com/ new-york/faisal-shahzad-times-sq-bomb-suspect-nabbed-minutes-escape-2-held-pakistan-article-1.444249 (last updated May 4, 2010, 5:13 PM).

176. Evan Perez, *Rights Are Curtailed for Terror Suspects*, WALL STREET J. (Mar. 24, 2011, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704050204576218970652119898.

177. Peter Baker, *A Renewed Debate Over Suspect Rights*, N.Y. TIMES (May 4, 2010), http://www.nytimes.com/2010/05/05/nyregion/05arrest.html.

178. *Id.* Shahzad would ultimately receive a life sentence. Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, N.Y. TIMES (Oct. 5, 2010), http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html.

179. *See* Nina Bernstein, *Bombing Suspect's Route to Citizenship Reveals Limitations*, N.Y. TIMES (May 7, 2010), http://www.nytimes.com/2010/05/08/nyregion/08immig.html.

180. *See* Baker, *supra* note 177 ("Senator John McCain of Arizona called it a mistake to read Mr. Shahzad his Miranda rights so soon."); William Branigin & Anne E. Kornblut, *Holder Defends Decision to Read Miranda Rights to Shahzad, Cites to His Continuing Cooperation,* WASH. POST (May 6, 2010, 4:09 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/06/AR2010050603380.html (reporting the decision to read *Miranda* warnings to Shahzad) ("Some congressional Republicans have criticized the administration's handling of the Shahzad case, questioning the decision to read him his Miranda rights and suggesting he should have immediately been treated as an enemy combatant.").

Attorney General Eric Holder addressed the Shahzad interrogation alongside the government's reliance on *Quarles* at a hearing on May 6, 2010, on the Justice Department's fiscal year 2011 budget request.[181] During an exchange with Holder, Senator Diane Feinstein asked, "according to process and precedent . . . what is the vicinity of time that . . . the public safety . . . exception . . . can last?"[182] He responded in part, "that's not really been defined by the courts. It is not a . . . prolonged period of time."[183] He later responded to a related question from her by emphasizing, "as long as you are asking . . . appropriate questions probing about public safety issues . . . the courts are generally going to be supportive."[184]

Presumably authored by a government then armed with experience gained from an approving judiciary but a disapproving public, the October 2010 DOJ memorandum makes more sense.[185] But among other questions, it left unanswered whether the government believed *Quarles* allowed for interrogations without *Miranda* beyond three hours,[186] and whether its interpretation of *Quarles* applied beyond what it considered terror cases.[187]

As the 2012 Holmes and 2013 Tsarnaev interrogations make clear, the passage of time has not offered clearer answers. As both cases make clear, both interrogations illustrate that both state *and* federal authori-

181. *See* Justin Elliott, *Experts: Obama Admin Pioneering Robust Use of Miranda Exception in Terrorism Cases*, TPM: MUCKRAKER (May 7, 2010, 9:52 PM), http://talkingpointsmemo.com/muckraker/experts-obama-admin-pioneering-robust-use-of-miranda-exception-in-terrorism-cases-video.

182. *Justice Dep't Fiscal Year 2011 Budget*, C-SPAN (May 6, 2010) http://www.c-span.org/video/?293362-1/justice-department-fiscal-year-2011-budget&start=2780.

183. *Id.*

184. *Id.*

185. *Cf.* Ley & Verhovek, s*upra* note 39, at 207 (suggesting that the Abdulmutallab experience made "the Obama Administration . . . profoundly aware of the political consequences of informing terrorism suspects of their constitutional rights").

186. In response to questions about its new policy, the Justice Department would later implicitly make clear its intent to leave the question of duration ambiguous. *See* Justin Elliott, *Obama Rolls Back Miranda Rights*, SALON (Mar. 24, 2011, 09:24 AM), http://www.salon.com/2011/03/24/obama_rolls_back_miranda/. A DOJ spokesperson said in March 2011 that "the complexity of the threat posed by terrorist organizations and the nature of their attacks — which can include multiple accomplices and interconnected plots – creates fundamentally different public safety concerns than traditional criminal cases." *Id.*

187. The *Los Angeles Times* published an editorial in April 2011 suggesting that the DOJ memorandum should apply beyond just terror cases. *See Miranda Rights and Terror Suspects*, L.A. TIMES (Apr. 4, 2011), http://articles.latimes.com/2011/apr/04/opinion/la-ed-warnings-20110404 ("[The memorandum] shouldn't be limited to terrorism cases but should apply to any case — a gang-related case, say, or a murder plot — in which a suspect may have knowledge of a possible future threat.").

ties aggressively employ *Quarles* in ways never before authorized by the judiciary and in ways that extend beyond so-called terror cases.[188]

B. Judicial Limitations on Quarles

By the time of the April 2013 Tsarnaev interrogation, the longest *Quarles*-based interrogation any state or federal court had approved of since 1984 outside the hostage negotiation context,[189] was three and one-half hours.[190] In that case, also distinct from the roughly 571 public safety cases before 2013,[191] the public safety interrogation occurred one week after commission of a kidnapping, when officers were still hoping the victim was alive.[192] Although the Holmes and Tsarnaev public safety interrogations occurred comparatively sooner (hours after the shootings for Holmes and four days after the bombing for Tsarnaev), relying on *Quarles* to interrogate (1) Holmes three separate times, sometimes without *Miranda*, and (2) Tsarnaev without *Miranda* for sixteen hours four days after the incident is collectively, by any measuring stick, abnormal.[193]

More commonly before the interrogations of Tsarnaev, Shahzad, Holmes, and Abdulmutallab, state and federal courts encountered limited law enforcement questioning of a suspect within an hour after commission of a crime.[194] But each facet of the public safety exception—

188. *Cf.* Christopher R. Schaedig, Note, *Protecting the Worst Among Us: A Narrow* Quarles *Public-Safety Exception in the Boston Bombing and Other Terror Investigations*, 30 T.M. COOLEY L. REV 449, 472–77 (2013) (arguing for a narrow application of *Quarles* to federal criminal prosecutions).

189. *See* United States v. Webb, 755 F.2d 382, 392 n.14 (5th Cir. 1985); United States v. Headbird, No. 14-cr-331 (PJS/LIB) (1), 2014 U.S. Dist. LEXIS 180911, at *19 (D. Minn. Dec. 22, 2014); Rowland v. Thaler, No. 4:09-CV-630-A, 2010 WL 4511023, at *7 (N.D. Tex. Nov. 1, 2010); People v. Lubrano, 985 N.Y.S.2d 754, 757 (App. Div. 2014); People v. Scott, 710 N.Y.S.2d 228, 230–31 (App. Div. 2000); People v. Treier, 630 N.Y.S.2d 224, 227 (Sup. Ct. 1995); State v. Finch, 975 P.2d 967, 990–91 (Wash. 1999).

190. People v. Coffman, 96 P.3d 30, 53 (Cal. 2004).

191. *See* Gallini app. 2, *supra* note 148, at tbl. 1, 1–54.

192. *See Coffman*, 96 P.3d at 48–50 (describing a kidnapping that occurred on November 7; defendants were arrested on November 14).

193. *See* Meredith Clark, Now Charged, Boston Suspect Was Longest Held Without Miranda Rights, MSNBC (Apr. 12, 2013, 03:08 PM), http://www.msnbc.com/up-with-steve-kornacki/now-charged-boston-suspect-was-longest-held ("Dzhokhar Tsarnaev, the 19-year-old prime suspect in the bombings, had been held longer, without Miranda protections, than any other terrorism suspect since the Obama administration announced it would rely on this expanded exception in 2010."); Elliott, *Obama Admin Pioneering Robust Use of Miranda Exception*, *supra* note 181 ("[T]he length of the pre-Miranda interrogations in the two recent cases -- 50 minutes and a few hours respectively -- also appears to break new ground.").

194. For a chart of every case involving limited law enforcement questioning of a sus-

duration of interrogation and passage of time since commission of the crime prior to interrogation—expanded after the 2010 DOJ memorandum.

Consider first how long the judiciary, whether federal or state, had approved of a *Quarles*-based interrogation prior to the 2010 DOJ memorandum. From 1984 to 2010, state and federal courts most commonly admitted a suspect's statements pursuant to *Quarles* when obtained by a state or federal law enforcement officer who, in one or two questions, asked a suspect about the location of a weapon,[195] an accomplice,[196] and/or more generally whether anything on the suspect could be used to hurt the arresting officer.[197] Courts were ordinarily unwilling to interpret *Quarles* to allow for deviation from those general guidelines.[198] It would therefore be an understatement to say that extended questioning pursuant to *Quarles* was rarely permissible prior to 2010.

But amongst the hundreds of cases representing the general rule, there were a few outliers. In 1991, a New York trial court declined to suppress a defendant's statements made during an eight-hour standoff with police.[199] In holding that *Quarles* allowed admission of the defendant's statements, the court reasoned that "so long as the emergency condition continued unabated, the overriding concern for the safety of the public, the police, and even the Defendant is paramount to Defendant's individual right against self incrimination."[200] Another New York state court reached the same result in a 1995 multi-hour hostage situation, during which the defendant made incriminating statements in response to questioning without *Miranda* from a hostage negotiator.[201]

Outside of New York, and outside the hostage context, a California appellate court in 1996 reviewed application of *Quarles* when officers

pect within an hour after the commission of a crime, see Gallini app. 2, *supra* note 148, at tbl. 2, 55–79.

195. For a chart of every case involving limited law enforcement questioning consisting of one or two questions about the location of a weapon, see Gallini app. 2, *supra* note 148, at tbl. 3, 80–112.

196. For a chart of every case involving limited law enforcement questioning consisting of one or two questions about the existence of an accomplice, see Gallini app. 2, *supra* note 148, at tbl. 4, 113–118.

197. For a chart of every case involving limited law enforcement questioning consisting of one or two questions about the presence of anything on the suspect that could hurt the arresting officer, see Gallini app. 2, *supra* note 148, at tbl. 5, 119–128.

198. For a chart of cases demonstrating that courts are ordinarily unwilling to interpret *Quarles* in a way that deviates from the general practice of one or two questions about officer safety, see Gallini app. 2, *supra* note 148, at tbl. 6, 129–142.

199. People v. Manzella, 571 N.Y.S.2d 875, 876, 878–79 (Sup. Ct. 1991).

200. *Id.* at 879.

201. People v. Treier, 630 N.Y.S.2d 224, 227–28 (Sup. Ct. 1995).

confronted the so-called "ticking time bomb scenario."[202] In *People v. Tritchler*, law enforcement stopped a suspicious vehicle after hearing two explosions.[203] Concerned about the prospect of additional explosions, different officers questioned the defendant over a period of approximately forty-five minutes without providing *Miranda* warnings.[204] In holding that *Quarles* permitted admission of the defendant's statements, the court in its reasoning highlighted the "evidence of the explosion, the unknown nature of the devices found hidden under the [car] seats and the necessity of further handling of the devices."[205]

Finally, in *Commonwealth v. Dillon D.*, a school police officer improperly read *Miranda* warnings to a juvenile suspect prior to commencing a roughly thirty-minute interrogation about the location of a weapon.[206] Although the trial court suppressed the defendant's statements, the Massachusetts Supreme Judicial Court in 2007 reversed and held that *Quarles* permitted admission.[207] In allowing the extended public safety interrogation, the court reasoned in part that an undiscovered weapon in the school presented "an emergency situation that required protecting approximately 890 children at the middle school and residents of the neighborhood."[208]

Consider next how much time, before 2010, normally expired after the commission of a crime prior to the commencement of a *Quarles*-based interrogation. The overwhelming majority of public safety interrogations take place immediately at the time of arrest shortly after commission of a crime.[209] A handful of permissible *Quarles*-based interrogations occur either in the patrol car before and during transport to

202. People v. Tritchler, 55 Cal. Rptr. 2d 650, 655–57 (Ct. App. 1996).
203. *Id.* at 657.
204. *Id.* at 656.
205. *Id.* at 657.
206. 863 N.E.2d 1287, 1289 (Mass. 2007).
207. *Id.* at 1289–90.
208. *Id.* at 1290.
209. *See, e.g.*, United States v. Noonan, 745 F.3d 934, 934 (8th Cir. 2014); United States v. Buchanan, No. 3:14-00062, 2015 WL 247876, at *9–10 (M.D. Tenn. Jan. 20, 2015); United States v. Jeronimo-Rodas, No. 4-13-cr-00153-RBH, 2013 WL 2285944, at *1–2 (D.S.C. May 23, 2013); United States v. Harris, No. 11-00118-01-CR-W-DGK, 2013 WL 1314885, at *1 (W.D. Mo. Mar. 7, 2013); United States v. Wilson, 914 F. Supp. 2d 550, 553–54, 560 (S.D.N.Y. 2012); People v. Brown, No. H039502, 2015 Cal. App. Unpub. LEXIS 178, at *2 (Ct. App. Jan. 12, 2015); People v. Caldera, No. F035948, 2002 WL 392977, at *1–2 (Cal. Ct. App. Mar. 13, 2002); State v. White, 619 A.2d 92, 94 (Me. 1993); People v. Hurst, 688 N.Y.S.2d 306, 306 (App. Div. 1999); People v. Williams, 595 N.Y.S.2d 61, 61 (App. Div. 1993); State v. Thompson, Nos. 98 JE 28, 98 JE 29, 2001 WL 69197, at *4 (Ohio Ct. App. Jan. 24, 2001); State v. Williams, No. CA92-07-133, 1993 WL 185611, at *1–2 (Ohio Ct. App. June 1, 1993).

book the suspect,[210] at the stationhouse or detention facility,[211] or in a hospital when the suspect is injured.[212] Most courts, however, decline to admit a suspect's statements pursuant to *Quarles* beyond that period by reasoning that the threat to public safety has expired by the time the suspect is in custody and the surrounding scene has been secured.[213]

Like the interrogation length cases, some outlying cases before 2010 recognized the continued existence of a threat to public safety despite an increased passage of time since completion of a crime. In 1995, the District of Columbia Court of Appeals in part held in *Trice v. United States* that *Quarles* permitted admission of a defendant's statement about the location of a gun despite officers interrogating him four days after the shooting and an additional hour after his arrest.[214] Noting that the defendant was arrested in the presence of children while the weapon was still missing, the court reasoned, "the detective did not learn of the specific threat his question was designed to eliminate—danger to children—until he saw children in appellant's home at the time of ar-

210. *See, e.g.*, United States v. Blackmon, 142 F.3d 437, 1998 WL 109992, at *2–3 (6th Cir. Mar. 3, 1998); United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994); Palmer v. Greiner, No. 00 Civ. 6677 WHPRLE, 2003 WL 22019740, at *8–9 (S.D.N.Y. Aug. 22, 2003); People v. Brewer, No. A100489, 2004 WL 363496, at *6–7 (Cal. Ct. App. Feb. 27, 2004); People v. Akhtar, No. C042427, 2003 WL 22925258, at *2–3 (Cal. Ct. App. Dec. 11, 2003); People v. Brandon, No. B156969, 2003 WL 22100720, at *3 (Cal. Ct. App. Sept. 11, 2003); People v. Chatman, 71 Cal. Rptr. 2d 867, 868–69 (Ct. App. 1998); Trice v. United States, 662 A.2d 891, 893 (D.C. 1995); People v. Palmer, 693 N.Y.S.2d 539, 540 (App. Div. 1999); People v. Oquendo, 685 N.Y.S.2d 437, 438–39 (App. Div. 1999); New York v. Allen, 658 N.Y.S.2d 393, 394 (App. Div. 1997); People v. Shah, 980 N.Y.S.2d 724, 724–27 (Sup. Ct. 2013); State v. Davis, No. 96-CO-44, 1999 WL 1050092, at *1, *5 (Ohio Ct. App. Nov. 19, 1999).

211. United States v. Khalil, 214 F.3d 111, 122 (2d Cir. 2000); People v. Stevenson, 59 Cal. Rptr. 2d 878, 880 (Ct. App. 1996); Thomas v. State, 737 A.2d 622, 626 (Md. Ct. Spec. App. 1999).

212. *See, e.g.*, *Khalil*, 214 F.3d at 122; United States v. Abdulmutallab, No. 10-20005, 2011 WL 4345243, at *3 (E.D. Mich. Sept. 16, 2011); People v. Panah, 107 P.3d 790, 840 (Cal. 2005); People v. Stryker, No. A118638, 2010 WL 219318, at *11 (Cal. Ct. App. Jan. 22, 2010); People v. Zanini, No. F038571, 2003 WL 103464, at *2–3 (Cal. Ct. App. Jan. 10, 2003); *Stevenson*, 59 Cal. Rptr. 2d at 880; People v. Dennis, 866 N.E.2d 1264, 1269 (Ill. App. Ct. 2007); *Thomas*, 737 A.2d at 626; State v. Garcia-Lorenzo, 430 S.E.2d 290, 292 (N.C. Ct. App. 1993); State v. Joel I.-N., 856 N.W.2d 654, 658 (Wis. Ct. App. 2014).

213. *See, e.g.*, United States v. Brathwaite, 458 F.3d 376, 382 n.8 (5th Cir. 2006) (denying admission of incriminating statements pursuant to *Quarles* in part because "the occupants were handcuffed"); United States v. Molina-Tepozteco, No. 07-181 (PJS/SRN), 2007 WL 3023292, at *6 (D. Minn. Oct. 12, 2007) (declining to allow admission of defendant's *Miranda*-less statements in part because "[t]he SWAT team had fully secured the premises, and Defendant was restrained"); United States v. Mengis, No. 04-CR-508-BR, 2006 WL 2552993, at *4 (D. Or. Aug. 31, 2006) (declining to admit statements because "officers were 20 blocks from where weapons might be located, [and] they did not confront the potential danger for approximately 90 minutes after questioning the accused").

214. 662 A.2d at 892.

rest, four days after the shooting."[215] Thus, concluded the court, "[a] refusal to apply the exception in this case would effectively penalize the government because [the detective] asked a question reasonably prompted by a concern for the well-being of small children."[216]

The *Trice* holding, though rare, was not anomalous. After *Trice*, sporadic courts admitted statements taken pursuant to *Quarles* thirty to forty minutes after a defendant turned himself in,[217] fifteen to thirty minutes after an arrest,[218] at a treating hospital following an injury to a defendant,[219] and during execution of a search warrant well after commission of the alleged crime.[220]

From 2002 to 2010, courts admitted statements pursuant to *Quarles* taken from a suspect hours or days after commission of the crime in fifteen more cases.[221] For example, courts during that period admitted incriminating statements pursuant to *Quarles* about a gun (1) at the time of arrest three days after commission of the crime,[222] (2) at the time of arrest seven days after commission of the crime,[223] and (3) one month after commission of the crime.[224] Note that in even in these extreme examples, the judiciary remained faithful to the core concern expressed by the *Quarles* Court—location of a weapon. Deviations from questions about weapons, though rare, do exist; courts during that period admit-

215. *Id.* at 896.

216. *Id.* at 897.

217. State v. Dubak, No. 99-0343-CR, 1999 WL 760925, at *1 (Wis. Ct. App. Sept. 28, 1999).

218. *In re* Pao C.V., 233 Wis. 2d 275, 2000 WL 19494, at *1 (Ct. App. Jan. 11, 2000).

219. United States v. Khalil, 214 F.3d 111, 122 (2d Cir. 2000).

220. United States v. Powell, 444 F. App'x 517, 519 (3d Cir. 2011).

221. Nine of those cases were published and, of those nine, four were federal court decisions and five originated in state court. United States v. Newsome, 475 F.3d 1221, 1223 (11th Cir. 2007); United States v. Newton, 369 F.3d 659, 663–64 (2d Cir. 2004); United States v. Lackey, 334 F.3d 1224, 1226 (10th Cir. 2003); United States v. Mendoza, 333 F. Supp. 2d 1155, 1158 (D. Utah 2004); People v. Panah, 107 P.3d 790, 840 (Cal. 2005); People v. Coffman, 96 P.3d 30, 76 (Cal. 2004); Anglin v. State, 157 S.W.3d 400, 404 (Mo. Ct. App. 2005); People v. Kimes, 831 N.Y.S.2d 1, 16 (App. Div. 2006); Jackson v. State, 146 P.3d 1149, 1158–59 (Okla. Crim. App. 2006).

The other six public safety decisions during that time period were unpublished cases, one of which was a federal decision and five of which were state court opinions. United States v. Phillips, 94 F. App'x 796, 800–01 (10th Cir. 2004); Palmer v. Greiner, No. 00 Civ. 6677 WHPRLE, 2003 WL 22019740, at *2 (S.D.N.Y. Aug. 22, 2003); People v. Akhtar, No. C042427, 2003 WL 22925258, at *3 (Cal. Ct. App. Dec. 11, 2003); People v. Gray, No. B156966, 2003 WL 21224779, at *1, *3 (Cal. Ct. App. May 28, 2003); People v. Taylor, No. 1845/2000, 2002 WL 465094, at *18–19 (N.Y. Sup. Ct. Mar. 20, 2002); State v. Luke, No. 2003CA00413, 2004 WL 2616422, at *2 (Ohio Ct. App. Nov. 15, 2004).

222. *Newsome*, 475 F.3d at 1224.

223. *Lackey*, 334 F.3d at 1226.

224. *Mendoza*, 333 F. Supp. 2d at 1161–62.

ted statements made after public safety questions about the existence of contraband generally,[225] the safety or condition of a victim,[226] and imminent completion of a robbery.[227]

Collectively, those twenty-one total cases between 1984 and 2010 are the dramatic exceptions; they are twenty-one among a list of 611 total public safety exception cases between 1984 and October 21, 2010, when the DOJ memorandum was authored.[228] Stated differently, 3.4% of courts prior to the DOJ memorandum permitted public safety interrogations that occurred sometime other than immediately following defendant's commission of the crime and subsequent apprehension.

But according to Attorney General Eric Holder in a May 2010 interview that in hindsight foreshadowed the DOJ memorandum, none of those cases address the "ticking time bomb" scenario.[229] That scenario, he implied, arises where immediate threats are posed to the public because of the prospect that an explosive is set for imminent detonation.[230] The weekend following the Shahzad interrogation, Holder appeared on *Meet the Press*, during which he sought to justify the FBI's decision not to read Shahzad his *Miranda* warnings. Arguing for a rule with "more flexibility," he commented, "we want the public safety exception to be consistent with the public safety concerns that we now have in the 21st century as opposed to the public safety concerns that we had back in the 1980s."[231] That statement about *Quarles*, alongside the government's subsequently solidified position as expressed in the DOJ memorandum, would seemingly make a significant impact both on ordinary public safety cases after 2010 and those involving the "ticking time bomb."

Holder's suggestion, though, that public safety exception cases prior to 2010 did not address modern public safety concerns in the form of so-called "ticking time bomb" cases is misleading. State and federal courts by then surprisingly already had experience with applying *Quarles* to bomb threats, mass casualty situations, or possible explosions. Indeed,

225. *Newton*, 369 F.3d at 663–64 (question about whether defendant "had any 'contraband' in the house").

226. *Panah*, 107 P.3d at 840; *Coffman*, 96 P.3d at 76; *Akhtar*, 2003 WL 2292528, at *3; *Gray*, 2003 WL 21224779, at *1, *3; *Kimes*, 831 N.Y.S.2d at 3; *Luke*, 2004 WL 2616422, at *6–7.

227. Palmer v. Greiner, No. 00 Civ. 6677 WHPRLE, 2003 WL 22019740, at *2 (S.D.N.Y. Aug. 22, 2003).

228. *See* Gallini app. 2, *supra* note 148, at tbl. 1, 1–54.

229. Justin Elliot, *Holder: Obama Admin Seeks Changes to Miranda Rule*, TPM: MUCKRAKER (May 9, 2010, 10:29 PM), http://talkingpointsmemo.com/muckraker/holder-obama-admin-seeks-changes-to-miranda-rule-video.

230. *See Id.*

231. *Id.*

during the time preceding Holder's interview (from 1984 to 2010), courts confronted ten *Quarles*-based interrogations where bomb detonation, explosions, or mass casualties were either threatened or had actually taken place.[232] In those ten examples, the longest judiciary-approved *Quarles*-based interrogation—a clear outlier—was forty-five minutes;[233] the next longest consisted of a few questions during an extended traffic stop.[234] But in the seven public safety interrogations involving possible explosions since 2010,[235] courts seemed more comfortable with extended questioning—approving of statements taken pursuant to *Quarles* in two of those cases after interrogations that lasted forty minutes and one hour.[236]

Post-2010 courts also routinely approved of extended length public safety interrogations in more ordinary street crimes. Indeed, whereas courts prior to 2010 normally approved of one or two questions in the absence of *Miranda* warnings,[237] extended public safety questioning af-

232. United States v. Spoerke, 568 F.3d 1236, 1249 (11th Cir. 2009); United States v. Khalil, 214 F.3d 111, 122 (2d Cir. 2000); United States v. Rumble, 714 F. Supp. 2d 388, 392–93 (N.D.N.Y 2010); United States v. Kramer, No. 07-80136-CR, 2008 WL 169615, at *1 (S.D. Fla. Jan. 16, 2008); United States v. Fairchild, 943 F. Supp. 1174, 1181 (W.D. Mo. 1996), aff'd, 168 F.3d 495 (8th Cir. 1999); United States v. Dodge, 852 F. Supp. 139, 142 (D. Conn. 1994); People v. Tritchler, 55 Cal. Rptr. 2d. 650, 656–67 (Ct. App. 1996); State v. Kane, 951 P.2d 934, 936 (Haw. 1998); State v. Simmons, 714 N.W.2d 264, 275 (Iowa 2006); *In re* Travis, 675 N.E.2d 36, 37 (Ohio Ct. App. 1996).

233. *Tritchler*, 55 Cal. Rptr. at 656.

234. *Spoerke*, 568 F.3d at 1248–49.

235. United States v. Hodge, 714 F.3d 380, 381–82 (6th Cir. 2013); United States v. Stout, 439 F. App'x 738, 741 (10th Cir. 2011); United States v. Buchanan, No. 3:14-00062, 2015 WL 247876, at *3–4 (M.D. Tenn. Jan. 20, 2015); United States v. Peace, No. 4:14-CR-11-HLM-WEJ-1, 2014 WL 6908394, at *1–2 (N.D. Ga. Sept. 25, 2014), *adopted in* 2014 WL 6908412, at *1–2 (N.D. Ga. Dec. 8, 2014); United States v. Rogers, No. 13-cr-130 (ADM/JJG), 2013 WL 6388459, at *2 (D. Minn. Aug. 29, 2013); United States v. Stevens, No. 1:12 CR 238, 2012 U.S. Dist. LEXIS 121260, at *3–5 (N.D. Ohio Aug. 27, 2012); People v. Rose, No. F446382, 2014 WL 6436205, at *1 (Cal. Ct. App. Nov. 17, 2014).

236. *Peace*, 2014 WL 6908394, at *16; *Rogers*, 2013 WL 6388459, at *6.

237. A representative though by no means exhaustive sample includes the following cases:

1984. *See* United States v. Udey, 748 F.2d 1231, 1240 n.4 (8th Cir. 1984).

1985. *See* Huntsman v. State, No. 121, 1984, 1985 Del. LEXIS 580, at *5–8 (Del. May 17, 1985).

1986. *See* Hubbard v. State, 500 So. 2d 1204, 1225–26 (Ala. Crim. App. 1986); State v. Obran, 496 So. 2d 1132, 1134 (La. Ct. App. 1986); State v. Turner, 716 S.W.2d 462, 466 (Mo. Ct. App. 1986).

1987. *See* United States v. Brady, 819 F.2d 884, 887–89 (9th Cir. 1987); United State v. Padilla, 819 F.2d 952, 961 (10th Cir. 1987); People v. Gilliard, 234 Cal. Rptr. 401, 405 (Ct. App. 1987).

1988. *See* United States v. Ochoa-Victoria, Nos. 87-5232, 87-5233, 1988 WL 74747, at *3 (9th Cir. July 6, 1988); United States v. Eaton, 676 F. Supp. 362, 365 (D. Me. 1988); State v. Jackson, 756 S.W.2d 620, 621–22 (Mo. Ct. App. 1988).

1989. *See* United States v. Edwards, 885 F.2d 377, 384–85 (7th Cir. 1989); State v. Vickers, 768 P.2d 1177, 1183 (Ariz. 1989); State v. Harris, 384 S.E.2d 50, 54 (N.C. Ct. App. 1989).
1990. *See* State v. Leone, 581 A.2d 394, 397 (Me. 1990); State v. Orso, 789 S.W.2d 177, 184–85 (Mo. Ct. App. 1990); State v. Trangucci, 796 P.2d 606, 608–09 (N.M. Ct. App. 1990).
1991. *See* United States v. Knox, 950 F.2d 516, 519 (8th Cir. 1991); State v. Stanley, 809 P.2d 944, 948–49 (Ariz. 1991); Alomari v. State, 587 A.2d 454, 1991 WL 22374, at *3 (Del. Feb. 14, 1991).
1992. *See* United States v. Simpson, 974 F.2d 845, 847 (7th Cir. 1992); United States v. Cox, 955 F.2d 42, 1992 WL 29136, at *4 (4th Cir. Feb. 20, 1992); United States v. Lawrence, 952 F.2d 1034, 1036–37 (8th Cir. 1992).
1993. *See* Johnson v. Estelle, No. 91-55158, 1993 WL 55146, at *1 (9th Cir. Mar. 3, 1993); People v. Sims, 853 P.2d 992, 1018–19 (Cal. 1993); Edwards v. United States, 619 A.2d 33, 36–37 (D.C. 1993).
1994. *See* United States v. Gonzalez, 864 F. Supp. 375, 381–82 (S.D.N.Y. 1994); United States v. Dodge, 852 F. Supp. 139, 142 (D. Conn. 1994); Howard v. Garvin, 844 F. Supp. 173, 174–75 (S.D.N.Y. 1994).
1995. *See* Smith v. State, 452 S.E.2d 494, 497 (Ga. 1995); State v. Bailey, 889 P.2d 738, 743–44 (Kan. 1995); People v. Treier, 630 N.Y.S.2d 224, 227–82 (Cty. Ct. 1995).
1996. *See* United States v. Fisher, 929 F. Supp. 26, 29 (D. Me. 1996); Commonwealth v. Kitchings, 666 N.E.2d 511, 516–17 (Mass. App. Ct. 1996); People v. Pulley, 648 N.Y.S.2d 32, 33 (App. Div. 1996).
1997. *See* People v. Cotton, 662 N.Y.S.2d 135, 136 (App. Div. 1997); People v. Allen, 658 N.Y.S.2d 393, 394 (App. Div. 1997); State v. Barros, 85 Wash. App. 1064, 1997 WL 177525, at *3–4 (Wash. Ct. App. Apr. 14, 1997).
1998. *See* United States v. Creech, 52 F. Supp. 2d 1221, 1230–31 (D. Kan. 1998), *aff'd*, 221 F.3d 1353 (10th Cir. 2000); People v. Simpson, 76 Cal. Rptr. 2d 851, 855–56 (Ct. App. 1998); Joppy v. State, 719 So. 2d 316, 318 (Fla. Dist. Ct. App. 1998).
1999. *See* Marshall v. State, 5 S.W.3d 496, 498–99 (Ark. Ct. App. 1999); Borrell v. State, 733 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1999); People v. Oquendo, 685 N.Y.S.2d 437, 439 (App. Div. 1999).
2000. *See* United States v. Reilly, 224 F.3d 986, 990, 992–94 (9th Cir. 2000); *In re* Roy L., 4 P.3d 984, 989 (Ariz. Ct. App. 2000); Commonwealth v. Clark, 730 N.E.2d 872, 884–85 (Mass. 2000).
2001. *See* United States v. Jones, 154 F. Supp. 2d 617, 623, 629–30 (S.D.N.Y. 2001); People v. Attebury, 624 N.W.2d 912, 916–18 (Mich. 2001); Luckett v. State, 797 So. 2d 339, 346–47 (Miss. Ct. App. 2001).
2002. *See* Allen v. Roe, 305 F.3d 1046, 1051 (9th Cir. 2002); United States v. Young, 186 F. Supp. 2d 642, 644–46 (E.D. Va. 2002); Bailey v. State, 763 N.E.2d 998, 1002 (Ind. 2002).
2003. *See* United States v. Williams, 282 F. Supp. 2d 586, 597–98 (E.D. Mich. 2003); State v. Betances, 828 A.2d 1248, 1255–57 (Conn. 2003); Dyson v. United States, 815 A.2d 363, 366, 368–69 (D.C. 2003).
2004. *See* United States v. Fox, 393 F.3d 52, 60 (1st Cir. 2004); United States v. Newton, 369 F.3d 659, 677–79 (2d Cir. 2004); United States v. Reynolds, 334 F. Supp. 2d 909, 913–14 (W.D. Va. 2004).
2005. *See* United States v. Estrada, 430 F.3d 606, 610–14 (2d Cir. 2005); United States v. Luker, 395 F.3d 830, 833–34 (8th Cir. 2005); United States v. King, 366 F. Supp. 2d 265, 275 (E.D. Pa. 2005).

ter the DOJ memorandum grew increasingly common. For example, courts approved of a roughly forty-five minute *Miranda*-less interrogation in a manslaughter and false imprisonment case,[238] an interrogation of unspecified duration in a murder case,[239] and a one-hour interrogation in a rape case.[240] One federal court interpreted *Quarles* to allow a thirty to forty-five minute interrogation about the presence of a gun—the very situation presented by *Quarles* itself.[241] But no court in any context—ticking time bomb or otherwise—had approved of a public safety interrogation lasting sixteen hours.

Like the expanded duration of public safety questioning, courts nationwide after 2010 grew more forgiving of *Quarles*-based interrogations that began later than immediately after defendant's commission of and apprehension for an offense. Compared to the 3.4% of courts between 1984 and 2010 that allowed public safety interrogations to commence sometime later than immediately following a defendant's commission or apprehension for a crime,[242] sixteen of 135 public safety opinions after 2010—or roughly twelve percent—admitted incriminating statements under similar circumstances.[243] Courts tolerated a broad range of ex-

2006. *See* Brown v. State, 982 So. 2d 565, 600–01 (Ala. Crim. App. 2006); State v. Londo, 158 P.3d 201, 204 (Ariz. Ct. App. 2006); State v. Simmons, 714 N.W.2d 264, 275 (Iowa 2006).

2007. *See* United States v. Newsome, 475 F.3d 1221, 1224–25 (11th Cir. 2007); United States v. Oung, 490 F. Supp. 2d 21, 31–33 (D. Mass. 2007); State v. Hewson, 642 S.E.2d 459, 466 (N.C. Ct. App. 2007).

2008. *See* United States v. Everman, 528 F.3d 570, 572 (8th Cir. 2008); Harris v. Phelps, 550 F. Supp. 2d 551, 562 (D. Del. 2008); People v. Allah, 863 N.Y.S.2d 682, 683 (App. Div. 2008).

2009. *See* United States v. Are, 590 F.3d 499, 505–06 (7th Cir. 2009); United States v. Jones, 567 F.3d 712, 715–16 (D.C. Cir. 2009); United States v. DeJear, 552 F.3d 1196, 1201–02 (10th Cir. 2009).

2010. *See* State v. Mendoza-Ruiz, 240 P.3d 1235, 1238 (Ariz. Ct. App. 2010); Smith v. State, 46 So. 3d 608, 609–10 (Fla. Dist. Ct. App. 2010); Commonwealth v. Loadholt, 923 N.E.2d 1037, 1044–46 (Mass. 2010).

238. People v. Alger, No. A126581, 2013 WL 5287305, at *1–2, *18–19 (Cal. Ct. App. Sept. 19, 2013).

239. People v. Zalevsky, 918 N.Y.S.2d 790, 792–93 (App. Div. 2011).

240. State v. Miller, 264 P.3d 461, 466, 487 (Kan. 2011).

241. United States v. Ferguson, 702 F.3d 89, 91, 93–95 (2d Cir. 2012).

242. *See* Gallini app. 2, *supra* note 148, at tbl. 1, 1–54.

243. *Ferguson*, 702 F.3d at 90, 96; United States v. Williams, 681 F.3d 35, 41 (2d Cir. 2012); Williams v. Jacquez, 472 F. App'x 851, 851 (9th Cir. 2012); United States v. Powell, 444 F. App'x 517, 520 (3d Cir. 2011); United States v. Peace, No. 4:14-CR-11-HLM-WEJ-1, 2014 WL 6908394, at *1–2, *19 (N.D. Ga. Sept. 25, 2014), *adopted in* 2014 WL 6908412 (N.D. Ga. Dec. 8, 2014); United States v. Rogers, No. 13-cr-130 (ADM/JJG), 2013 WL 6388459, at *2, *11 (D. Minn. Aug. 29), *aff'd in part and rev'd in part*, 2013 WL 6388457 (D. Minn. 2013); United States v. Chavez-Maciel, No. 1:10-CR-00490-TCB-LTW, 2012 WL 6742323, at *1, *3 (N.D. Ga. Dec. 7, 2012); United States v. Stevens, No. 1:12 CR 238,

tended delays including public safety interrogations that took place hours after an arrest,[244] two days after commission of the crime,[245] nearly four months after an offense,[246] and three months after a crime.[247] And interestingly, unlike the pre-DOJ memorandum cases, these sixteen cases covered a broader array of questioning; that is, questioning that differed from the *Quarles* Court's concerns about locating a weapon. For example, courts allowed extended questioning prior to *Miranda* warnings in the context of collecting evidence for a rape kit,[248] and "asking [for hours of] general questions designed to investigate a crime and elicit incriminating statements."[249]

But lengthier public safety interrogations and longer times before commencing those interrogations are just part of the story. Indeed, addressing the expansion of *Quarles* in the limited contexts of interrogation length alongside when that interrogation occurs provides no guidance on how to approach the other challenges presented by Tsarnaev's interrogation,[250] namely (1) whether the government can preemptively "invoke" *Quarles* before an interrogation;[251] (2) the permissible scope of questions that are necessary to secure the public's safety; (3) whether

2012 U.S. Dist. LEXIS 121260, at *13–16 (N.D. Ohio Aug. 27, 2012); United States v. Vega-Rubio, No. 2:09-cr-00113-GMN-PAL, 2011 WL 220033, at *8–9 (D. Nev. Jan. 21, 2011); People v. Mendez, No. E057294, 2013 WL 5570427, at *1 (Cal. Ct. App. Oct. 10, 2013); *Alger*, 2013 WL 5287305, at *20–23; People v. Alger, No. A126581, 2012 WL 293596, at *4–7, *22; *Miller*, 264 P.3d at 466, 486–87; State v. Melendez, 30 A.3d 320, 323 (N.J. Super. Ct. App. Div. 2011); People v. Doll, 998 N.E.2d 384, 387–88 (N.Y. 2013).

244. *See, e.g.*, *Ferguson*, 702 F.3d at 96 (sixty to ninety minutes); *Williams*, 681 F.3d at 38 (two hours); *Jacquez*, 472 F. App'x at 852 (Murguta, J., concurring in the judgment) (several hours); *Peace*, 2014 WL 6908394, at *13–14 (more than an hour); *Stevens*, 2012 U.S. Dist. LEXIS 121260, at *15–16 (four-hour interview began at midnight after defendant was "clearly suffering from having been exposed to the elements at the time of his arrest"); *Alger*, 2013 WL 5287305, at *4 (several hours); *Doll*, 998 N.E.2d at 390 (several hours).

245. *Melendez*, 30 A.3d at 323.

246. *Powell*, 444 F. App'x at 518–19.

247. *Vega-Rubio*, 2011 WL 220033, at *2.

248. *Miller*, 264 P.3d at 490.

249. *Jacquez*, 472 F. App'x at 852 (Murguta, J., concurring in the judgment).

250. *Cf.* H. Joshua Rivera, Note, *At Least Give Them* Miranda*: An Exception to Prompt Presentment as an Alternative to Denying Fundamental Fifth Amendment Rights in Domestic Terrorism Cases*, 49 AM. CRIM. L. REV. 337, 353 (2012) (arguing the DOJ memo "is unclear as to how agents will remain within the public safety exception in 'exceptional cases' while ensuring an opportunity to lawfully detain suspects").

251. As used here and throughout this Article, preemptive invocation refers to a scenario where law enforcement makes the premeditated decision to rely on *Quarles* prior to questioning a suspect. That, of course, is counter-intuitive to the logic of *Quarles* itself, which emphasized that the spontaneous nature of a threat to public safety causes law enforcement to "act out of a host of different, instinctive, and largely unverifiable motives[.]" New York v. Quarles, 467 U.S. 649, 656 (1984).

the suspect's invocation of counsel or silence impact *Quarles*; and (4) whether *Quarles* allows for the admission of an involuntary statement.[252] The 2010 DOJ memorandum does not even attempt to answer those questions. But that is a problem; the Supreme Court has never addressed them and lower courts have struggled in various capacities with each question.

Consider first whether law enforcement can invoke *Quarles* before commencing an interrogation. The government's decision to do so prior to questioning Tsarnaev in 2013 was unusual, and highlighted yet another question left unanswered by *Quarles*. The first of only two other instances, at least in case law, wherein the government preemptively relied on *Quarles* to question a suspect without *Miranda*, occurred shortly after the Marathon Bombings.[253] In *United States v. Rogers*, FBI agents received a tip that defendant planned "to destroy a radio tower or communications equipment in the City of Montevideo, raid the National Guard armory, and attack the Montevideo police station."[254] Based in part on that tip, the FBI obtained a search warrant to seize firearms and other related personal property associated with explosives or explosive-making.[255]

Agents located the defendant while executing the search warrant and took him into custody.[256] One agent in particular believed that an attack was imminent and therefore wanted to speak with the defendant immediately.[257] That agent preemptively declined to give the defendant

252. Arguably also unanswered by *Quarles* is the question of who the relevant "public" is in the public safety exception. *See Id.* at 657; *cf.* United States v. Fautz, 812 F. Supp. 2d 570, 621 (D.N.J. 2011) (noting "public safety" includes officer safety); State v. Betances, 828 A.2d 1248, 1255–57 (Conn. 2003) (discussing who "public" in "public safety" includes). Given that that question is less relevant to the Boston Marathon bombing, this Article does not consider it.

253. *See* United States v. Rogers, No. 13-cr-130, 2013 WL 6388459, at *3–4 (D. Minn. Aug. 29, 2013). There is also language in *United States v. Abdulmutallab* implying that the FBI invoked the public safety exception prior to questioning defendant:

> Mindful of Defendant's self-proclaimed association with al-Qaeda and knowing the group's past history of large, coordinated plots and attacks, the agents feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world. For these reasons, Agent Waters questioned Defendant for about 50 minutes without first advising him of his *Miranda* rights.

No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011). The *Abdulmutallab* opinion is not addressed here given that the opinion is not explicit on the question of preemptive invocation.

254. 2013 WL 6388459, at *2.

255. *Id.*

256. *Id.* at *4.

257. *Id.* at *4–5.

his *Miranda* warnings;[258] indeed, with the Marathon Bombings on his mind,[259] the agent proceeded to question the defendant for forty minutes.[260] To explain his rationale for doing so, the agent would later testify, "[w]e utilized the public safety exception, specifically because we had solid information that a plot was in the works, that an individual had weapons, explosives, and knowledge, wherewithal, those things, in order to commit a plot."[261]

Noting in part that the interrogating agent focused his questions on "the nature and quantity of the explosive and incendiary devices," "who else had access to similar devices or weapons," and the defendant's "potential collaborators and associates,"[262] the reviewing magistrate recommended denial of the defendant's motion to suppress incriminating statements he made during the public safety interrogation.[263] Although not every question was crafted "meticulously," the court emphasized that the questions must be viewed "in the context of the haste and urgency that created the public exigency, not in the calm and academic setting afforded by retrospective review."[264]

Fascinatingly, the district court in part rejected the magistrate's recommendation and ordered that certain pre-*Miranda* statements be suppressed.[265] Focusing on the wide scope of the agent's questions, the court found problematic questions "about when [the defendant] handled particular firearms explaining to [the defendant] that fingerprints cannot be dated."[266] Admission of answers to those and similar questions, the court reasoned, would expand "public safety" questioning "to include nailing down by admission elements of an anticipated charging offense."[267] That, concluded the court, would improperly "allow the public safety exception to swallow the *Miranda* rule."[268]

The second preemptive invocation case arose early in 2014 when Terry Peace used an Internet forum to promote an attack against the

258. *Id.* at *5.
259. *Id.* at *4 ("The Boston Marathon bombings had occurred three weeks earlier and were forefront in the minds of Agent Ball and the other law enforcement officers involved in the investigation.").
260. *Id.* at *6.
261. *Id.* at *5.
262. *Id.* at *9.
263. *Id.* at *9–10.
264. *Id.* at *10.
265. United States v. Rogers, No. 13-130, 2013 WL 6388457, at *5 (D. Minn. Dec. 6, 2013).
266. *Id.* at *4.
267. *Id.*
268. *Id.*

government.[269] Using a confidential informant, the government in *United States v. Peace* set up a meeting with Peace to deliver decoy explosives to him.[270] Peace was arrested at the meeting site, along with a confederate in the afternoon—approximately 1:35 p.m.—and taken into custody.[271]

Meanwhile, the FBI "had previously determined that the apprehension of defendants posed an 'emergency situation.'"[272] Feeling they were "good to go on the public safety exception," the FBI therefore elected to interrogate the defendant for nearly an hour without *Miranda* warnings.[273] The court acknowledged that Peace's interrogation extended the traditional boundaries of public safety, but otherwise paid no specific attention to the government's premeditated invocation of *Quarles*.[274] Given the court's decision to deny the defendant's motion to suppress, however, the inference of judicial approval is unmistakable.[275]

Consider next the permissible scope of *Quarles*-based questions that courts have deemed appropriate to secure the public's safety. Stated generally, courts typically admit answers to questions pursuant to *Quarles* that are not investigative in nature.[276] Thus, beyond the basic "where is the gun,"[277] illustrative permissible questions include "[w]hat

269. United States v. Peace, No. 4:14-CR-11-HLM-WEJ-1, 2014 WL 6908394, at *1 (N.D. Ga. Sept. 25, 2014); *see also* Ryan J. Reilly, *Georgia Men Used Facebook to Plot Anti-Government Militia Uprising, Prosecutors Say*, HUFFINGTON POST (Feb. 21, 2014, 07:07 PM), http://www.huffingtonpost.com/2014/02/21/georgia-militia-facebook_n_4834322.html. A magistrate authored this *Peace* opinion; his recommendations about the applicability of the public safety exception were subsequently adopted in pertinent part. *See* United States v. Peace, No. 4:14-CR-011-01-HLM-WEJ, 2014 WL 6908412, at *4–5 (N.D. Ga. Dec. 8, 2014).

270. *Peace*, 2014 WL 6908394, at *3.

271. *Id.*

272. *Id.*

273. *Id.* at *3–6. The interrogation lasted from roughly 2:44 p.m. until 3:39 p.m. *Id.* at *4, *6. The government sought only to introduce statements the defendant made between 2:44 p.m. and 3:14 p.m. *See Id.* at *2 n.2.

274. *Id.* at *12–13 ("[P]olice here subjected defendant to a lengthy, pre-planned interrogation, which was intended to neutralize a less defined, less isolated threat than a gun or other dangerous instrumentality located within the vicinity of the suspect and officers.").

275. *Id.* at *13, *19.

276. *See, e.g.*, United States v. Brady, 819 F.2d 884, 888 (9th Cir. 1987); United States v. Chartier, No. 13-CR-18-LRR, 2013 WL 5719482, at *7–8 (N.D. Iowa Oct. 21, 2013), *aff'd*, 772 F.3d 539 (8th Cir. 2014); United States v. Dominguez, No. 11-CR-0129-CVE, 2011 WL 4857867, at *3–5 (N.D. Okla. Oct. 13, 2011); United States v. Garcia-Meza, No. 1:02-CR-56, 2003 U.S. Dist. LEXIS 8318, at *9–10 (W.D. Mich. May 6, 2003), *aff'd*, 403 F.3d 364 (6th Cir. 2005); United States v. Harris, 961 F. Supp. 1127, 1134 (S.D. Ohio 1997); Jackson v. State, 146 P.3d 1149, 1159 (Okla. Crim. App. 2006); State v. Barros, No. 36915-6-I, 1997 WL 177525, at *4 (Wash. Ct. App. Apr. 14, 1997).

277. *See* Gallini app. 1, *supra* note 45.

is that object,"[278] "the number and whereabouts of the remaining robbers,"[279] and whether the suspect has "any drugs or needles on his person."[280] By comparison, impermissible investigative questions include "[w]hy do you have this gun,"[281] "is there anything in here I need to know about,"[282] "[d]o you have anything on you,"[283] "do you have any of these items,"[284] and "who owned the suitcase."[285]

Interestingly—but problematically—not all courts evaluate the permissibility of public safety questions solely by considering whether they are investigative in nature. Indeed, some courts, apparently the minority, are willing to admit a suspect's responses to questions that, in part, may elicit incriminating information so long as officers asked them spontaneously.[286] Still other courts focus less on the precise wording of the question and more on the temporal relationship between the question and the immediacy of any threat.[287] The disagreement amongst lower courts about how to evaluate the permissibility of an officer's question can produce directly conflicting results. Some courts, for example, admit responses to an officer asking, "is there anything we need to be aware of,"[288] whereas others conclude that that same question is "open-ended" and "framed to elicit an incriminating response."[289]

Confusion likewise persists in courts nationwide about whether a suspect's invocation of the right to silence or counsel impacts admission

278. State v. Sneed, 851 N.E.2d 532, 535 (Ohio Ct. App. 2006) (alteration in original).
279. People v. Howard, 556 N.Y.S.2d 940, 942 (App. Div. 1990).
280. United States v. Carrillo, 16 F.3d 1046, 1049 (9th Cir. 1994).
281. United States v. Coleman, No. 10-484, 2011 WL 2619543, at *4 n.3 (D.N.J. July 1, 2011), *aff'd,* 545 F. Appx. 156 (3d Cir. 2013).
282. United States v. Redrick, 48 F. Supp. 3d 91, 100 (D.D.C. 2014); *see also* Commonwealth v. Jones, No. 06-P-1072, 2007 WL 4208714, at *1 (Mass. App. Ct. Nov. 29, 2007).
283. State v. Strozier, 876 N.E.2d 1304, 1307 (Ohio Ct. App. 2007).
284. People v. Allen, 199 P.3d 33, 38 (Colo. App. 2007).
285. People v. Roundtree, 482 N.E.2d 693, 696 (Ill. App. Ct. 1985); *see* People v. Johnson, 716 N.Y.S.2d 493, 494 (App. Div. 2000) (holding *Quarles* did not allow admission of incriminating statement made in response to officer's question about whether defendant owned a pair of pants).
286. *See, e.g.*, United States v. Newsome, 475 F.3d 1221, 1225 (11th Cir. 2007); United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005); United States v. Newton, 369 F.3d 659, 678–79 (2d Cir. 2004); United States v. Williams, 181 F.3d 945, 953 n.13 (8th Cir. 1999).
287. *See, e.g.*, United States v. Hasan, 747 F. Supp. 2d 642, 665–66 (E.D. Va. 2010); United States v. Molina-Tepozteco, No. 07-181 (PJS/SRN), 2007 WL 3023292, *5–6 (D. Minn. Oct. 12, 2007); State v. Hazley, 428 N.W.2d 406, 411 (Minn. Ct. App. 1988).
288. *Williams*, 181 F.3d at 953; United States v. Nelson, 489 F. Supp. 2d 309, 315 (S.D.N.Y. 2007).
289. Commonwealth v. Jones, No. 06-P-1072, 2007 WL 4208714, at *2 (Mass. App. Ct. Nov. 29, 2007); *see also* United States v. Redrick, 48 F. Supp. 3d 91, 96, 104 (D.D.C. 2014).

of incriminating statements obtained pursuant to *Quarles*.[290] Shortly before *Quarles*, the Supreme Court in 1981 held in *Edwards v. Arizona* that an accused's request for counsel terminates the interrogation until an attorney is present.[291] Some federal and state courts hold that *Quarles* trumps *Edwards*; thus, statements taken during a public safety interrogation are admissible despite noncompliance with *Miranda*.[292] Those courts typically reason that public safety concerns do not dissipate simply because a defendant seeks to invoke his rights.[293]

The Ninth Circuit's widely cited 1989 decision in *United States v. DeSantis* is illustrative.[294] In *DeSantis*, the defendant contended that he requested an attorney as soon as law enforcement entered his apartment to arrest him.[295] Because he immediately sought counsel, he further argued that his later statement that "there was a gun on the shelf in the closet" should be suppressed.[296] Recognizing that it faced a novel issue, the Ninth Circuit held that *Quarles* applies even where a suspect invokes his right to counsel.[297] The court reasoned, in oft-quoted language,[298] that "[s]ociety's need to procure the information about the lo-

290. State v. Cosby, 169 P.3d 1128, 1138–39 (Kan. 2007) (discussing conflict but "declin[ing] to "weigh in").

291. 451 U.S. 477, 484–85 (1981).

292. **Federal cases**. *See, e.g.*, United States v. Bell, 343 F. App'x 72, 74 (6th Cir. 2009); United States v. Mobley, 40 F.3d 688, 692–93 (4th Cir. 1994); United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989); United States v. Dominguez, No. 11-CR-0129-CVE, 2011 WL 4857867, at *3–4 (N.D. Okla. Oct. 13, 2011); Palmer v. Greiner, 00 Civ. 6677 WHPRLE, 2003 WL 22019740, at *8–9 (S.D.N.Y. Aug. 22, 2003).
State cases. *See, e.g.*, State v. Stanley, 809 P.2d 944, 949 (Ariz. 1991), *cert. denied*, 502 U.S. 1014 (1991); People v. Broderick, No. E060006, 2015 WL 401747, at *4 (Cal. Ct. App. Jan. 30, 2015); People v. Alger, No. A126581, 2012 WL 293596, at *19–20 (Cal. Ct. App. Jan. 31, 2012); People v. Brewer, No. A100489, 2004 WL 363496, at *7–8 (Cal. Ct. App. Feb. 27, 2004); People v. Tritchler, 55 Cal. Rptr. 2d 650, 657 (Ct. App. 1996); Trice v. United States, 662 A.2d 891, 895 (D.C. 1995); Borrell v. State, 733 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1999); State v. Melendez, 30 A.3d 320, 334–35 (N.J. Super. Ct. App. Div. 2011); People v. Kimes, 831 N.Y.S.2d 1, 13 (App. Div. 2006); People v. Palmer, 693 N.Y.S.2d 539, 540–41 (App. Div. 1999); State v. Meyer, No. WM-03-008, 2004 WL 2334150, at *4–5 (Ohio Ct. App. Sept. 30, 2004); State v. Davis, No. 96-CO-44, 1999 WL 1050092, at *5–7 (Ohio Ct. App. Nov. 19, 1999); State v. Taylor, No. 92CA005313, 1992 WL 380624, at *2–3 (Ohio Ct. App. Dec. 16, 1992); State v. Kunkel, 404 N.W.2d 69, 75–76 (Wis. 1987).

293. *See, e.g.*, *Mobley*, 40 F.3d at 692–93; *DeSantis*, 870 F.2d at 541; *Tritchler*, 55 Cal. Rptr. 2d at 657–58.

294. 870 F.2d at 538–41.

295. *Id.* at 537.

296. *Id.*

297. *Id.* at 541.

298. *See, e.g.*, *Mobley*, 40 F.3d at 692; Trice v. United States, 662 A.2d 891, 895 (D.C. 1995); Borrell v. State, 733 So. 2d 1087, 1089 (Fla. Dist. Ct. App. 1999).

cation of a dangerous weapon is as great after, as it was before, the request for counsel."[299]

But *DeSantis* was not universally embraced. Many jurisdictions hold that a suspect's invocation of counsel or silence renders *Quarles*-based statements inadmissible.[300] Still, other courts reason either that cases where a suspect seeks to invoke counsel or silence typically do not involve an "immediate necessity"[301] or that the *Quarles* exception is too narrow to allow such an expansive interpretation.[302] Moreover, at least one other court has expressed concern that applying *Quarles* to statements made after a defendant invokes counsel could improperly allow officers to decide for themselves the effectiveness of a suspect's invocation.[303] Identifying a unifying analytical thread among these jurisdictions' decisions is challenging to say the least.

Although less controversial than some of the other unanswered *Quarles* issues, whether *Quarles* allows for the admission of an involuntary or coerced statement remains an open question.[304] As a firm general rule in the lower courts—state or federal—*Quarles* does not allow admission of involuntary statements, that is, statements obtained through coercion, the admission of which would normally violate due process.[305] Those courts almost uniformly reason that although *Quarles*

299. *DeSantis*, 870 F.2d at 541.

300. **Federal cases**. *See, e.g.*, United States v. Fautz, 812 F. Supp. 2d 570, 633 (D.N.J. 2011); Williams v. Jacquez, No. CIV S-05-0058 LKK GGH, 2011 WL 703616, at *14 (E.D. Cal. Feb. 18, 2011); United States v. Guess, 756 F. Supp. 2d 730, 745 (E.D. Va. 2010); United States v. Brown, No. CR05-73-S-EJL, 2005 WL 2847434, at *7 (D. Idaho Oct. 26, 2005).

State cases. *See, e.g.*, People v. Ingram, 984 P.2d 597, 605 (Colo. 1999); People v. Laliberte, 615 N.E.2d 813, 819–23 (Ill. App. Ct. 1993); Commonwealth v. Bruce, No. CRIM. A. 99-1226, 2000 WL 1545790, at *5 (Mass. Dist. Ct. Oct. 18, 2000); State v. Gonzalez, No. A05-2151, 2007 WL 46029, at *9–10 (Minn. Ct. App. Jan. 9, 2007); State v. Cross, No. A-93-368, 1993 WL 311554, at *4 (Neb. Ct. App. Aug. 17, 1993); State v. Pante, 739 A.2d 433, 438 (N.J. Super. Ct. App. Div. 1999); State v. Thompson, Nos. 98 JE 28, 98 JE 29, 2001 WL 69197, at *11 (Ohio Ct. App. Jan. 24, 2001); State v. Miller, 709 P.2d 225, 241 (Or. 1985); Russell v. State, 215 S.W.3d 531, 534–36 (Tex. Ct. App. 2007); State v. Harris, 544 N.W.2d 545, 553 (Wis. 1995).

301. *E.g.*, *Cross*, 1993 WL 311554, at *4.

302. *E.g.*, *Ingram*, 984 P.2d at 605.

303. People v. Zanini, No. F038571, 2003 WL 103464, at *5 (Cal. Ct. App. Jan. 10, 2003).

304. The *Quarles* Court itself expressly disclaimed resolution of this issue. 467 U.S. 649, 654 (1985) ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist."). Moreover, it observed that Quarles was free to argue "that his statement was coerced under traditional due process standards." *Id.* at 655 n.5.

305. **Federal cases**. United States v. Carroll, 207 F.3d 465, 472 (8th Cir. 2000); United States v. DeSantis, 870 F.2d 536, 540 (9th Cir. 1989); United States v. Buchanan, No.

is an exception to *Miranda*, it is not an exception to the requirements of due process.[306] Perhaps not surprisingly, then, no court has interpreted *Quarles* to allow for admission of an arguably coerced or involuntary statement.[307]

C. Applying Quarles to the Holmes interrogation

Let us return to July 2012, when all of the unanswered *Quarles* questions surfaced during the Holmes interrogation. Following Holmes's apprehension, officers interrogated him three separate times: (1) at the scene, (2) approximately two hours following his arrest, and (3) approximately fifteen hours after his arrest.[308] Holmes gave incriminating responses during each interrogation—responses that the prosecution would later seek to admit at his trial on the basis of *Quarles*.[309]

As the prosecution and defense battled over the admissibility of Holmes's statements, they did so against the backdrop of relatively undeveloped *Quarles*-based law. Indeed, the law surrounding the public safety exception is not particularly well-developed either in the Tenth Circuit or in Colorado state courts. Prior to the Aurora shooting, only two Colorado state cases considered application of the public safety exception,[310] whereas the Tenth Circuit had addressed *Quarles* in twelve

3:14-00062, 2015 WL 247876, at *10–11 (M.D. Tenn. Jan. 20, 2015); United States v. Stanton, No. 11-57, 2013 WL 228241, at *5–6 (W.D. Pa. Jan. 22, 2013); United States v. Kelly, No. 08-109 (1) (RHK/RLE), 2008 WL 5382272, at *6 (D. Minn. Dec. 23, 2008); United States v. Rosario, 558 F. Supp. 2d 723, 729 (E.D. Ky. 2008); United States v. Veilleux, 846 F. Supp. 149, 154 (D.N.H. 1994); United States v. Rullo, 748 F. Supp. 36, 40–42 (D. Mass. 1990).

State cases. People v. Coffman, 96 P.3d 30, 76 (Cal. 2004); People v. Fanelli, No. D050425, 2007 WL 2626215, at *3–4 (Cal. Ct. App. Sept. 12, 2007); Green v. United States, 974 A.2d 248, 261–62 (D.C. 2009); *In re* B.R., 479 N.E.2d 1084, 1086–87 (Ill. App. Ct. 1985); State v. Leone, 581 A.2d 394, 397 (Me. 1990); Commonwealth v. Batista, Nos. CRIM. A. 99-0512, CRIM A. 99-513-515, 2000 WL 192247, at *5 (Mass. Super. Jan. 21, 2000), *aff'd*, 761 N.E.2d 523 (2002); State v. Morrisey, 214 P.3d 708, 719 (Mont. 2009); State v. Brown, No. 94-CA-15, 1994 WL 721586, at *2 (Ohio Ct. App. Dec. 21, 1994).

306. *See, e.g.*, *Carroll*, 207 F.3d at 472; *DeSantis*, 870 F.2d at 540; *In re* J.D.F., 553 N.W.2d 585, 589–90 (Iowa 1996).

307. *But cf.* Price v. State, 591 N.E.2d 1027, 1030 (Ind. 1992).

308. Ingold & Steffen, *"There Weren't Any Children Hurt, Were There?," supra* note 18; John Ingold & Jordan Steffen, *Gunman Quit CU Program One Month Before Attack*, DENVER POST (May 5, 2015, 1:14 AM).

309. *See* Robles, *supra* note 21; Keith Coffman, *Court Bars Some Statements by Accused Colorado Theater Gunman,* REUTERS (Nov. 8, 2013, 7:46 PM), http://www.reuters.com/article/2013/11/09/us-usa-shooting-denver-idUSBRE9A70ZM20131109.

310. People v. Ingram, 984 P.2d 597, 605 (Colo. 1999); People v. Allen, 199 P.3d 33, 36 (Colo. App. 2007).

cases.[311] As a result, there is little case law, in either jurisdiction, addressing the questions left unanswered by *Quarles*, namely (1) whether investigators can preemptively "invoke" *Quarles* before an interrogation, (2) the permissible scope of questions that are necessary to secure the public's safety, (3) whether the suspect's invocation of counsel impacts *Quarles*, and (4) whether *Quarles* allows for the admission of an involuntary statement.

Despite the absence of a robust *Quarles* doctrine in either jurisdiction, the Colorado Court of Appeals, in *People v. Allen*, considered whether *Quarles* applied to post-arrest statements made by a defendant during booking.[312] During the booking process, the defendant first denied possessing contraband.[313] But a subsequent search of the defendant's person uncovered marijuana.[314] After the deputy asked, "[W]hy didn't you tell me about this before?" the defendant responded in part, "I don't know. I didn't recall it was there."[315] The defendant appealed his conviction for introducing contraband, arguing the officer's question exceeded the scope of *Quarles*.[316] The court agreed, noting that the officer neither acted with urgency, nor did he limit his questions to the presence of weapons or dangerous items.[317] Although the court acknowledged that "courts elsewhere have applied the public safety exception in other contexts," it emphasized that "the public safety exception applies most readily in the context of immediate, on-scene investigations of crime."[318]

For its part, the Tenth Circuit first addressed the permissible scope of questions under the public safety exception in *United States v. Padilla*. Decided in 1987*, Padilla* held that public safety permitted a detective responding to a shots-fired call to ask (1) if the defendant was

311. United States v. DeJear, 552 F.3d 1196, 1202 (10th Cir. 2009); United States v. Donachy, 118 F. App'x 424, 426-27 (10th Cir. 2004); United States v. Phillips, 94 F. App'x 796, 801 (10th Cir. 2004); United States v. Morrison, 58 F. App'x 381, 385 (10th Cir. 2003); United States v. Wynne, No. 01-6386, 2003 WL 42508, at *3–4 (10th Cir. Jan. 7, 2003); United States v. Lackey, 334 F.3d 1224, 1226 (10th Cir. 2003); United States v. Holt, 264 F.3d 1215, 1226 (10th Cir. 2001); Stauffer v. Zavaris, No. 93-1358, 1994 WL 532739, at *3–4 (10th Cir. Sept. 29, 1994); United States v. Maestas, No. 91-2219, 1992 WL 113745, at *1–2 (10th Cir. May 28, 1992); United State v. Padilla, 819 F.2d 952, 961 (10th Cir. 1987); United States v. Paetsch, 900 F. Supp. 2d 1202, 1220 (D. Colo. 2012), *aff'd*, 782 F.3d 1162 (10th Cir. 2015); United States v. Creech, 52 F. Supp. 2d 1221, 1230 (D. Kan. 1998), *aff'd*, 221 F.3d 1353 (10th Cir. 2000).

312. 199 P.3d at 35–37.

313. *Id.* at 34.

314. *Id.*

315. *Id.*

316. *Id.* at 36–37.

317. *Id.*

318. *Id.*

okay and (2) whether people were injured inside the house.[319] The court reasoned that the detective "needed a response to his questions, not to obtain evidence against [the defendant] but to prevent further injury to anyone inside the house or to the officers outside."[320]

After *Padilla*, courts in the Tenth Circuit—like every other jurisdiction—began to gradually expand the reach of *Quarles*. Apart from admitting answers to routine questions related to presence or location of weapons,[321] the Tenth Circuit, in 1992, admitted a defendant's response to an officer asking, "What is that?" after feeling a suspicious bulge in the defendant's front pocket during a pat-down.[322] Then, in 2003, it applied *Quarles* to admit a defendant's responses to questions necessary to secure an officer's safety, like, "[d]o you have any guns or sharp objects on you."[323] The court, in 2004, also relied on *Quarles* to admit a defendant's responses, during the execution of a search warrant, to an officer's query about whether drugs or weapons were in the defendant's home.[324] Finally, in 2009, the Tenth Circuit applied the public safety exception to an officer's question about what a defendant stuffed into the pocket of a car seat.[325]

Colorado state and federal courts have also considered whether *Quarles* trumps a suspect's invocation of *Miranda* rights. In 2012, officers in *United States v. Paetsch* briefly questioned a defendant three separate times after detaining him during a roadside investigation into a recent bank robbery.[326] During the third interaction, an officer asked if the defendant had any firearms in the vehicle.[327] He replied, "Yes, I have a Glock and a Walther handgun inside the vehicle."[328] The federal district court in *Paetsch* suppressed the defendant's response because

319. 819 F.2d at 960–61.

320. *Id.* at 961.

321. United States v. Donachy, 118 F. App'x 424, 426 (10th Cir. 2004); United States v. Wynne, No. 01-6386, 2003 WL 42508, at *3 (10th Cir. Jan. 7, 2003) ("Under *Quarles*, officers may—without violating the suspect's constitutional rights—ask a suspect in custody whether he had a weapon before Mirandizing him, as long as the question is 'necessary to secure their own safety or the safety of the public.'"); United States v. Holt, 264 F.3d 1215, 1226 (10th Cir. 2001); Stauffer v. Zavaris, No. 93-1358, 1994 WL 532739, at *3–4 (10th Cir. Sept. 29, 1994).

322. United States v. Maestas, No. 91-2219, 1992 WL 113745, at *1 (10th Cir. May 28, 1992).

323. United States v. Lackey, 334 F.3d 1224, 1228 (10th Cir. 2003); *see also* United States v. Morrison, 58 F. App'x 381, 385 (10th Cir. 2003) (holding that questioning is permitted when the purpose is to protect police officers).

324. United States v. Phillips, 94 F. App'x 796, 801 (10th Cir. 2004).

325. United States v. DeJear, 552 F.3d 1196, 1202 (10th Cir. 2009).

326. 900 F. Supp. 2d 1202, 1206–10 (D. Colo. 2012).

327. *Id.* at 1210.

328. *Id.*

he unambiguously invoked his *Miranda* right to counsel.[329] Although the court, citing *DeSantis*, acknowledged that "the public safety exception . . . also applies to interrogation that occurs after a suspect has requested to speak to an attorney,"[330] it reasoned that the scene was secure and "there was no realistic risk of the defendant being able to regain access to any weapons in his vehicle."[331]

Prior to *Paetsch*, a federal district court in *United States v. Creech* considered whether *Quarles* applied to a defendant's ambiguous invocation of counsel,[332] followed by his reinitiating a dialogue with investigators.[333] The court held that *Quarles* permitted admission of the defendant's incriminating responses, despite his ambiguous invocation of counsel in response to officers' questions about the presence of weapons inside the defendant's apartment.[334]

Colorado state courts seem to have taken a clearer position. In *People v. Ingram*, the Colorado Supreme Court held that *Quarles* precluded admission of a defendant's incriminating statement made after the defendant invoked his *Miranda* right to silence while he sat in police custody for roughly four hours.[335] In its reasoning, the court distinguished *Quarles*, noting that, "in *Quarles*, only the prophylactic protections of *Miranda* were at issue, whereas in the instant case, [the defendant] had invoked his constitutional right to remain silent."[336] Moreover, said the court, the defendant sat in custody for several hours, which demonstrated "that there was no 'immediate necessity'" and thus "no exigency [existed] in the circumstances surrounding the investigation."[337]

Consider that backdrop against law enforcement's three separate interrogations of James Holmes on July 20, 2012. Officers' first interrogation of Holmes that day was a brief one that consisted of a few questions immediately following his apprehension and arrest.[338] The scene preceding his arrest was chaotic to say the least. Officers Jason Oviatt and Jason Sweeney arrived at roughly 12:43 a.m. to find "a war zone" scene approximately ninety seconds after receiving the call from dis-

329. *Id.* at 1219–20.
330. *Id.* at 1220–21 (citing United States v. DeSantis, 870 F.2d 536, 541 (9th. Cir. 1989)).
331. *Id.* at 1221.
332. 52 F. Supp. 2d 1221, 1228–30 (D. Kan. 1998), *aff'd*, 221 F.3d 1353 (10th Cir. 2000).
333. *Id.* at 1231–32.
334. *Id.*
335. 984 P.2d 597, 605 (Colo. 1999).
336. *Id.*
337. *Id.*
338. *See* Tenser & Padilla, *supra* note 17.

patch.[339] After following a trail of blood on the backside of the complex, officers spotted Holmes standing next to a parked white car.[340] Although officers initially assumed that Holmes, who was dressed in tactical gear, was a fellow officer, Sweeney noticed that the gas mask Holmes wore was not department-issued.[341]

Officers approached Holmes from the passenger's side of the vehicle and pointed their guns at him.[342] Officer Sweeney ordered Holmes to put his hands up; Holmes immediately complied.[343] Officers ordered Holmes to put his face down on the ground; Holmes again complied.[344] As Holmes was on the ground, another officer, Justin Grizzle, arrived to assist Oviatt with securing Holmes and placing him under arrest.[345] After moving Holmes away from the car, Officer Oviatt removed Holmes's helmet and gas mask for the first time.[346] Officer Sweeney asked Holmes "if there was anybody else with him."[347] Holmes responded, "No, it's just me."[348]

Following his arrest, officers moved Holmes to the back seat of a patrol car where Oviatt and a new officer, Officer Aaron Blue, remained with Holmes.[349] While in the car, Blue opened Holmes's wallet and looked at his driver's license.[350] Blue then asked Holmes if he had any weapons on him.[351] Holmes replied that he had "four guns" and "didn't have any bombs [at the theater], but had improvised explosive devices at his house" that would not "go off unless [police officers] set them off."[352] Blue asked Holmes if the address on his driver's license was the same address Holmes mentioned; Holmes answered "yes."[353] Blue then asked Holmes if anybody else was with him, to which Holmes responded "no."[354] Following a thorough search of Holmes's person, officers

339. Steffen, *The Latest from Day 4*, *supra* note 16; Order Re. Mot. to Suppress Mr. Holmes' July 20, 2012 Alleged Statements to Officers Sweeney, Oviatt, and Blue (D-124) at 3, People v. Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. Nov. 1, 2013) [hereinafter Order Re. D-124].

340. Order Re. D-124, *supra* note 339, at 4.

341. *Id.* at 5.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 7.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

transported him to the station wearing only his underwear and t-shirt.[355]

With the first interrogation complete, the second would not occur until 2:44 a.m. when Detectives Chuck Mehl and Craig Appel interviewed Holmes back at the Aurora Police Department.[356] At the outset of the interview, which lasted fewer than eight minutes, detectives greeted Holmes, asked if he needed anything to drink, and asked booking questions.[357] Detective Mehl then asked, "Do you need us to get you some help or are you good to talk to us?"[358] Holmes replied, "Help as in counsel?"[359] Detective Mehl replied, "No, no. As in making sure you're ok physically. The paramedics check you out, are you okay there? You good to talk to us?"[360] Holmes answered in the affirmative, which prompted Mehl to tell Holmes they first had "to get a couple things out of the way," namely, *Miranda* warnings.[361]

As Detective Mehl prepared to read Holmes his *Miranda* rights, Holmes interrupted and asked, "There weren't any children hurt, were there?"[362] Detective Mehl replied, "We'll get to that."[363] Mehl commenced advising Holmes of his rights and then asked him if he understood his right to talk to a lawyer and to have the lawyer present during questioning.[364] Holmes responded, "How do I get a lawyer?"[365] Mehl replied that they would talk about that.[366] At the end of the warnings, Holmes said he wanted to "invoke the Sixth Amendment."[367] The detectives confirmed that he was invoking his right to counsel and acknowledged his affirmative response.[368] But despite Holmes's invocation, the detectives asked Holmes three additional questions about accomplices.[369] When asked if there was anyone with him at the theater, Holmes

355. *Id.* at 12–13.
356. Order Re. Mot. to Suppress Mr. Holmes' July 20, 2012 Statement to Detectives Mehl and Appel (D-126) at 16, People v. Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. Nov. 7, 2013) [hereinafter Order Re. D-126].
357. *Id.* at 16–17.
358. *Id.*
359. *Id.*
360. *Id.* at 17.
361. *Id.* at 18.
362. Ingold & Steffen, *"There Weren't Any Children Hurt, Were There?"*, *supra* note 18.
363. *Id.*
364. *Id.*
365. Order Re. D-126, *supra* note 356, at 18–19.
366. *Id.* at 19.
367. *Id.*
368. *Id.*
369. *Id.*

responded, "Except for the 100 people in the movie theater, no."[370] The interview terminated at 2:51 a.m.[371]

The third interrogation occurred around noon on July 20, 2012, when officers determined that they needed more information in order to safely defuse the explosives in Holmes's apartment.[372] Holmes agreed to investigators' request that he answer questions related only to his apartment.[373] The interrogation began around 3:30 p.m., roughly fifteen hours after the shooting, and lasted about forty minutes.[374] Holmes described in detail two explosive systems in his apartment and told the officers that he set the bombs in his apartment to distract police officers while he carried out the theater shooting.[375] Holmes would go on to answer all of the officers' questions in great detail without refusing to answer any of them.[376]

As Holmes's trial approached eleven months later, his attorneys moved to suppress the statements Holmes made to the police during all three interrogations.[377] In response, Judge Carlos Samour, writing for the Arapahoe County District Court, held that *Quarles* permitted admission of Holmes's un-Mirandized statements at the scene.[378] The court reasoned that "the questions propounded to [Holmes] by Officers Sweeney and Blue were justified by an objectively reasonable need to protect the public and officers from immediate and grave danger."[379] The court moreover found Holmes's statements voluntary.[380]

More interesting was the court's response to Holmes's efforts to suppress the statements he made two hours after the shootings to Detectives Mehl and Appel at the Aurora Police Department.[381] Holmes contended that the detectives violated his *Miranda* right to counsel by continuing to question him after he "unambiguously asserted" his right to counsel.[382] Despite the State's responsive assertion that the public

370. Ingold & Steffen, *"There Weren't Any Children Hurt, Were There?"*, *supra* note 18.
371. Mot. to Suppress (D-126), *supra* note 23, at 2.
372. Order Re. Mot. to Suppress Mr. Holmes' July 20, 2012 Statement to Special Agent Gumbinner and Detective Appel (D-127) at 36-37, People v. Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. Jan. 9, 2014) [hereinafter Order Re. D-127].
373. *Id.* at 41.
374. *Id.* at 38, 43.
375. Ingold & Steffan, *"There Weren't Any Children Hurt, Were There?"*, *supra* note 18.
376. Order re. D-127, *supra* note 372, at 43.
377. Ingold & Steffen, *James Holmes Allowed to Plead Guilty*, *supra* note 19.
378. Order Re. D-124*, supra* note 339, at 28.
379. *Id.*
380. *Id.* at 33.
381. Mot. to Suppress (D-126), *supra* note 23, at 1.
382. *Id.*

safety exception trumps a suspect's *Miranda* invocation,[383] the court suppressed Holmes's post-invocation statements.[384] Citing *Ingram*,[385] the court reasoned that the "People failed to establish that there were exigencies surrounding the interrogation and that there was an immediate necessity which justified the detectives' failure to scrupulously honor the defendant's request for counsel."[386] But, reasoned the court, "had an exigency existed, the detectives presumably would not have waited to ask the questions until after the *Miranda* warnings were recited."[387]

Finally, Holmes moved to suppress the statements he made during the 3:30 p.m. interrogation.[388] Holmes again argued that officers violated his right to counsel because his *Miranda* right-to-counsel invocation persisted pursuant to *Edwards* and he did not reinitiate communication with law enforcement.[389] He further argued that his statements were involuntary in part because the police "made an implied promise to [him] that any statement he gave would not be used against him in a subsequent proceeding."[390] That implied promise, said Holmes, occurred when Detective Appel, who knew that Holmes had invoked his right to counsel, told Holmes he only had questions about the explosives in his apartment "because [they] were concerned about the safety of the public in and around his apartment."[391]

This time, the court elected to admit some of the statements but to suppress others. The court first held that Holmes's statements were voluntary by reasoning that Detective Appel's comments "related to the reasons the officers were there and asking to talk to him—the public's safety."[392] In rejecting Holmes's invocation argument, the court next held, citing *DeSantis*,[393] that *Quarles* trumps *Edwards*; that is, the need for public safety trumped Holmes's *Miranda* right to counsel.[394] According to the court, "virtually every jurisdiction that has dealt with the issue has concluded that certain exigencies may warrant application of

383. Resp. to Def. Mots. to Suppress Statements of the Defendant (D-124, D-125, D-126, and D-127) at 16, People v. Holmes, No. 12CR1522 (Arapahoe Cnty. Dist. Ct. July 02, 2013).
384. Order re. D-126, *supra* note 356, at 2.
385. *Id.* at 36.
386. *Id.* at 30.
387. *Id.* at 36.
388. Mot. To Suppress (D-127), *supra* note 23, at 1.
389. *Id.* at 4.
390. *Id.* at 7.
391. *Id.* at 7.
392. Order re. D-127, *supra* note 372, at 108.
393. *See supra* notes 294–299 and accompanying text.
394. Order Re. D-127, *supra* note 372, at 8.

the public safety exception to the rule of *Edwards*."[395] And, in this case, said the court, officers investigating Holmes's apartment confronted a "grave and highly dangerous situation that placed at great risk the lives of first responders and members of the community."[396] Accordingly, the court concluded some of Detective Appel's questions were "reasonably prompted by a concern for the public safety and the safety of the first responders."[397]

But, the court noted, "[Holmes] made some statements that were evoked by questions that were not reasonably necessary to render the apartment safe."[398] Given that the public safety exception is "narrow,"[399] the court suppressed Holmes's responses to the questions about explosive devices outside the apartment, in his car, hidden in a backpack or package around the theater, and requests for information about "anything else [he] could think of."[400]

Whereas the Tsarnaev interrogation showcased the public safety exception's doctrinal shortcomings at the federal level,[401] the Holmes interrogation reflects a powerful example of state law enforcement's expansive interpretation of *Quarles*. Collectively, the Tsarnaev and Holmes interrogations amplify the clear point that *Quarles* is no longer a "narrow exception" but rather a doctrine that requires case-by-case analysis, unbound by any particular requirement.[402]

III.

Expanding judicial views of *Quarles* have remarkably evolved without any guidance from the Supreme Court since the decision's issuance in 1984. Unguided lower court and law enforcement expansion, though, is problematic because the Burger Court never considered applying the public safety exception to anything other than ordinary street crime.

395. *Id.* at 57.
396. *Id.* at 68.
397. *Id.* at 72.
398. *Id.* at 77.
399. *Id.* at 76.
400. Order re. D-127, *supra* note 372, at 77–79.
401. Gallini, *supra* note 41, at 438–42.
402. *See, e.g.*, United States v. Peace, No. 4:14-CR-11-HLM-WEJ-1, 2014 WL 6908394, at *13 (N.D. Ga. Sept. 25, 2014) ("*Quarles* does not drape a blanket over any class of cases (i.e., those that bear upon national security), but demands a case-by-case analysis."); *see also* United States v. Duncan, 308 F. App'x 601, 605 (3d Cir. 2009); United States v. Estrada, 430 F.3d 606, 612 (2d Cir. 2005) ("[W]e have described the public safety exception as 'a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of the circumstances in a given case.'" (quoting United States v. Reyes, 353 F.3d 148, 152 (2d Cir. 2003))).

Thus, neither in *Quarles*—nor since—has the Court addressed the constitutionality of *any* of the issues raised by the Tsarnaev interrogation. But that is not to say that it has not had its opportunities.

Quarles is, at its core, a *Miranda* decision. But by the time of *Quarles*, whether *Miranda* permitted a true exception to its applicability remained an open question. To be sure, some lower courts prior to *Quarles* had already construed *Miranda*'s definition of "interrogation" as inapplicable to, for example, "booking" or "pedigree" questions.[403] Other lower courts had also held that certain other questions did not constitute *Miranda* interrogation, like those considered "routine,"[404] "threshold,"[405] "neutral,"[406] or "casual, lone and conversational."[407] Some lower courts, more pointedly, had even already created an "on-scene questioning" exception for "an on the scene investigation of an emergency situation,"[408] or for "on-the-scene questioning designed to determine what had occurred."[409] Lower courts by the time of *Quarles* were particularly forgiving in an emergency when officers neglected to provide *Miranda* warnings before asking about the presence of a firearm.[410] Thus had emerged something of a general rule in the lower courts: "[w]here a state has alleged that there was a sufficiently compelling noninvestigatory purpose for asking questions of an accused who had not been informed of or waived his rights, . . . any statements made in response to the questions [may] be used by the prosecution at trial."[411]

403. *See, e.g.*, United States *ex rel.* Hines v. LaVallee, 521 F.2d 1109, 1113 (2d Cir. 1975); People v. Hernandez, 69 Cal. Rptr. 448, 454–55 (Ct. App. 1968); State v. Rassmusen, 449 P.2d 837, 842 (Idaho 1969); Clarke v. State, 240 A.2d 291, 294 (Md. Ct. Spec. App. 1968).

404. People v. Wright, 66 Cal. Rptr. 95, 97–98 (Ct. App. 1968); State v. Cobb, 539 P.2d 1140, 1143 (Or. Ct. App. 1975).

405. Shy v. State, 218 S.E.2d 599, 604 (Ga. 1975); Neal v. State, 263 S.E.2d 185, 187–88 (Ga. Ct. App. 1979).

406. State v. Simoneau, 402 A.2d 870, 873 (Me. 1979); State v. Taylor, 343 A.2d 11, 19–20 (Me. 1975).

407. State v. Persinger, 433 P.2d 867, 868 (Wash. 1967).

408. *See, e.g.*, State v. Holsclaw, 257 S.E.2d 650, 653 (N.C. Ct. App. 1979).

409. *See, e.g.*, State v. Heath, 592 P.2d 1302, 1305 (Ariz. Ct. App. 1979).

410. *See, e.g.*, United States v. Castellana, 500 F.2d 325, 326 (5th Cir. 1974); United States v. Ganter, 436 F.2d 364, 369 (7th Cir. 1970); Pope v. State, 478 P.2d 801, 804–05 (Alaska 1970); Ballew v. State, 441 S.W.2d 453, 456–57 (Ark. 1969); People v. Superior Court (*Mahle*), 83 Cal. Rptr. 771, 780–81 (Ct. App. 1970); People v. Mullins, 532 P.2d 733, 735 (Colo. 1975); People v. Brown, 266 N.E.2d 131, 135–36 (Ill. App. Ct. 1970); State v. Levy, 292 So. 2d 220, 221 (La. 1979); People v. Ramos, 170 N.W.2d 189, 191 (Mich. Ct. App. 1969); People v. Coppernol, 229 N.W.2d 913, 916 (Mich. Ct. App. 1975); State v. Lane, 467 P.2d 304, 306 (Wash. 1970); State v. LaRue, 578 P.2d 66, 70 (Wash. Ct. App. 1978).

411. Harryman v. Estelle, 616 F.2d 870, 874–75 (5th Cir. 1980).

Quarles was published on June 12, 1984.[412] It was, and remains, "the only exception to *Miranda* that permits police officers intentionally to delay administering Miranda warnings while interrogating a suspect who is 'in custody.'"[413] Everything about the decision-making process in *Quarles*, from the Court's own private deliberations to the opinions' final drafts, focused on how—or whether—*Miranda* should work when officers sought to identify a lost weapon while arresting a rape suspect.[414] The idea that such a narrowly focused opinion could, twenty-nine years later, support interrogating a domestic terror suspect for sixteen hours, four days after detonating explosives at a marathon, seems, at best, misguided.

Yet highlighting the narrow focus of the *Quarles* opinion omits a critical part of the story. Absent from that focus is what the Supreme Court did after *Quarles* was issued—nothing. Acknowledged at the time as the "first time that the Court carved out an exception" to *Miranda*,[415] *Quarles* has since received no additional attention from the Supreme Court. Not surprisingly, then, by the time of the Tsarnaev interrogation "[t]here was already much debate about whether a public safety exemption could be invoked and what kinds of questions Mr. Tsarnaev could be asked during the exemption."[416] That the debate reignited over Tsarnaev's questioning makes sense given the government's broad invocation of the public safety exception alongside the limited guidance provided by lower courts on the questions left unanswered by *Quarles*.

The Supreme Court has had its chances to address those questions. By way of illustrative example, the Court since 1984 has turned down requests to hear cases involving public safety interrogations that lasted

412. New York v. Quarles, 467 U.S. 649, 649 (1984) (listing date of decision).

413. United States v. Fautz, 812 F. Supp. 2d 570, 621 (D.N.J. 2011).

414. *See, e.g.*, First Draft of *New York v. Quarles* Majority Opinion (Feb. 17, 1984) (on file with Washington & Lee University School of Law); Justice Lewis F. Powell, Jr., Vote Sheet in *New York v. Quarles* (Jan. 20, 1984) (on file with Washington & Lee University School of Law); THE SUPREME COURT IN CONFERENCE (1940-1985) 524 (Del Dickson ed. 2001).

415. *High Court Curbs Right of Suspect*, N.Y. TIMES, http://www.ny times.com/1984/06/13/us/high-court-curbs-right-of-suspect.html (last visited Sept. 12, 2016).

416. 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?_r=1; *see* Adam Goodman, *How the Media Have Misunderstood Dzhokhar Tsarnaev's Miranda Rights*, THE ATLANTIC (Apr. 22, 2013), http://www.theatlantic.com/national/archive/2013/04/how-the-media-have-misunderstood-dzhokhar-tsarnaevs-i-miranda-i-rights/275189/; Mark Sherman, *Dzhokhar Tsarnaev Miranda Rights Timing Sparks Legal Questions*, HUFFINGTON POST (Apr. 25, 2013, 11:49 AM), http://www.huffingtonpost.com/2013/04/25/dzhokhar-tsarnaev-miranda_n_3159287.html.

two minutes,[417] thirty to forty-five minutes,[418] and three and one-half hours.[419] Moreover, the Court has declined opportunities to resolve the permissibility of public safety interrogations that began hours,[420] days,[421] and months after the commission of a defendant's crime.[422] The Court has similarly passed on answering the question of what constitutes a proper public safety question,[423] and what impact, if any, a suspect's invocation of counsel or silence has on the *Quarles* analysis.[424] Less important, though still incompletely answered,[425] is whether *Quarles* permits admission of an involuntary statement.[426]

The Supreme Court has moreover thematically turned down opportunities to clarify *Quarles* while accepting cases that explain varied facets of *Miranda* doctrine. This part of the story arguably begins in 1986 when the Court accepted two *Miranda* waiver cases and one re-initiation case,[427] while rejecting the opportunity to clarify whether a defendant's invocation of counsel in *State v. Miller* alters the public safety analysis.[428] There, a defendant confessed to his brother that he

417. United States v. Duncan, 308 F. App'x 601, 608 (3d Cir.), *cert. denied*, 556 U.S. 1275 (2009).

418. Derrington v. United States, 488 A.2d 1314, 1322 (D.C. Cir. 1985), *cert. denied sub nom*. Grayson v. United States, 486 U.S. 1009 (1988).

419. People v. Coffman, 96 P.3d 30, 73–74 (Cal. 2004), *cert. denied*, 544 U.S. 1063 (2005).

420. United States v. Ferguson, 702 F.3d 89, 96 (2d Cir. 2012) (interrogation began sixty to ninety minutes following commission of the crime), *cert. denied*, 134 S. Ct. 56 (2013).

421. People v. Sims, 853 P.2d 992, 1019 (Cal. 1993) (interrogation began sixteen days after the crime), *cert. denied*, 112 U.S. 1253 (1994).

422. United States v. Powell, 444 F. App'x 517, 520 (3d Cir. 2011) (interrogation began almost three and one-half months after commission of the crime), *cert. denied*, 132 S. Ct. 1907 (2012).

423. *See, e.g.*, United States v. Newsome, 475 F.3d 1221, 1225 (11th Cir.), *cert. denied*, 552 U.S. 899 (2007); United States v. Brady, 819 F.2d 884, 887 (9th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); State v. Ramirez, 871 P.2d 237, 244 (Ariz.), *cert. denied*, 513 U.S. 968 (1994).

424. *See, e.g.*, United States v. Mobley, 40 F.3d 688, 692–93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995); People v. Palmer, 693 N.Y.S.2d 539, 540 (App. Div.), *cert. denied*, 528 U.S. 1051 (1999); State v. Stanley, 809 P.2d 944, 949 (Ariz.), *cert. denied*, 502 U.S. 1014 (1991).

425. *Cf.* New York v. Quarles, 467 U.S. 649, 685 (1984). (Marshall, J., dissenting) ("The 'public-safety' exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements.").

426. *See, e.g.*, United States v. Carroll, 207 F.3d 465, 472 (8th Cir.), *cert. denied*, 531 U.S. 849 (2000); People v. Panah, 107 P.3d 790, 841 (Cal. 2005), *cert. denied*, 546 U.S. 1216 (2006); People v. Coffman, 96 P.3d 30, 76–79 (Cal. 2004), *cert. denied*, 544 U.S. 1063 (2005).

427. Colorado v. Spring, 479 U.S. 564, 566 (1987) (waiver); Connecticut v. Barrett, 479 U.S. 523, 525 (1987) (re-initiation); Moran v. Burbine, 475 U.S. 412, 415 (1986) (waiver).

428. 709 P.2d 225, 231 (Or. 1985), *cert. denied*, 475 U.S. 1141 (1986).

"strangled a kid."[429] His brother advised that the defendant call a mental health professional; the defendant heeded the advice and called a mental health hospital that, in turn, relayed the defendant's confession to law enforcement.[430] Following the defendant's apprehension, the officer persistently questioned the defendant without providing *Miranda* warnings—over the latter's request to speak to a lawyer.[431] The Oregon Supreme Court held that *Quarles* was inapplicable by reasoning that the defendant had not waived his *Miranda* rights and, as a result, *Edwards* governed.[432] In particular, it emphasized, "the Supreme Court has unequivocally stated that in custodial interrogation, if an accused requests counsel, questioning must cease until an attorney is present."[433]

In 1988, after the Court accepted yet another *Miranda* re-initiation case,[434] it turned down opportunities to address (1) whether *Quarles* permitted admission of a defendant's responses to questions about something other than a weapon,[435] and (2) the impact on *Quarles*, if any, of a suspect's invocation of *Miranda* silence and counsel.[436] That year the Court also turned down the Ninth Circuit's case in *United States v. Brady*, which offered the opportunity to describe how long after an offense officers may still commence a public safety interrogation.[437] In *Brady*, officers responded to a 9-1-1 call about an assault and spoke to on-scene witnesses, but the defendant was gone.[438] Law enforcement apprehended the defendant when he returned to the scene some period of time later.[439] During the defendant's apprehension, officers asked him if there was a gun in his car, to which the defendant responded affirmatively.[440] In electing to admit the defendant's statement pursuant to *Quarles*, the Ninth Circuit admitted that "[t]he questions posed to Quarles . . . differed from the questions posed to [the defendant]."[441] But, reasoned the court, "we do not believe that the Supreme

429. *Id.* at 230.
430. *Id.*
431. *Id.* at 230–31.
432. *Id.* at 241.
433. *Id.*
434. Arizona v. Roberson, 486 U.S. 675, 677–78 (1988).
435. United States v. Ochoa-Victoria, No. 87-5232, 1988 WL 74747, at *3–4 (9th Cir. July 6, 1988), *cert. denied*, 488 U.S. 898 (1988).
436. Derrington v. United States, 488 A.2d 1314, 1328 (D.C. 1985), *cert. denied*, 486 U.S. 1009 (1988).
437. 819 F.2d 884, 885 (9th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988).
438. *Id.* at 885.
439. *Id.*
440. *Id.*
441. *Id.* at 888.

Court in *Quarles* intended to limit its ruling to the particular facts of that case."[442]

The Court's effort to refine *Miranda* while ignoring *Quarles* was particularly pronounced on April 23, 1990, when it both agreed to hear *Minnick v. Mississippi*[443]—another *Miranda* invocation case—and denied certiorari in *United States v. Eaton*.[444] In *Eaton*, the perfect case to test the scope of *Quarles*, officers apprehended a defendant following a drug bust, asked him whether he had a gun, and then asked him what he was doing there.[445] Although the court admitted the defendant's response about the weapon, it suppressed his response to the latter question.[446] After twice noting that *Quarles* is "narrow," the court reasoned, in part, "[t]his was a question meant to elicit testimonial evidence from a suspect already arrested and in custody."[447]

But perhaps the best illustration of this still-ongoing phenomenon arose in 2003.[448] That year, the Court granted certiorari in four *Miranda*-related cases while denying six *Quarles* cases[449]—sometimes again

442. *Id.*

443. 498 U.S. 146, 150 (1990), *cert. granted*, 495 U.S. 903 (1990).

444. 676 F. Supp. 362, 368 (D. Me. 1988), *cert. denied*, 495 U.S. 906 (1990). That same year, the Court turned down two other *Quarles*-related cases. State v. Vickers, 768 P.2d 1177, 1183 (Ariz. 1989), *cert. denied*, 497 U.S. 1033 (1990); State v. McKessor, 785 P.2d 1332, 1337 (Kan.), *cert. denied*, 495 U.S. 937 (1990).

445. 676 F. Supp. at 364–65.

446. *Id.* at 366.

447. *Id.*

448. That is not to say that the time between 1990 and 2003 offers no further illustrations of the Court's dedication to *Miranda* and corresponding resistance to *Quarles*. To the contrary, the Court in 1993 accepted another invocation case, Davis v. United States, 512 U.S. 452, 454 (1994), *cert. granted*, 510 U.S. 942 (1993), while rejecting a trio of *Quarles* cases: United States v. Simpson, 974 F.2d 845, 847 (7th Cir. 1992), *cert. denied*, 507 U.S. 936 (1993); United States v. Seibert, 779 F. Supp. 366, 366–67 (E.D. Pa. 1991), *cert. denied*, 510 U.S. 875 (1993); State v. Provost, 490 N.W.2d 93, 94 (Minn. 1992), *cert. denied*, 507 U.S. 929 (1993).

449. **2003 *Miranda* certiorari grants**. United States v. Patane, 542 U.S. 630, 635 (2004) (sequential confessions), *cert. granted*, 538 U.S. 976 (2003); Missouri v. Seibert, 542 U.S. 600, 604–05 (2004) (sequential confessions), *cert. granted*, 538 U.S. 1031 (2003); Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 180–81 (2004) (interrogation), *cert. granted*, 540 U.S. 965 (2003); Yarborough v. Alvaredo, 541 U.S. 652, 656–57 (2004) (custody), *cert. granted*, 539 U.S. 986 (2003).

2003 *Quarles* certiorari denials. United States v. Lackey, 334 F.3d 1224, 1226 (10th Cir.) (scope), *cert. denied*, 540 U.S. 997 (2003); United States v. Joseph, 333 F.3d 587, 591 (5th Cir.) (timing between completion of the crime and commencement of public safety interrogation), *cert. denied*, 540 U.S. 973 (2003); Allen v. Roe, 305 F.3d 1046, 1051 (9th Cir. 2002) (scope), *cert. denied*, 537 U.S. 1214 (2003); United States v. Morrison, 58 F. App'x 381, 385 (10th Cir.) (scope), *cert. denied*, 583 U.S. 1044 (2003); United States v. Wynne, No. 01-6386, 2003 WL 42508, at *3–4 (10th Cir. Jan. 7, 2003) (scope), *cert. denied*, 540 U.S. 903 (2003); United States v. Young, 186 F. Supp. 2d 642, 644 (E.D. Va. 2002)

granting one but rejecting the other on the same day.[450] One of those rejected cases, *Allen v. Roe*, squarely raised the question of how long after a crime's completion do public safety concerns persist.[451] Decided in 2002, *Roe* upheld admission of incriminating statements pursuant to *Quarles* made by a suspect about the location of a gun where the suspect was detained a "significant amount of time" after the shooting.[452] Noting the "danger posed by the gun does not dissipate over time," the court reasoned that "[the gun] posed a continuing immediate danger because anyone could have found the gun at any time."[453]

As the Court labored on to refine *Miranda* in 2009 and 2010,[454] it simultaneously missed opportunities to elucidate *Quarles*.[455] Ironically and sadly, the Supreme Court again refined *Miranda* while ignoring *Quarles* around the time of both the Holmes and Tsarnaev interrogations. Although it granted yet another *Miranda* interrogation case in 2013,[456] it turned down one *Quarles*-scope case on April 29, 2013[457]—just days after the April 15 Marathon Bombings[458]—and another a few

(scope), *cert. denied*, 540 U.S. 869 (2003).

450. This remarkably happened twice in 2003. The Court granted *Seibert* and denied *Morrison* on May 19, 2003. *Compare Seibert*, 538 U.S. at 1031, *with Morrison*, 583 U.S. at 1044. It then granted *Hiibel*, but rejected *Joseph* on October 20, 2003. *Compare Hiibel*, 540 U.S. at 965, *with Joseph*, 540 U.S. at 973.

451. 305 F.3d at 1051.

452. *Id.*

453. *Id.*

454. **2009 *Miranda* certiorari grants**. Berghuis v. Thompkins, 560 U.S. 370, 374 (2010) (waiver), *cert. granted*, 557 U.S. 965 (2009); Maryland v. Shatzer, 559 U.S. 98, 103 (2010) (invocation), *cert. granted*, 555 U.S. 1152 (2009).

2010 *Miranda* certiorari grants. J.D.B. v. North Carolina, 564 U.S. 261, 268 (2011) (custody), *cert. granted*, 562 U.S. 1001 (2010).

455. **2009 *Quarles* certiorari denials**. United States v. Watters, 572 F.3d 479, 482 (8th Cir.) (scope), *cert. denied*, 558 U.S. 1033 (2009); United States v. Everman, 528 F.3d 570, 572 (8th Cir. 2008) (scope), *cert. denied*, 555 U.S. 1140 (2009); United States v. Doble, No. 08-50044, 2009 WL 567995, *1 (9th Cir. Mar. 6, 2009) (scope), *cert. denied*, 558 U.S. 920 (2009); United States v. Duncan, 308 F. App'x 601, 605 (3d Cir.) (scope), *cert. denied*, 556 U.S. 1275 (2009).

2010 *Quarles* certiorari denials. United States v. Are, 590 F.3d 499, 506 (7th Cir. 2009) (scope), *cert. denied*, 562 U.S. 946 (2010); United States v. Hill, 340 F. App'x 950, 951 (4th Cir. 2009) (scope), *cert. denied*, 559 U.S. 1106 (2010); United States v. DeJear, 552 F.3d 1196, 1202 (10th Cir. 2009) (scope), *cert. denied*, 562 U.S. 942 (2010); United States v. Jordan, 303 F. App'x 439, 441 (9th Cir. 2008) (scope), *cert. denied*, 558 U.S. 920 (2010); United States v. Jackson, 544 F.3d 351, 360 n.9 (1st Cir. 2008) (scope), *cert. denied*, 563 U.S. 990 (2010).

456. Salinas v. Texas, 369 S.W.3d 176, 178 (Tex. Crim. App. 2012) (interrogation), *cert. granted*, 133 S. Ct. 928 (2013).

457. United States v. Mohammed, No. 10-4145, 2012 WL 4465626, at *12 (6th Cir. Nov. 5, 2012), *cert. denied*, 133 S. Ct. 2044 (2013).

458. Russell & Farragher, *supra* note 24, at 2.

months later in October.[459] With those denials in mind, the Court has, since *Quarles*, taken at least fourteen *Miranda*-related cases while turning down at least twenty-seven opportunities to finally clarify some facet of the public safety exception.[460]

CONCLUSION

The *Quarles* Court thought in 1984 that it created a "narrow exception" to *Miranda*.[461] Since then, the Supreme Court has not addressed a number of questions that *Quarles* left unanswered, including the permissible length and scope of a public safety interrogation alongside the impact, if any, of a suspect's invocation of counsel or silence. Meanwhile, the Court has, since 1984, seen fit to address almost every other aspect of the *Miranda* doctrine including custody,[462] interrogation,[463] invocation,[464] waiver,[465] re-initiation,[466] and the admissibility of sequential confessions.[467] This phenomenon is surprising—if not entirely shocking. Moreover, that failure, by default, tolerates an expansive view of *Quarles*, which enables the government to preemptively invoke *Quarles* to interrogate suspects in private, days after the commission of a crime, for an indefinite temporal period, even when the suspect has invoked their rights to silence or counsel. Given that the *Quarles* Court never contemplated such an expansion, the time has come for either *Quarles* to overtake *Miranda* or for the Court to finally reconsider the relationship between the two.

459. United States v. Hodge, 714 F.3d 380, 385 (6th Cir.) (scope), *cert. denied*, 134 S. Ct. 286 (2013).

460. There are technically over 100 cases involving *Quarles* where the Court denied certiorari. For a chart of every *Quarles*-related case where the Supreme Court denied review, see Gallini app. 1, *supra* note 45.

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

462. *See, e.g.*, J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011); Yarborough v. Alvaredo, 541 U.S. 652, 660 (2004); Berkemer v. McCarty, 468 U.S. 420, 426–27 (1984).

463. *See, e.g.*, Salinas v. Texas, 133 S. Ct. 2174, 2179 (2013); Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 182 (2004); Pennsylvania v. Muniz, 496 U.S. 582, 588 (1990).

464. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 103 (2010); Davis v. United States, 512 U.S. 452, 456 (1994); Minnick v. Mississippi, 498 U.S. 146, 150 (1990).

465. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 374 (2010); Colorado v. Spring, 479 U.S. 564, 571 (1987); Moran v. Burbine, 475 U.S. 412, 420 (1986).

466. *See, e.g.*, Arizona v. Roberson, 486 U.S. 675, 679 (1988); Connecticut v. Barrett, 479 U.S. 523, 525 (1987); Smith v. Illinois, 469 U.S. 91, 91 (1984).

467. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600, 607 (2004); United States v. Patane, 542 U.S. 630, 636 (2004); Oregon v. Elstad, 470 U.S. 298, 300 (1985).