

MIRANDIZING TERRORISTS? AN EMPIRICAL ANALYSIS OF THE PUBLIC SAFETY EXCEPTION

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The Quarles Public Safety Exception (PSE) exempts testimony from Miranda's exclusionary rule and admits un-Mirandized statements made in response to questions intended to secure public safety. Recently, legislators, advocates, and academics have questioned the PSE's ability to accommodate the unique challenges of terrorist interrogations, calling for legislative modification or elimination of suspected terrorists' constitutional right to Miranda warnings. Before summarily concluding that such drastic measures are necessary, this Note advocates for a logical, grounded assessment of the judiciary's actual application of the PSE, learning as much as possible from past case law to gauge exactly how courts utilize the PSE. This analysis examines whether or not the PSE is, in fact, capable of handling the unique challenges of terrorist interrogations. This Note conducts an empirical study of the PSE, systematically categorizing every state and federal court opinion that definitively asserts the appropriate application of the PSE, filtering the opinions through different metrics and variables relevant to terrorist interrogations. Ultimately, this Note concludes that the PSE is a fact-sensitive, capacious device equipped to properly handle the unique nature of terrorist interrogations, due largely to its malleability in the hands of the courts. Part I tracks the doctrinal evolution of confessions law leading up to the PSE. Part II presents the results of an empirical examination of the entire universe of Quarles case law. Part III pinpoints individual opinions that showcase features of the PSE particularly relevant to the debate. The data and analysis show, in conclusion, that Miranda warnings coupled with the PSE empower law enforcement to adequately interrogate suspected terrorists.

INTRODUCTION

On May 4, 2010, the FBI apprehended and interrogated Faisal Shahzad (the so-called "Times Square Bomber").¹ Before being Mirandized, Shahzad not only confessed, he also provided "valuable intelligence and evidence."² On December 25, 2009, the FBI apprehended Umar Farouk Abdulmutallab (the so-called "Christmas Day Bomber")

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1. William K. Rashbaum, Mark Mazzetti & Peter Baker, Owner of S.U.V. Arrested in Times Square Bomb Case, N.Y. Times, May 4, 2010, at A1.

2. Peter Baker, Arrest Renews Debate About Rights of Suspects in Terrorism Cases, N.Y. Times, May 5, 2010, at A28 (quoting FBI press release); Emily Bazelon, *Miranda Worked! The Bizarre Criticism of the Faisal Shahzad Interrogation*, Slate (May 5, 2010 4:24 PM), <http://www.slate.com/id/2253056> (on file with the *Columbia Law Review*) ("In Shahzad's case, the FBI invoked the public safety exception. The agency called in its crack interrogation team, asked Shahzad questions with no *Miranda* warning, and reaped what the FBI says was 'valuable intelligence evidence.'").

and interrogated him for nearly an hour before Mirandizing him.³ In the course of the interrogation, Abdulmutallab “repeatedly made incriminating statements,” ultimately confessing to the attempted bombing.⁴

The *Quarles* Public Safety Exception (PSE) exempts testimony from *Miranda*’s exclusionary rule and admits statements made in response to questions “reasonably prompted by a concern for the public safety.”⁵ Thus, had Abdulmutallab or Shahzad moved to exclude their un-Mirandized testimony at trial, the government could have argued that the testimony should be admitted under the PSE. While these cases never advanced to that point, *United States v. Khalil* did.⁶ In *Khalil*, police located several pipe bombs in Lafi Khalil and Gazi Ibrahim Abu Mezer’s apartment and asked them how to defuse the bombs before Mirandizing them.⁷ Before trial, Mezer moved to suppress his un-Mirandized statements.⁸ The district court denied the motion, admitting the testimony under the PSE, and the Second Circuit affirmed on the same grounds.⁹

Recently, legislators, advocates, and academics have questioned the PSE’s ability to accommodate the unique challenges of terrorist interrogations.¹⁰ The gravity of this debate, which pits constitutional guarantees

3. Officials Describe Arrest of Christmas Day Bomber for First Time, Fox News (Jan. 24, 2010), <http://www.foxnews.com/us/2010/01/24/officials-arrest-christmas-day-bomber-time/> (on file with the *Columbia Law Review*); see also Jeff Zeleny & Charlie Savage, Officials Say Jet Plot Suspect Is Cooperating, N.Y. Times, Feb. 3, 2010, at A11 (reporting events following Abdulmutallab’s arrest and ongoing interrogation); Warren Richey, Holder Letter: Why We Read Christmas Day Bomber His Rights, Christian Sci. Monitor, Feb. 3, 2010, available at <http://www.csmonitor.com/USA/Justice/2010/0203/Holder-letter-why-we-read-Christmas-Day-bomber-his-rights> (on file with the *Columbia Law Review*) (detailing Abdulmutallab’s arrest and subsequent interrogation by law enforcement); Profile: Umar Farouk Abdulmutallab, BBC News (Oct. 14, 2010 11:09 AM), <http://www.bbc.co.uk/news/world-us-canada-11545509> (reporting personal history and life of Abdulmutallab leading up to attempted bombing).

4. Officials Describe Arrest of Christmas Day Bomber for First Time, *supra* note 3.

5. *New York v. Quarles*, 467 U.S. 649, 656 (1984); *Miranda v. Arizona*, 384 U.S. 436 (1966).

6. 214 F.3d 111 (2d Cir. 2000).

7. *Id.* at 121.

8. Mezer only appealed the district court’s decision to admit his statement “poof,” made in reference to his desire to kill himself when detonating the bomb because, he argued, it was irrelevant to public safety. The Second Circuit disagreed, holding that “whether or not he would survive his attempt to detonate the bomb had the potential for shedding light on the bomb’s stability.” *Id.*

9. *Id.*

10. See M.K.B. Darmer, Lessons from the *Lindh* Case: Public Safety and the Fifth Amendment, 68 Brook. L. Rev. 241, 271–86 (2002) [hereinafter Darmer, *Lindh* Case] (arguing for expansion of PSE to properly accommodate terror paradigm); Jonathan B. Zeitlin, Voluntariness with a Vengeance: *Miranda* and a Modern Alternative, 14 St. Thomas L. Rev. 109, 144–45, 157–61 (2001) (arguing for expansion of PSE by analogizing to rescue doctrine); Peter Baker, Obama Challenges Terrorism Critics, N.Y. Times, Feb. 8, 2011, at A12 (discussing Republican critiques of Obama Administration’s approach to interrogating suspected terrorists); Letter from Senator Mitch McConnell et al. to Attorney Gen. Eric Holder (Jan. 27, 2010), <http://republican.senate.gov/public/index.cfm/2010/1/seniorrepublicansdemandanswerswestestimonyfromagholderonchristmasbomber> (on file

of due process against pressing national safety concerns, has fostered a contentious political climate replete with hyperbolic conclusions about the repercussions of Mirandizing suspected terrorists.¹¹ Interestingly, those most acquainted with the way *Miranda* warnings and the PSE coexist staunchly support the status quo. Retired FBI special agents have opposed any legislative changes to *Miranda* rights on more than one occasion.¹² Most notably, in a letter to President Obama, three veteran FBI agents argued passionately against potential legislation revoking suspected terrorists' *Miranda* rights.¹³ Recalling their vast experience interrogating terrorists, the special agents explained that "*Miranda* rules are nimble enough to handle situations as they arise. . . . In our decades of working in law enforcement, including the years following 9/11, *Miranda* rights never interfered with our ability to obtain useful information or make prosecutable cases."¹⁴

The Obama Administration has wavered considerably in its position on this issue. Initially, the Administration asserted that the PSE provided law enforcement with enough flexibility to properly interrogate suspected terrorists, rebuffing congressional calls to eliminate suspected terrorists'

with the *Columbia Law Review*) (criticizing Obama Administration's general approach to terrorism interrogations and prosecutions); Charles Krauthammer, *Miranda* Warnings and Public Safety, Nat'l Rev. Online (May 7, 2010 12:00 AM) [hereinafter Krauthammer, *Miranda* and Public Safety], <http://www.nationalreview.com/articles/229708/miranda-warnings-and-public-safety/charles-krauthammer> (on file with the *Columbia Law Review*) (criticizing Obama Administration's use of "civilian-law-enforcement model" for terrorists).

11. See Paul Kane, Shailagh Murray & Matt DeLong, Times Square Bombing Arrest Allows GOP to Revive "*Miranda*" Debate, Wash. Post., 44: Pol. & Pol'y in Obama's Washington Blog (May 4, 2010 12:24 PM), <http://voices.washingtonpost.com/44/2010/05/gop-seizes-on-times-square-arr.html> (on file with the *Columbia Law Review*) (identifying politicians and legislators calling for elimination of *Miranda* rights for suspected terrorists as only appropriate approach to terrorist interrogations); Michael O'Brien, McCain: "Serious Mistake" if Car Bombing Suspect Was Mirandized, The Hill's Blog Briefing Room (May 4, 2010 8:50 AM), <http://thehill.com/blogs/blog-briefing-room/news/95837-mccain-serious-mistake-if-car-bombing-suspect-was-mirandized> (on file with the *Columbia Law Review*) (reporting Senator John McCain's critique of Obama Administration's decision to Mirandize Faisal Shahzad); supra note 10 (detailing critiques of *Miranda* rights for suspected terrorists).

12. See, e.g., Coleen Rowley, *Quarles* Public Safety Exception—Constitutional and Proven Effective!, Huffington Post (May 5, 2010 10:44 AM), http://www.huffingtonpost.com/coleen-rowley/quarles-public-safety-exc_b_564138.html (on file with the *Columbia Law Review*) (stating, as a retired FBI special agent, "[a]lthough I wanted to shout 'I told you so!' after so many years of waiting and warning, it was nonetheless gratifying to see several news accounts yesterday revealing that the FBI finally relied on the 'public safety exception' . . . to interview . . . Faisal Shahzad").

13. Letter from Jim Clemente, Jack Cloonan & Joe Navarro, retired FBI special agents, to President Barack Obama (May 13, 2010), reprinted in Spencer Ackerman, FBI Interrogators Urge Obama to Keep *Miranda* Warnings Intact, Wash. Indep., <http://washingtonindependent.com/84716/fbi-interrogators-urge-obama-to-keep-miranda-warnings-intact> (on file with the *Columbia Law Review*).

14. *Id.*

Miranda rights.¹⁵ In an about-face a few months later, the Administration supported proposed legislation modifying *Miranda* warnings in terrorist interrogations.¹⁶ Then, last October, the Administration issued an internal Department of Justice (DOJ) Memorandum that cited *Quarles* as legal authority for directing law enforcement to interrogate suspected terrorists on matters pertinent to public safety before Mirandizing them. This DOJ Memorandum thus seems to disavow previous support for legislative proposals that would revoke suspected terrorists' *Miranda* rights.¹⁷

The PSE debate remains largely speculative in nature, fueled by hypothetical worst-case scenarios and conclusory arguments deeming the Abdulmutallab and Shahzad interrogations either successes or failures.¹⁸ This Note leaves that debate aside and offers a more preliminary contribution to the conversation by methodically assessing the entire universe of *Quarles* case law to create a comprehensive understanding of the judiciary's use of the PSE to admit or exclude un-Mirandized testimony.¹⁹ The

15. See Letter from Attorney Gen. Eric Holder to Senator Mitch McConnell (Feb. 3, 2010), <http://www.scribd.com/doc/26323975/AG-Letter-2-3-10> (on file with the *Columbia Law Review*) (defending interrogation of Abdulmutallab and use of PSE, asserting that "the federal justice system is an extremely effective tool for gathering intelligence").

16. See Charlie Savage, *Obama Said to Be Open to New Miranda Look*, N.Y. Times, May 10, 2010, at A11 (reporting President Obama's support of Attorney General Holder's call "for Congress to enact legislation that would carve out a new exception to the *Miranda* rule"); Charles Krauthammer, *Modernizing Miranda: A New Consensus*, Townhall.com (May 14, 2010), http://townhall.com/columnists/charleskrauthammer/2010/05/14/modernizing_miranda_a_new_consensus (on file with the *Columbia Law Review*) (expressing surprise and satisfaction at Obama's alignment with conservative position that *Miranda* requires modification for terrorist interrogations).

17. While the DOJ issued this internal memorandum in October 2010, it was not shared publicly until March 2011. See Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. Times, Mar. 25, 2011, at A17 (noting that Attorney General Holder asked Congress for legislation modifying *Miranda* in May and that the DOJ Memorandum "shows that the Justice Department decided on its own to encourage agents to take a broad interpretation [of the PSE]"); Fed. Bureau of Investigations, U.S. Dep't of Justice, *Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States* (2010) [hereinafter DOJ Memorandum], <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> (on file with the *Columbia Law Review*) (explaining that in case of suspected terrorists, PSE will include "questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons . . . and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks"); see also Justin Elliott, *Obama Administration Keeps New Policy on Miranda Secret*, Salon (Jan. 19, 2011 2:15 PM), http://www.salon.com/news/politics/war_room/2011/01/19/obama_holder_doj_miranda (on file with the *Columbia Law Review*) (reporting that DOJ spokesperson, Dean Boyd, noted that "flexibility" of PSE ensures that it can handle terrorist interrogations).

18. See O'Brien, *supra* note 11 (reporting Senator McCain's critique of Administration's decision to Mirandize Faisal Shahzad); *supra* note 10 (detailing critiques of *Miranda* rights for suspected terrorists).

19. This analysis is particularly important when constitutional rights are in question. Persuasive, well-reasoned arguments exist calling for heightened caution when modifying constitutional rights, particularly in the face of national security exigencies. See, e.g.,

assessment targets what appears to be the debate's animating assumption: The PSE does not provide law enforcement with enough flexibility to interrogate suspected terrorists.²⁰ To evaluate both this claim and the PSE effectively, this study systematically categorizes every state and federal court opinion that definitively asserts the appropriate application of the PSE, filtering the opinions through different metrics and variables relevant to terrorist interrogations. The analysis identifies demonstrated factual and statistical patterns in the opinions to advance the debate in two ways. First, it grounds accurate claims about the PSE in concrete proof. Second, the data refute speculative condemnations of the PSE, thereby discrediting them. Ultimately, this Note concludes that the PSE is a fact-sensitive, capacious device equipped to properly handle the unique nature of terrorist interrogations, due largely to its malleability in the hands of the courts.

Part I tracks the doctrinal evolution of confessions law leading up to the PSE, establishing its role in relation to both the Fifth Amendment and to *Miranda* warnings. Part II presents the results of an empirical examination of the entire universe of *Quarles* case law. Part III pinpoints individual opinions that showcase features of the PSE particularly relevant to the debate. The data and analysis show, in conclusion, that *Miranda* warnings, coupled with the PSE, empower law enforcement to adequately interrogate suspected terrorists. The findings indicate that the PSE deftly balances *Miranda*'s constitutional safeguards with public safety, extinguishing any need for legislation revoking suspected terrorists' *Miranda* warnings, a constitutional right crucial to ensuring procedural due process.²¹

Ronald J. Sievert, War on Terrorism or Global Law Enforcement Operation?, 78 Notre Dame L. Rev. 307, 308–12, 335–40 (2003) (discussing stakes involved when defining criminal approach to terrorism as a “law-enforcement or military problem” and different criminal procedural approaches that would follow based on that determination). Bruce Ackerman argues that civil liberties are permanently assaulted when unnecessary restrictions are implemented. This may be especially true when these restrictions are wrought on a highly visible and symbolic civil liberty that most Americans are familiar with, such as *Miranda*. Bruce Ackerman, Before the Next Attack, New Statesman, July 3, 2006, at 38.

20. See *supra* notes 10–17 (discussing PSE debate). To be sure, eliminating suspected terrorists' *Miranda* rights would provide the government with a wide range of benefits beyond the admissibility of un-Mirandized testimony pertinent to public safety. The PSE only exempts un-Mirandized testimony that results from questioning that both was relevant to public safety and occurred during the time period in which public safety was endangered. See *infra* Part I.C (outlining doctrinal structure of the *Quarles* PSE). While the Due Process Clause would continue to limit the nature of law enforcement's interrogations, eliminating *Miranda* warnings would allow law enforcement to question suspected terrorists on any matter, for as long as they desired, whether or not public safety was endangered.

21. See *infra* Part I.C (discussing *Dickerson v. United States*, which confirmed that *Miranda* warnings are not a prophylactic remedy designed to protect a constitutional right, but are in fact a constitutional right in themselves).

I. CONFESSIONS LAW: 1789 TO *QUARLES*

The Fifth Amendment provides a range of individual protections in criminal proceedings, including the right to procedural due process and the privilege against self-incrimination.²² The Supreme Court's interpretation of the Fifth Amendment has evolved over time, affecting the nature and extent of these constitutional safeguards. Part I.A discusses the early case law which used the Due Process Clause to balance the "complex of values implicated in police questioning of a suspect" to determine the admissibility of a defendant's statements to law enforcement at trial.²³ Part I.B focuses on *Miranda v. Arizona*, which replaced this due process balancing test with the presumption that all un-Mirandized statements made by a defendant while in custody were involuntary and thus inadmissible.²⁴ Part I.C introduces the PSE and examines the subset of un-Mirandized statements admissible under the PSE.

A. *Admissibility Before Miranda: Bram's Due Process Inquiry*

In the late nineteenth century, courts suppressed coerced or compelled testimony on the basis of the Fifth Amendment.²⁵ *Bram v. United States* was one of the earliest American cases to address the relationship

22. The Fifth Amendment establishes two constitutional protections for criminal defendants that are relevant to this Note: (1) No person "shall be compelled in any criminal case to be a witness against himself" and (2) No person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. For the Court's early stance on the relationship between these two constitutional rights and the ways they both, individually and together, inform how courts should rule on the admissibility of confessions in criminal proceedings, see *infra* Part I.A.

23. Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule* (Part II), 53 *Ohio St. L.J.* 497, 509–10 (1992) (discussing early confessions law's balance of "need for police questioning as a tool for the effective enforcement of criminal laws . . . [and] values reflecting society's deeply felt belief that . . . the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice" (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 224–25 (1973))).

24. This presumption of involuntariness may only be overcome by *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that unless suspect is Mirandized "no evidence obtained as a result of interrogation can be used against him").

25. See Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 *Wash. U. L.Q.* 59, 100 (1989) (discussing how Supreme Court applied Fifth Amendment to accommodate common law voluntariness doctrine). Prior to *Bram*, the analysis focused more on the reliability or credibility of the confession while also considering voluntariness. See Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 *Am. J. Crim. L.* 309, 325 (1998) (citing case law prior to *Bram* establishing "reliability-based" standard). For a complete history of confessions law dating back to the thirteenth century, see M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 *Cornell J.L. & Pub. Pol'y* 319, 324–28 (2002) [hereinafter Darmer, *Beyond Bin Laden*] (discussing Wigmore's *Treatise on Evidence* and four stages of confessions law leading up to *Bram*); Herman, *supra* note 23, at 497–502 (reviewing British origin of confessions law and tracking American case law developing due process doctrine). See generally Benner, *supra*, at 93–94 (discussing origin of "voluntariness" concept).

between the Fifth Amendment and the admissibility of testimony in criminal proceedings.²⁶ Drawing from British and American case law and treatises,²⁷ *Bram* affirmed the longstanding common law rule that the prosecution can only introduce the defendant's statements to law enforcement as evidence at trial if they had been made "freely, voluntarily, and without compulsion or inducement of any sort."²⁸ *Bram* reasoned that "[i]n criminal trials . . . wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"²⁹ Accordingly, confessions obtained involuntarily by means of torture, coercion, or compulsion simultaneously violated the Fifth Amendment's Due Process Clause and the privilege against self-incrimination.³⁰ Linking the privilege against self-incrimination to the Due Process Clause³¹ paved the way for *Blackburn v. Alabama*, which incorporated this privilege against the states via the Fourteenth Amendment,³² applying it to involuntary testimony in state court criminal proceedings.³³

Bram neglected to provide a concrete framework for determining the voluntariness of defendants' statements to law enforcement beyond the general due process balancing test. *Bram* conceded outright that any inquiry into voluntariness based on the defendant's mental state at the

26. 168 U.S. 532 (1897). Prior to *Bram*, the standard for admissibility of testimony and confessions was reliability or credibility. See Penney, *supra* note 25, at 325 (noting that in earlier cases "the Court proclaimed a rule of admissibility that relied explicitly on the reliability rationale").

27. The Court indulged itself in many pages of interpretive history considering the origin of the Fourth Amendment right against search and seizure and the Fifth Amendment privilege against self-incrimination. It grounded its ruling in its understanding that the privilege against self-incrimination had strong, uncompromising roots in the Founders' desire to secure the rule of law over tyranny and protect the individual from government abuses. See *Bram*, 168 U.S. at 543–58 (reviewing British and American cases that discuss the origin of the voluntariness doctrine and extrapolating it to "laws of nature," which encouraged and respected self-preservation).

28. *Id.* at 548 (quoting *Wilson v. United States*, 162 U.S. 613, 623 (1896)). The Court elaborated on the principle developed in *Wilson*, describing the doctrine of involuntariness as "comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes." *Id.*

29. *Id.* at 542.

30. See *id.* at 549 (declaring that record must sufficiently "establish that the making of the statement was voluntary").

31. Benner reads *Bram* as "engrafting the common law voluntariness rule into the Fifth Amendment and virtually equating the two." Benner, *supra* note 25, at 100.

32. 361 U.S. 199, 205 (1960) ("[T]he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction.").

33. Admitting involuntary confessions in state court "transgressed the imperatives of fundamental justice which find their expression in the Due Process Clause of the Fourteenth Amendment." *Id.* at 211.

time of the statement would be untenable.³⁴ The opinion instead relied on precedent that identified coercive tactics by law enforcement that violated due process.³⁵ *Blackburn* advanced the doctrine by establishing a judicial balancing test, freeing it from *Bram*'s sole dependence on precedent.³⁶ The *Blackburn* Court reasoned that a "complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."³⁷ The credibility or veracity of the testimony was irrelevant to the admissibility standard, which examined the "'totality of the circumstances'" to determine whether the defendant's procedural due process rights had been violated.³⁸ At this point in the doctrine's development, courts judged admissibility on a case-by-case basis using the Due Process Clause in its vague entirety to determine voluntariness.³⁹ Thus, prior to *Miranda*, each court's own understanding of the Due Process Clause converged to form confessions law.⁴⁰

34. Quoting again from British treatises on evidence, the *Bram* Court explained that "[t]he law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." *Bram*, 168 U.S. at 565 (quoting 3 William Oldnall Russell, Charles Sprengel Greaves & Georges Sharswood, *A Treatise on Crimes and Misdemeanors* ch. IV, § 1, at 368 (London, Stevens & Sons 4th ed. 1865)).

35. The inquiry focused on the defendant's possible perception of coercion as judged by the court; law enforcement's subjective motivation or intent to intimidate or coerce was irrelevant. *Id.* at 556 (discussing, with approval, similar prior British precedent). The prosecution had the burden of showing that the statement was voluntarily made. *Id.* at 565. The courts looked at law enforcement's behavior and determined either that it was objectively coercive or, based on the circumstances, that the defendant was in fact coerced. *Id.*

36. But see Benner, *supra* note 25, at 115–17 ("While the due process 'voluntariness' test thus dethroned the trustworthiness rationale, it also obscured the issue of 'compulsion' by submerging it within an ad hoc balancing test based upon the totality of the circumstances.").

37. *Blackburn*, 361 U.S. at 207.

38. *Id.* at 206–07 (quoting *Fikes v. Alabama*, 352 U.S. 191, 197 (1957)). *Blackburn* self-consciously justified this potential sacrifice of worthy evidence with recourse to the fundamental principles motivating the Due Process Clause and "the strongly felt attitude of our society that important human values are sacrificed where an agency of the government . . . wrings a confession out of an accused against his will." *Id.* at 206–07.

39. The Court has long been comfortable being nebulous and inconsistent in identifying the origin of the right against self-incrimination, blurring this right with procedural due process rights. See Darmer, *Beyond Bin Laden*, *supra* note 25, at 321–22 & n.15 (describing "confessions jurisprudence" as "incoherent" and surveying pre-*Miranda* Supreme Court decisions which relied, variously, on the Fifth, Sixth, and Fourteenth Amendments to develop confessions law). For a historical summary of the American legal relationship between voluntariness and self-incrimination, see generally Benner, *supra* note 25, at 92–101.

40. There is a detour in the Supreme Court case law between *Blackburn* and *Miranda* in which the Court uses the Sixth Amendment right to counsel to shape and guide the privilege against self-incrimination. See *Escobedo v. Illinois*, 378 U.S. 478, 488, 490–91 (1964) (extending *Massiah* which established the right to counsel to apply pre-

B. *Miranda's Presumption of Coercion*

In a move intended to increase constitutional protection against police abuse in criminal investigations,⁴¹ *Miranda* rejected *Bram* and *Blackburn's* due process balancing test wholesale.⁴² The Warren Court ruled that custodial interrogations were inherently coercive, rendering all statements, both inside and outside the police station, involuntary and thus inadmissible.⁴³ This presumption of coercion, and thus involuntariness, could only be rebutted if the police notified the suspect of her right to remain silent, the potential that statements she made could be incriminating, and her right to have an attorney present during questioning.⁴⁴ *Miranda* warnings granted defendants a "full opportunity to exercise the

indictment); *Massiah v. United States*, 377 U.S. 201, 205–06 (1964) (holding that lack of attorney post-indictment was de facto violation of both the Fifth and Sixth Amendments). The Court seemed to prefer this line of reasoning because it was easy to apply and provided a dispositive test based on a definitive and provable factor: the provision of counsel. See Benner, *supra* note 25, at 117–19 (reviewing *Massiah* and *Escobedo* and analyzing reasons doctrine did not further develop via Sixth Amendment). *Miranda* entirely supplanted this doctrinal development, making it irrelevant to this Note's inquiry. *Id.*

41. See *Miranda v. Arizona*, 384 U.S. 436, 484–87 (1966) (extolling virtues of increased criminal safeguards in federal interrogations and expressing value in replicating FBI's methods at state level).

42. In striking down legislation attempting to eliminate *Miranda* rights, *Dickerson v. United States* described the development of the case law leading up to *Miranda*, citing *Bram* as the origin of the voluntariness test found in the Fifth Amendment privilege against self-incrimination. *Dickerson v. United States*, 530 U.S. 428, 433 (2000). For a review of important Supreme Court decisions involving confessions and voluntariness between *Bram* and *Miranda*, see Benner, *supra* note 25, at 109–14 (describing twenty-nine confessions cases preceding *Miranda* as "progressively civiliz[ing] the meaning of due process until the clause forbade not only physical force, but also psychological coercion"). Before *Miranda*, the Fifth Amendment voluntariness test was focused on the reliability or veracity of testimony whereas the Fourteenth Amendment due process balancing test was concerned with coercion that resulted in "fundamental unfairness" that the Due Process Clause was manufactured to prevent. *Id.* at 116 (quoting *Lisenba v. California*, 314 U.S. 219, 236 (1941)).

43. *Miranda*, 384 U.S. at 444 (describing custodial interrogations as those involving police as well as any proceeding which deprives defendant of "freedom of action in any significant way"). Decisions following *Miranda* described the test for custodial interrogations: "[T]he ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Behler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)); see also George C. Thomas, Separated at Birth but Siblings Nonetheless: *Miranda* and the Due Process Notice Cases, 99 Mich. L. Rev. 1081, 1083–85 (2001) [hereinafter Thomas, Separated at Birth] (outlining three holdings in *Miranda* and identifying one as holding that "the pressure of custodial interrogation is inherently compelling for purposes of the Fifth Amendment"). For a summary of case law defining custody as regards *Miranda*, see Alan N. Lane & Richard D. Grossman, *Miranda: The Erosion of a Doctrine*, 62 Chi. B. Rec. 250, 251–54 (1981).

44. *Miranda*, 384 U.S. at 469 ("[A] warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.").

privilege against self-incrimination” by being “adequately and effectively apprised of [their] rights.”⁴⁵ While a suspect could waive these rights, law enforcement was required to immediately stop questioning the suspect if she invoked her *Miranda* rights at any later time.⁴⁶ The presumption that all un-Mirandized custodial interrogations were coercive⁴⁷ increased the range of police behavior that constituted a per se violation of the Due Process Clause.⁴⁸ Similarly, by eliminating the judicial discretion to determine voluntariness through *Blackburn*’s due process balancing test, *Miranda* ensured that a large category of statements, whose fate was previously left to judicial determination, would always be inadmissible.⁴⁹

C. The Quarles Public Safety Exception

Miranda thus altered the landscape of confessions law, rendering all un-Mirandized testimony inadmissible at trial. Shortly after *Miranda*, however, the Burger Court began narrowing the scope of this protection, creating judicial exceptions to this rule. The *Quarles* PSE is one such exception.

45. *Id.* at 467. Albert Alschuler describes the *Miranda* decision as embracing two competing definitions of the privilege against self-incrimination: (1) the right to silence and (2) the right to be free from improper means of interrogation, abuse, or torture. Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2625–27 (1996).

46. *Miranda*, 384 U.S. at 444–45.

47. The Court explained the privilege against self-incrimination as freedom from “being *compelled* to incriminate themselves,” thereby creating a default presumption of involuntariness. *Id.* at 467 (emphasis added). For an interesting interpretation of this conflation of the due process voluntariness inquiry with the privilege against self-incrimination, see Thomas, Separated at Birth, *supra* note 43, at 1087 (arguing that the “Due Process Clause is sufficiently flexible (or amorphous) to accommodate *Miranda*-style due process”).

48. Darmer argues that “[o]n the facts, the confessions at issue in *Miranda* almost certainly would have been admissible under the old voluntariness test.” Darmer, Beyond Bin Laden, *supra* note 25, at 339. But see Leonard W. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination 496 n.43 (1968) (arguing that reading Due Process Clause and right against self-incrimination as in opposition creates false dichotomy, noting that “the present state of constitutional law in the United States show[s] the intimacy, not the opposition or differences, of the two rules”); Catherine Hancock, Due Process Before *Miranda*, 70 Tul. L. Rev. 2195, 2220–26, 2232–36 (1996) (arguing that *Miranda* originated in and grew from Due Process Clause cases excluding confessions due to involuntariness). For a full discussion of Levy, see Darmer, Beyond Bin Laden, *supra* note 25, at 324 n.25.

49. See Yale Kamisar, *Miranda*’s Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact, 92 A.B.A. J. 48, 48 (2006) (describing Warren’s opinion as “compromise of sorts between the former elusive, ambiguous and subjective voluntariness/totally-of-the-circumstances test and extreme proposals that would have eliminated police interrogation altogether”); cf. David Sonenshein, *Miranda* and the Burger Court: Trends and Countertrends, 13 Loy. U. Chi. L.J. 405, 413 (1981) (“[T]he Warren Court was clearly dissatisfied with the traditional due process/voluntariness test as a guarantor of fair police interrogation practices and of voluntary, non-coerced, confessions.”).

Miranda warnings, by design, alerted suspects to the potential that responding to law enforcement's questioning could be incriminating. In *New York v. Quarles*, the Supreme Court worried that, by Mirandizing suspects, law enforcement encouraged them not to respond to the questioning, which unacceptably endangered public safety in certain situations.⁵⁰ In *Quarles*, a rape victim approached the police immediately after being attacked, described the rapist, identified his whereabouts, and told the police that he had a gun. The police then pursued Benjamin Quarles, the suspect, cornering him in a convenience store. Noticing Quarles's empty holster, the police asked him about the location of the gun before Mirandizing him. Quarles responded "the gun is over there."⁵¹ Since Quarles had not been Mirandized, *Miranda*'s automatic presumption of coercion should have required the exclusion of his testimony.⁵² The Burger Court, however, admitted the testimony. Citing "overriding considerations of public safety," the Court relaxed *Miranda*'s exclusionary rule and admitted the statement.⁵³

In *Quarles*, the Burger Court responded to its perception of *Miranda* as an inflexible and unreasonable shield for criminal defendants.⁵⁴ The Court found that *Miranda* rights forced law enforcement to choose between collecting vital public safety information and securing admissible statements in time-pressured, sensitive situations.⁵⁵ Thus the Court created the PSE, a judicial mechanism that justified the admission of un-Mirandized statements in certain situations in which the public safety was

50. 467 U.S. 649, 657 (1984) ("[I]f the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding.").

51. *Id.* at 649–52.

52. See *supra* Part I.B (identifying circumstances in which *Miranda*'s presumption requires the exclusion of testimony).

53. *Quarles*, 467 U.S. at 651.

54. See Steven Andrew Drizzin, Note, Fifth Amendment—Will the Public Safety Exception Swallow the *Miranda* Exclusionary Rule?, 75 J. Crim. L. & Criminology 692, 692–95 (1984) ("*Quarles* fits into a general trend of Burger Court decisions that have deviated from both the letter and the spirit of *Miranda*."); cf. Darmer, *Beyond Bin Laden*, *supra* note 25, at 344 ("[T]he irrebuttable presumption established by *Miranda* is itself problematic.").

55. *Quarles*, 467 U.S. at 657–58 (refusing to make law enforcement instantaneously choose between "ask[ing] the necessary questions without the *Miranda* warnings and render[ing] whatever probative evidence they uncover inadmissible" and "giv[ing] the warnings in order to preserve the admissibility of evidence . . . [and] destroy their ability to obtain that evidence and neutralize the volatile situation confronting them").

in jeopardy.⁵⁶ The PSE provides a forgiving framework,⁵⁷ admitting un-Mirandized testimony whenever the court believes that law enforcement's questioning was intended to protect public safety.⁵⁸ When evaluating whether or not the questioning was intended to secure public safety, the officer's actual goal in questioning the suspect is irrelevant (even in cases where it could be proved).⁵⁹ *Quarles* instructed courts to assume an objective ex ante posture when reviewing the record to determine whether or not "police officers ask[ed] questions reasonably prompted by a concern for the public safety."⁶⁰ The court should consider the context of the questioning relative to the situation as it evolved.⁶¹ Thus, the court should admit the testimony even if it becomes clear ex post that there was never any actual public safety threat.⁶² Similarly, the suspect's response is

56. The PSE is not the only exception developed after *Miranda*. See, e.g., *United States v. Patane*, 542 U.S. 630, 643–44 (2004) (holding that *Miranda* does not require exclusion of physical evidence found as result of voluntary un-Mirandized statements made by the defendant); *Harris v. New York*, 401 U.S. 222 (1971) (holding that statements made in violation of *Miranda* are admissible at trial to impeach defendant if defendant chooses to testify).

57. Exactly what situations qualify as a PSE is determined on a case-by-case basis. Some have argued that the doctrinal approach to defining a threat or danger worthy of the PSE has led to a split in the federal circuits. See 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, 1947–58 (2010) (arguing that there is a "broad" and "narrow" approach to PSE). Table 2 in Part II.B.2 *infra* shows that the so-called "broad" and "narrow" approaches to the PSE make little difference in the actual outcomes.

58. *Quarles*, 467 U.S. at 656. For an argument that *Quarles* is really a return to *Bram*'s due process balancing test, see Stephen J. Schulhofer, *Miranda*, *Dickerson*, and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 Mich. L. Rev. 941, 950 (2000) (arguing that "net-effect" of *Quarles* was to "bring the law full circle, reinstating Fifth Amendment exceptionalism [after *Miranda*] . . . assuming that a confession could be *truly* compelled only if it was judged involuntary under the totality of the circumstances").

59. *Quarles*, 467 U.S. at 656 ("[T]he availability of [the public safety] exception does not depend upon the motivation of the individual officers involved. . . . [T]he application of the exception . . . [does not] depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer."). For an argument that the officer's subjective motivation should be considered, see generally Marc Schuyler Reiner, Note, The Public Safety Exception to *Miranda*: Analyzing Subjective Motivation, 93 Mich. L. Rev. 2377 (1994).

60. *Quarles*, 467 U.S. at 656.

61. For example, in *United States v. Carillo*, the court admitted incriminating testimony regarding the defendant's status as a drug dealer, which was not directly relevant to public safety but was provided in response to questions concerning public safety. 16 F.3d 1046, 1048–50 (9th Cir. 1994) ("[I]n this case, the narrowly tailored question was a reasonable attempt by a police officer to insure his personal safety in the midst of a search. Consequently, the spontaneous and unrequested response of the suspect was properly admitted under the *Quarles* public safety exception to *Miranda*.").

62. See *United States v. Josephson*, No. CR-3-96-100, 1997 WL 1774873 (S.D. Ohio Aug. 27, 1997) (admitting testimony based on PSE even though defendant lied about existence of bomb, meaning that there was never any bomb or public safety risk).

admissible even if it does not address the public safety issue.⁶³ The PSE thus inoculates a large subset of statements previously vulnerable to *Miranda*'s exclusionary rule, admitting any statement that responds to a question reasonably perceived to be relevant to public safety.⁶⁴ Thus, in its most permissive posture, the PSE will admit testimony in response to any question that could have been intended to secure public safety—even if the question was asked with the motive to incriminate or if there was never any actual public safety threat. In certain extreme situations, *Quarles* overhauls *Miranda*, arguably gutting the core tenets of this constitutional right.

The constitutionality of these modifications was recently addressed in a controversial Supreme Court opinion holding that *Miranda* was a constitutional right and therefore impervious to legislative override while also holding that *Quarles* was a constitutional exception to this right.⁶⁵ *Dickerson v. United States* reasoned, somewhat unsatisfactorily, that since *Miranda* rights abrogated state criminal procedure and evidentiary rules they must be constitutional, otherwise federalism would prohibit this intrusive preemption of state law.⁶⁶ A close examination of *Dickerson* and its academic progeny exceeds the scope of this Note.⁶⁷ It is only necessary to recognize that the Rehnquist Court simultaneously held that *Miranda* is a constitutional rule *and* that exceptions to *Miranda*, such as *Quarles*, are

63. *United States v. Gonzalez*, 864 F. Supp. 375, 381–82 (S.D.N.Y. 1994) (admitting defendant's statements about brother's affiliation with police force because they were made in response to questions concerning public safety).

64. *Quarles*, 467 U.S. at 655–56.

65. *Dickerson v. United States*, 530 U.S. 428 (2000). For a history of section 3501 of the Omnibus Crime Control Act of 1968, the legislation *Dickerson* struck down as unconstitutional, see David Huitema, *Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment, 18 Yale L. & Pol'y Rev. 261, 289–94 (2000) (discussing merits and constitutionality of section 3501).

66. *Dickerson*'s reasoning, blessing both *Miranda* and *Quarles*, is less than satisfactory, leading some commentators to reduce it to nothing more than “judicial fiat.” Susan R. Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1071 (2000) [hereinafter Klein, Prophylactic Rules]; see also Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to *Miranda v. Arizona*) 22 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-42, 2010), available at <http://ssrn.com/abstract=1647745> (on file with the *Columbia Law Review*) (describing *Dickerson* as simply glossing over the “seemingly irreconcilable”).

67. Commentators have extensively discussed and debated *Dickerson*. For a brief survey of the issues captivating academics, see Klein, Prophylactic Rules, *supra* note 66, at 1062 n.148 (arguing that *Dickerson* and *Quarles* are potentially coherent if the constitutional right is understood conditionally as similar to the First Amendment). Klein also argues that *Miranda*'s creation of prophylactic rules was intended to allow Congress to create alternative, equally sufficient rules. *Id.* at 1060. But see Schulhofer, *supra* note 58, at 944 (arguing that *Quarles* forwards common misconceptions that “(1) a statement isn't *really* compelled unless it is judged ‘involuntary’ within the meaning of the Fourteenth Amendment due process, and (2) that judgments about *real* compulsion must consider the totality of the circumstances in the particular case”).

also constitutional.⁶⁸ Having established *Miranda*'s relationship to *Quarles* and *Quarles*'s effect on *Miranda* rights, Part II empirically examines how the judiciary actually employs the PSE in order to create a blueprint of the PSE in action.

II. THE *QUARLES* PUBLIC SAFETY EXCEPTION IN ACTION

A vast multitude of empirical studies on *Miranda* exist.⁶⁹ They focus on *Miranda*'s effect on the quality, veracity, and frequency of confessions;

68. *Dickerson*, 530 U.S. at 441 (noting that *Quarles* and *Miranda*'s other exceptions "illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable"). The Supreme Court justified *Quarles* and other judicial exceptions to *Miranda*, in part, by referring to case law following *Miranda*, which described *Miranda* warnings as a prophylactic rule. *Quarles*, 467 U.S. at 653 ("[C]oncern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*"). A prophylactic rule as defined by Klein "comes into play when the Court finds that it cannot otherwise protect a particular constitutional clause. Although in such situations some prophylactic rule is necessary, no particular rule is required—only one that is 'effective.'" Klein, *Prophylactic Rules*, supra note 66, at 1060. For arguments for and against characterizing *Miranda* as a prophylactic rule, see Hancock, supra note 48, at 2234 (describing argument that *Miranda* is a "constitutional prophylactic rule" that cannot be overridden by Congress because it protects Fifth Amendment privilege against self-incrimination); Thomas, *Separated at Birth*, supra note 43, at 1088–98 (describing *Miranda* as a "constitutional prophylactic rule," meaning that since it is constitutional it may not be overridden by Congress but as a prophylactic it is required to protect the Fifth Amendment right against self-incrimination). Thomas argued that this understanding of *Miranda* enabled the *Dickerson* Court to "embrace[] the entire doctrinal superstructure created with the prophylactic understanding." *Id.* at 1091 (footnote omitted).

69. See Edward L. Barrett, Jr., *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11 (1962) (using published data from California police departments and California Bureau of Criminal Statistics to develop "highly impressionistic survey of actual [police] practices"); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops?: A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998) (using regression analysis to study crime clearance rates after *Miranda*); Paul G. Cassell, **Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 Harv. J.L. & Pub. Pol'y 327 (1997) (using FBI data on crime clearance rates to argue that "violent crime clearance rates fell precipitously immediately after *Miranda*"); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda**, 43 UCLA L. Rev. 839 (1996) (surveying "frequency of waivers of rights and confessions, police compliance with *Miranda*, and the role of confessions in the outcome of prosecutions" from pool of 200 cases in 1994 in Salt Lake County, Utah); *Interrogations in New Haven: The Impact of *Miranda**, 76 Yale L.J. 1519 (1967) (documenting *Miranda*'s impact on police interrogation based on constant observation of New Haven police station over eleven week period in 1966); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of *Miranda**, 47 Denver L.J. 1 (1970) (conducting empirical study in Denver in 1969 of detainees' awareness of their constitutional rights); Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1996) (analyzing 500 hours of police interrogations to better understand "characteristics, context, and outcome of contemporary police interrogation practices"); Richard J. Medalie, Leonard Zeitz & Paul Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement *Miranda**, 66 Mich. L. Rev. 1347 (1968) (using questionnaires to study effect of *Miranda* on defense counsel at police station as well as defendants' understanding of legal rights in Washington, D.C. over two-year period);

law enforcement's compliance with or violation of *Miranda*; and *Miranda*'s relationship to crime rates, among other things. However, no study to date has examined the judicial application of the PSE, analyzing the way courts employ this mechanism to admit or exclude un-Mirandized testimony.⁷⁰ Part II offers the first attempt, presenting an empirical yet descriptive analysis of the PSE in order to construct a credible understanding of how the PSE functions in the hands of the judiciary. Part II.A outlines the methodology used to read, review, and categorize all state and federal opinions definitively stating the appropriate use of the PSE. Part II.B systematically presents the entirety of *Quarles* case law, analyzing the courts' operational use of the PSE. This Note argues that an exhaustive examination of the judiciary's past employment of the PSE offers the best evidence available regarding the judiciary's future employment of the PSE in terrorist interrogations.⁷¹

Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda* in Pittsburgh—A Statistical Study, 29 U. Pitt. L. Rev. 1 (1967) (examining extent to which *Miranda* impaired Pittsburgh police department); George C. Thomas III, Stories About *Miranda*, 102 Mich. L. Rev. 1959 (2004) (surveying 211 cases to derive rate at which police actually Mirandize suspects); Charles D. Weisselberg, Mourning *Miranda*, 96 Calif. L. Rev. 1519 (2008) (surveying police training materials to “demonstrate how the warning and waiver regime coheres with a sophisticated psychological approach to police interrogation”); Marvin Zalman & Brad W. Smith, Criminology: The Attitudes of Police Executives Toward *Miranda* and Interrogation Policies, 97 J. Crim. L. & Criminology 873 (2007) (surveying police department administrators in major American cities “regarding interrogation law and practice” to gauge law enforcement compliance with *Miranda*). For an excellent summary of these studies and their methodological weaknesses, see George C. Thomas III, Is *Miranda* a Real-World Failure?: A Plea for More (and Better) Empirical Evidence, 43 UCLA L. Rev. 821 (1996).

70. By reviewing the case law to examine nothing more than past judicial behavior, without first formulating a causal hypothesis, this study differs greatly from the cottage industry of empirical studies spawned by *Miranda*. Those studies largely identify themselves as social science studies attempting to divine a causal relationship between *Miranda* and a multitude of situations including police behavior, suspect behavior, and receipt of information, among other things. Even studies which hesitate to classify themselves as social science studies, offering the milder classification as policy studies, encounter difficulties because “[w]ithout finer quantitative data it is not possible to make firm causal statements about the mutual influences of legal rules and social behavior.” Zalman & Smith, *supra* note 69, at 877 n.13.

71. While a long, historic debate thrives concerning the prudence of courts using social science and empirical data in judicial decisionmaking, this Note sidesteps that issue. See Klein, Prophylactic Rules, *supra* note 66, at 1068 (arguing that the legislature “has superior factfinding abilities”). The empirical data presented in Part II are not intended for the courts; rather, the data are meant to shed light on the *way* courts apply the PSE in order to better inform the debate regarding the PSE's adequacy in relationship to terrorist interrogations.

A. Methodology

In stark contrast to the empirical studies previously endeavored,⁷² the judiciary comprises the sole subject of this study's inquiry.⁷³ This study reviews all state and federal cases⁷⁴ to date⁷⁵ that discuss the application of the PSE to admit or exclude un-Mirandized testimony. Establishing this pool of cases involved a relatively straightforward Westlaw search of all federal and state cases using the search terms ["public safety exception" and suppress! and Quarles]. That search resulted in 558 cases (after excluding *Quarles* itself). Within these results, opinions proffering clear, definitive statements regarding the admission or exclusion of un-Mirandized testimony based on the PSE were filtered and categorized based on several different metrics.⁷⁶ Since not all similarly situated defendants appeal, the analysis includes and considers state court and lower

72. See *supra* note 69 (surveying empirical studies on *Miranda*).

73. Chief Judge Richard Posner explicitly calls for empirical examinations of the judicial system, urging scholars to undertake the "task of exploring the operation and consequences of constitutionalism," looking to see if "constitutional issues [are] becoming more complex, and if so, what . . . the courts [are] doing to keep abreast of the complexities." Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 11 (1998). But see Deborah Jones Merritt, *Constitutional Fact and Theory: A Response to Chief Judge Posner*, 97 Mich. L. Rev. 1287, 1293–95 (1999) (challenging Posner's proposed use of empirical data in constitutional theory and advancing three different uses for empirical data). Susan Klein explicitly argues for the value of empirical data in the Supreme Court's rulemaking process: "[R]egardless of the method of constitutional interpretation used to develop the constitutional norm . . . social science and empirical data can assist the Court in developing the subsidiary rules and rights necessary to protect that norm, value, or rule." Klein, *Prophylactic Rules*, *supra* note 66, at 1066.

74. To avoid tricky constitutional issues regarding *Miranda* rights for foreigners and citizens abroad, the study only includes the use of the PSE in interrogations of American citizens on American soil. Thus cases in which the interrogation took place abroad, such as *In re Terrorist Bombings of United States Embassies in East Africa*, 552 F.3d 177 (2d Cir. 2008), were excluded.

75. The study is limited to cases decided before October 4, 2010, a cutoff date imposed by editorial deadlines.

76. Since the inquiry focuses on the courts' use of the PSE to rule on admissibility, opinions in which the PSE was mentioned only in the concurring or dissenting opinions were excluded. See, e.g., *Gearing v. State*, 685 S.W.2d 326, 331 n.4 (Tex. Crim. App. 1985) (Clinton, J., dissenting) (mentioning the *Quarles* PSE only in the dissenting opinion), overruled by *Woods v. State*, 956 S.W.2d 33 (Tex. Crim. App. 1997). The PSE need not have been the determinative factor in the court's decisionmaking process to be relevant to the study. See, e.g., *Caballero v. Hartley*, No. CV 08-5725 JFW(E), 2009 WL 2341744, at *10 (C.D. Cal. July 28, 2009) ("Alternatively, if Petitioner made his statement in response to police interrogation into whether Petitioner had shot the gun and the location of the gun, the public safety exception to *Miranda* would have permitted the use of Petitioner's statement at trial."). In these cases, while the PSE was not central to the actual holding, the dicta make clear how the court would have ruled on the PSE which offers equally valuable information concerning the judiciary's stance on the appropriate application of the PSE and were thus included in the study. For the same reasons, cases on remand were considered on equal footing to the original decision, since both decisions indicate valuable information about judicial behavior and not every case will, in fact, be appealed.

federal court opinions on equal footing.⁷⁷ The analysis also acknowledges that the judiciary's application of the PSE could vary depending upon the court system and level. To account for this potential, the study not only examines all opinions together—without discriminating between court systems—but also divides the opinions by state and federal court, separating trial decisions from appellate decisions, and dividing them by circuit.

While the pool of opinions examined is extensive—including every opinion that states the appropriate application of the PSE to un-Mirandized testimony—the universe may still be skewed, somewhat limiting the study's value.⁷⁸ The study cannot account for the cases in which the defendant did not move to suppress the testimony or in which the prosecution did not argue the PSE. This is, of course, a common drawback of all empirical studies of litigation and judicial opinions.⁷⁹ The study partially mitigates this drawback by expanding the universe of opinions beyond those cases in which the PSE was the deciding factor or comprised the holding. The data pool includes opinions that clearly indicate,

77. There are a myriad of reasons to consider state court opinions equally. State courts are uniquely poised to decide issues of criminal justice, possessing a canonical voice often more authoritative than that of the federal district courts: "[B]ecause of the restrictions on the reach of federal habeas corpus, the lower federal courts—for the most part—cannot play a meaningful role in reviewing the application of *Miranda* in state courts." Weisselberg, *supra* note 69, at 1593; cf. Robert M. Bloom & Hillary Massey, Accounting for Federalism in State Courts: Exclusion of Evidence Obtained Lawfully by Federal Agents, 79 U. Colo. L. Rev. 381, 382 (2008) (proposing answer to question of whether or not "evidence that results from a federal law enforcement agent acting legally under federal law [should] be admitted in state court when the agent's actions constitute a violation of state law"). Additionally, federalism concerns are especially inflamed in issues of criminal law, a domain almost always reserved for the states. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812) (instituting prohibition on federal criminal common law). The Fifth Amendment establishes the floor for criminal justice safeguards. States can and do create greater criminal justice protections, which should be considered in relation to the PSE. See, e.g., *State v. Kane*, 951 P.2d 934, 942 (Haw. 1998) (explaining that "while the United States Supreme Court has adopted the 'public safety' exception . . . this court has never formally adopted an analogous limitation on the protections afforded to criminal defendants by article I, section 10 of the Hawai'i Constitution"); see also Weisselberg, *supra* note 69, at 1592 n.390 ("Some state courts, as a matter of state law, have afforded suspects greater protection than *Miranda* provides."); cf. Klein, Prophylactic Rules, *supra* note 66, at 1052–53 (discussing federalism concerns as applied to *Miranda*).

78. This study, by design, only involves instances in which behavior on the ground is challenged in court. Developing a criteria or method for selecting a sample pool of cases was unnecessary since the universe of cases implicating the PSE was self-generating and complete by definition. The obvious advantage of a study like this is that it is less susceptible to built-in biases bending findings in one direction. As noted by Debra Jones Merritt, however, the very formulation of investigative questions may belie certain biases adulterating the objectivity of the study. Merritt, *supra* note 73, at 1291 ("One cannot ask for data without suggesting that the data are relevant.").

79. See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 4–6 (1984) (hypothesizing that potential litigants only engage the litigation process if they have a 50% chance of prevailing in court, therein always producing a skewed pool of cases for empirical studies focused on litigation or the court system).

in dicta, how the court would have ruled if it had reached the issue of admissibility based on the PSE.⁸⁰ The standard for inclusion of this kind of dicta is very high: The opinion has to provide a clear, definite statement on the court's approach.⁸¹ Conversely, cases lacking clear statements regarding the appropriate application of the PSE are omitted since they do not improve the understanding of the courts' use of the PSE.⁸²

B. Results and Analysis

This section examines the entirety of the *Quarles* case law, aggregating the relevant opinions in various ways in order to provide credible data points for evaluating past applications of the PSE. Part II.B.1 shows the rate at which the judiciary uses the PSE to admit un-Mirandized testimony in all state and federal cases. To ensure that a particular circuit, state, or

80. See, e.g., *United States v. Murray*, 53 V.I. 831, 853 n.18 (D.V.I. 2010) (stating in dicta that case "also falls within the public safety exception").

81. The most typical dicta included in the study are opinions which state, "even if X did not justify admitting the testimony, the PSE surely would have done so." For an example of a case meeting this stringent dicta requirement, see *Caballero*, 2009 WL 2341744, at *10 (finding *Miranda* did not apply because statements were spontaneous, but stating, "[a]lternatively, if Petitioner made his statement in response to police interrogation into whether Petitioner had shot the gun and the location of the gun, the public safety exception to *Miranda* would have permitted the use of Petitioner's statement"). For an example of a case that was rejected because the language was not sufficiently conclusive, see *State v. Sowards*, No. 06CA13, 2007 WL 2729848, at *6 n.2 (Ohio Ct. App. Sept. 17, 2007) (finding defendant's admission inadmissible under *Miranda* but stating, "[a]dditionally, it is interesting to consider whether appellant's admission to Trooper Johnson, if Trooper Johnson had framed his question differently, could have fallen under the 'public safety exception' to the *Miranda* rule").

82. In total, 186 of the 558 cases lacked outcome-determinative statements regarding the use of the PSE to admit or exclude un-Mirandized statements. A rough categorization of the cases excluded is: (1) opinions with thin factual summary precluding PSE analysis, see, e.g., *United States v. Jordan*, 303 F. App'x 439, 440 (9th Cir. 2008) (comprising three paragraph opinion stating, "[t]he facts are known to the parties and need not be repeated here"); (2) opinions focusing only on the exclusion of physical evidence, see, e.g., *State v. Rogers*, No. 93-0950-CR, 1994 WL 133037, at *5-*6 (Wis. Ct. App. Apr. 19, 1994) (deciding issue on appeal relating to admission of physical evidence); (3) opinions exclusively addressing the issue of defectively administered *Miranda* warnings, see, e.g., *Rigterink v. State*, 2 So. 3d 221, 254 (Fla. 2009) ("[T]he PCSO detectives provided . . . defective right-to-counsel warning both verbally and in writing."); (4) opinions rhetorically acknowledging the PSE, see, e.g., *State v. Stearns*, 506 N.W.2d 165, 168-69 (Wis. Ct. App. 1993) (mentioning *Quarles* only as an exception to *Miranda* after finding *Miranda* inapplicable); (5) opinions forgoing discussion of the PSE because *Miranda* rights were unnecessary, see, e.g., *State v. Letts*, 129 Wash. App. 1017, 1017 (2005) (explaining that application of PSE is unnecessary because suspect was not in custody); and (6) opinions deciding the case on narrower grounds eliding the PSE question, see, e.g., *United States v. Swearingen*, No. 94-30202, 1995 WL 306745, at *4 (9th Cir. May 18, 1995) (finding it unnecessary to review "district court's holding that Swearingen's answer to the question was admissible under the 'public safety' exception"). This is not an exhaustive categorization of excluded cases. A full list of excluded cases as well as the reason for each particular case's exclusion from the study is available upon request to the *Columbia Law Review*.

judge's idiosyncratic practices do not skew the results, Table 1 aggregates all opinions but also divides them by state and federal court as well as by trial and appellate opinion. Table 2, presented in Part II.B.2, further parses this data, organizing the rate of admissibility by federal circuit to see if different doctrinal approaches to the PSE affect the rate of its use. Part II.B.3 considers the effect 9/11 may have had on the judiciary's application of the PSE. Unsurprisingly, after 9/11 and the subsequent enactment of the Patriot Act, law enforcement pursued and prosecuted terrorists more aggressively. Some academics have argued that this heightened aggression extended to all suspects, not just suspected terrorists.⁸³ Table 3 applies this behavioral hypothesis to the judiciary and compares the rates at which the judiciary applied the PSE to admit evidence before and after 9/11.

While Parts II.B.1–3 analyze the effect external factors like the court system and historic events have on the judiciary's application of the PSE, Parts II.B.4–6 examine the effect the inherent variables of the relevant incident have on the judiciary's use of the PSE. Thus Table 4, in Part II.B.4, breaks down the application of the PSE by threat, investigating whether or not the weapon or device endangering public safety influences the judiciary's ruling on the PSE. Part II.B.5 categorizes the *Quarles* case law by the demographic in danger; Table 5 shows the rate at which the judiciary applies the PSE based on the demographic in danger. Lastly, Table 6 determines whether or not the type of law enforcement involved in the interrogation affects the judiciary's willingness to admit evidence based on the PSE. To do this, Part II.B.6 divides the opinions into state and federal court to account for the potential that state courts treat local police more favorably by applying the PSE at a higher rate when state law enforcement is involved and/or that federal courts treat the FBI more favorably, applying the PSE at a higher rate when the FBI is involved. Part II.B.7 aggregates all of the data to synthesize the general knowledge amassed by the study, sketching a composite of the prototypical PSE case.

1. *The Frequency of Judicial Application of the PSE to Admit Evidence.* — Table 1 shows the rate at which courts use the PSE to admit un-Mirandized testimony, which can reveal a lot about the mechanism. A very low rate of admission based on the PSE might suggest that courts believe that the PSE has marginal value or that the policy concerns motivating *Quarles* rarely occur. Thus a low rate of admission would provide strong evidence that the PSE does not empower law enforcement to properly interrogate suspected terrorists and simultaneously obtain admissible testimony. Conversely, if the data showed that courts admit un-Mirandized testimony due to the PSE at a very high rate, it would support arguments that the judiciary is extremely comfortable and adept at employing this mechanism, making it a powerful prosecutorial tool.

83. See *infra* note 91 (discussing impact 9/11 and Patriot Act had on law enforcement behavior and scope of prosecutorial discretion).

TABLE 1: JUDICIAL APPLICATION OF THE PSE TO ADJUDICATE ADMISSIBILITY

Court Level Comparison of Successful Use of PSE				
Court Level	Total PSE Cases	Evidence Admissible Due to PSE	Evidence Excluded Despite PSE Claim	Percent of Cases in Which PSE Justified Admitting Evidence
State Trial	5	4	1	80%
State Appellate	152	122	30	80%
Federal District	139	104	35	75%
Federal Appellate	75	68	7	91%
Federal/State Comparison of Successful Use of PSE				
State Court (Trial & Appellate)	157	126	31	80%
Federal Court (District & Appellate)	214	172	42	80%

The most striking aspect of Table 1 is its consistency. Divided by court level, the PSE is argued successfully between 75% and 91% of the time. State and federal courts use the PSE to justify admissibility at an identical rate of 80%. Given the different players involved in the state and federal court systems, these results could be read to suggest that the PSE, as a mechanism, produces uniform outcomes, regardless of the implementing body. Put differently, subjective application of the PSE yields objective, consistent results. This is high and rare praise for a judicially created balancing test.⁸⁴ The most modest upshot of Table 1 showcases the PSE as a trustworthy tool created by the judiciary that produces predictable, reliable results.

The data also support the conclusion that courts are very comfortable employing the PSE to admit evidence. This finding weakens concerns that the PSE is a rarely applied exception viewed skeptically by the courts, that could not, therefore, be entrusted to situations as gravely important as terrorist interrogations. Furthermore, to the extent that the data in Part II.B show that the judiciary applied the PSE to admit un-Mirandized testimony 80% of the time prosecutors argued it, the analysis may suggest that federal prosecutors underutilize the PSE or at least underestimate the judiciary's demonstrated receptivity to it.

84. It is much more likely for a Due Process Clause balancing test to be critiqued for its unreliability. See, e.g., Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 319–24 (1993) (criticizing due process balancing tests as intuitive, vague, and sometimes arbitrary); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 Va. L. Rev. 1361, 1376 (2010) (“Scholars have often lamented that procedural due process doctrine is confusing, unpredictable, and even incoherent.” (internal citations omitted)); Edward L. Rubin, *Due Process and the Administrative State*, 72 Calif. L. Rev. 1044, 1045 (1984) (describing the Due Process Clause’s “fall from grace”).

2. *The PSE Applied in the Federal Circuits.* — While Table 1 suggests that the PSE yields consistent results whether in state or federal court, the rate at which the judiciary uses the PSE to admit evidence could still skew by federal circuit. Table 2 thus divides the data by federal circuit to determine whether or not certain circuits apply the PSE more or less frequently than other circuits. This finding is relevant to the PSE debate since, while it is fairly likely that suspected terrorists will be tried in federal court,⁸⁵ it is more difficult to determine in which circuit the trial will take place. Thus, opponents of the PSE will only be fairly rebutted if Table 2 showed that all circuits are equally comfortable applying the PSE to admit un-Mirandized testimony and do so at a high frequency.

TABLE 2: APPLICATION OF THE PSE TO ADJUDICATE ADMISSIBILITY DIVIDED BY FEDERAL CIRCUIT

Circuit Court Comparison of PSE Use Including Both District & Appellate Courts				
Circuit	Total PSE Cases	Evidence Admissible Due to PSE	Evidence Excluded Despite PSE Claim	Percent of Cases in Which PSE Justified Admitting Evidence
First (Broad)	17	10	7	59%
Second (Narrow)	30	24	6	80%
Third	16	11	5	69%
Fourth (Narrow)	15	13	2	87%
Fifth (Narrow)	8	5	3	63%
Sixth (Narrow)	20	16	4	80%
Seventh	13	9	4	69%
Eighth (Broad)	28	22	6	79%
Ninth (Broad)	23	23	0	100%
Tenth (Narrow)	22	20	2	91%
Eleventh	12	11	1	92%
D.C.	7	7	0	100%

The rates at which the federal circuits use the PSE to admit evidence vary from 59% to 100%—a greater variation than the rates in Table 1—despite the fact that the circuits are presented with similar fact patterns at similar rates.⁸⁶ A recent Note argued that the federal circuits employ ei-

85. In the case of terrorist interrogations, the FBI will always conduct or lead the questioning. See Anne E. Kornblut, New Unit to Question Key Terror Suspects, Wash. Post, Aug. 24, 2009, at A1 (reporting that FBI’s High Value Detainee Interrogation Group will interrogate key suspected terrorists). Table 6, *infra* Part II.B.6, shows that when the FBI is involved, the case almost always ends up in federal court. Therefore, admissibility issues regarding the large majority of un-Mirandized testimony of suspected terrorists will be adjudicated in federal court.

86. For example, in each circuit the proportion of firearm cases compared to all PSE cases in the circuit is as follows: First Circuit: 15/17; Second Circuit: 21/30; Third Circuit: 11/16; Fourth Circuit: 10/15; Fifth Circuit: 7/8; Sixth Circuit: 13/20; Seventh Circuit: 11/

ther a “broad” or “narrow” doctrinal approach to the application of the PSE.⁸⁷ The Note argued that courts employing the “broad approach” applied the PSE to “inherently dangerous circumstances . . . regardless of the immediacy or any actual evidence of that threat.”⁸⁸ Courts embracing the “narrow approach” applied the PSE only if “actual knowledge of an imminent threat to public safety” existed.⁸⁹ Table 2 notates these “broad” and “narrow” approaches.

According to this framework, the First, Eighth, and Ninth Circuits apply the “broad approach,” while the Second, Fourth, Fifth, Sixth, and Tenth Circuits apply the “narrow approach.”⁹⁰ If this doctrinal characterization were correct, the “narrow” approach could account for the lower rates of admissibility based on the PSE. This is not the case, however, as Table 2 shows that the rate of PSE application in the “broad” circuits varies from 59% to 100% and the rate of PSE application in the “narrow” circuits varies from 63% to 91%. Thus the data suggest that a circuit’s doctrinal approach to the PSE does not affect the rate at which the courts use the PSE to admit evidence. Dividing up the data at this level, however, creates such small sample pools (ranging from seven to thirty cases), no real statistical or empirical conclusions are merited.

3. *9/11’s Effect on the Judiciary’s Approach.* — Academics speculate that law enforcement overhauled its practices after 9/11, increasing its power to more aggressively prosecute all cases, not just terrorism cases.⁹¹ A natural assumption following from that speculation is that the judiciary assumed a similar posture. This shift could have resulted in the judiciary’s increased willingness to relax criminal safeguards in the name of national safety, thereby favoring prosecutorial arguments to admit evidence based on the PSE in all criminal cases. Table 3 reviews the application of the PSE before and after 9/11 to see if the rate at which courts admit evidence based on the PSE increased after 9/11 due to the general climate of caution and suspicion.

13; Eighth Circuit: 16/28; Ninth Circuit: 21/23; Tenth Circuit: 16/22; Eleventh Circuit: 7/12; D.C. Circuit: 7/7. See data on file with the *Columbia Law Review*, available upon request.

87. Norton, *supra* note 57, at 1947–60.

88. *Id.* at 1934.

89. *Id.*

90. *Id.* at 1948.

91. See Robert C. Power, “Intelligence” Searches and Purpose: A Significant Mismatch Between Constitutional Criminal Procedure and the Law of Intelligence-Gathering, 30 *Pace L. Rev.* 620, 624 (2010) (reporting that DOJ’s “New Paradigm” after 9/11 meant that “anti-terrorism . . . expanded law enforcement’s powers to act”); Philip Michael Romero, An Immunological Approach to Counter-Terrorism and Infrastructure Defense Law in Electronic Domains, 14 *Int’l J.L. & Info. Tech.* 101, 107–08 (2006) (“The Patriot Act, in particular, provides law enforcement with a virtual cornucopia of enforcement tools, allowing aggressive collection efforts.”).

TABLE 3: APPLICATION OF THE PSE TO ADJUDICATE ADMISSIBILITY BEFORE AND AFTER 9/11

Pre 9/11 Court Level Comparison				
Court Level	Total PSE Cases	Evidence Admitted Due to PSE	Evidence Excluded Despite PSE Claim	Percent of Cases in Which PSE Justified Admitting Evidence
State Trial	2	2	0	100%
State Appellate	78	62	16	79%
Federal District	24	18	6	75%
Federal Appellate	37	33	4	89%
Total Cases	141	115	26	82%
Post 9/11 Court Level Comparison				
State Trial	3	2	1	67%
State Appellate	74	60	14	81%
Federal District	115	86	29	75%
Federal Appellate	38	35	3	92%
Total Cases	230	183	47	80%
Pre 9/11 State/Federal Comparison of Successful Use of PSE				
State Court (Trial & Appellate)	80	64	16	80%
Federal Court (District & Appellate)	61	51	10	84%
Post 9/11 State/Federal Comparison of Successful Use of PSE				
State Court (Trial & Appellate)	77	62	15	81%
Federal Court (District & Appellate)	153	121	32	79%

The results in Table 3 suggest that the judiciary did not significantly change its application of the PSE following 9/11. For state appellate courts, the rate at which the PSE was used to admit evidence before and after 9/11 varied by only 2%, increasing from 79% to 81%. In federal district courts, the rate stayed constant. In federal appellate courts, the rate increased by 3%, changing from 89% to 92%. Overall, state courts used the PSE to admit evidence 80% of the time before 9/11 and 81% of the time after 9/11. Perhaps counterintuitive to academic suggestions that courts read the PSE far more “expansively” after 9/11,⁹² the rate at which federal courts used the PSE to admit evidence dropped from 84% to 79% after 9/11.

92. See Darmer, *Lindh Case*, *supra* note 10, at 272 (“Given the current national preoccupation with security in the wake of the September 11 terrorist attacks, a court is far more likely to read the public safety exception expansively.”).

That conclusion may be misleading, however, since the number of times the federal government argued the PSE grew significantly after 9/11, thereby increasing the judiciary's opportunity to admit evidence based on the PSE: Before 9/11, the federal government argued the PSE an average of eight times per year.⁹³ After 9/11, however, the federal government argued the PSE an average of twenty-three times per year.⁹⁴ Thus, Table 3 also demonstrates that, in line with academic predictions,⁹⁵ the government seems to have become more aggressive toward all criminal defendants after 9/11, at least to the extent that raising the PSE may indicate such an approach. Despite the increased opportunity to admit evidence based on the PSE, however, the rate at which the judiciary applied the PSE to admit evidence basically remained constant, which may suggest a strict judicial fidelity to the policy concerns and doctrinal framework of *Quarles*.

4. *The Application of the PSE Categorized by Threat.* — Table 4 shows the application of the PSE based on the nature of the threat in order to investigate whether or not the judiciary is more likely to admit evidence if a certain kind of threat to the public safety is present. This data can illuminate the PSE debate in a number of ways. Were it to show that courts only admitted evidence based on the PSE in cases that involved firearms, as was the case in *Quarles*, arguments that the PSE can adequately handle terrorist interrogations would be effectively rebutted since terrorist attacks are typically attempted with explosive devices. Conversely, if the data showed that the judiciary was particularly moved by cases that involved explosive devices, advocates of the status quo would possess concrete facts showing that courts are highly likely to admit un-Mirandized testimony when explosive devices endanger public safety and thus the PSE is more than capable of handling the unique challenges of terrorist interrogations.

93. *Quarles* was decided in 1984, resulting in seventeen years of PSE cases before 9/11. Over those seventeen years, there were 141 PSE cases, which results in an average of eight cases per year.

94. This number cannot account for unpublished opinions adjudicating the PSE that are not available on Westlaw.

95. See *supra* notes 91–92 (surveying academic arguments that law enforcement and prosecutions would become more aggressive after 9/11). This number cannot account for unpublished opinions adjudicating the PSE that are not available on Westlaw.

TABLE 4: APPLICATION OF THE PSE TO ADJUDICATE ADMISSIBILITY
CATEGORIZED BY THREAT⁹⁶

Adjudication of PSE Categorized by Nature of Threat in All State and Federal Cases				
Type of Threat	Total PSE Cases	Successful Use of PSE	Unsuccessful Use of PSE	Percent of Cases in Which PSE Was Successful
Bomb/Potential Explosion	9	8	1	89%
Firearm	267	220	47	82%
Knife	10	7	3	70%
Second Suspect	15	14	1	93%
Weapon	21	15	6	71%

Even before calculating the rate at which courts employ the PSE to admit evidence, the raw numbers reveal a significant fact about the application of the PSE: The vast majority of PSE cases involve firearms. Yet when the rate with which the courts use the PSE to admit evidence is examined by type of threat, the lowest rate of judicial use of the PSE to admit evidence is 70%. This reveals that courts are willing to admit evidence based on the PSE 70% of the time, no matter the type of threat. More to the point, in the case of bombs or explosive devices, courts use the PSE to admit the evidence 89% of the time. Thus, the fact that the majority of PSE cases involve firearms may simply be representative of the fact that the majority of criminal cases involve firearms and may not lend itself to any relevant takeaway about the judiciary’s application of the PSE as regards the PSE debate. Furthermore, since the *modus operandi* of terrorists is explosive devices, the fact that the judiciary applies the PSE 89% of the time to admit evidence when an explosive device is involved is particularly relevant. To fully evaluate this statistic, Part III.D examines these nine cases in detail.

5. *The Identity of the Endangered Public.* — *Quarles* directed the courts to evaluate the possible risk to public safety when determining whether the testimony should be admitted under the PSE.⁹⁷ In the case of terrorist interrogations, explosives will likely endanger both law enforcement and the general public. Therefore, data showing that this circumstance makes it more likely that the judiciary will admit evidence based on the PSE bode well for proponents of the legislative status quo that extends *Miranda* rights to suspected terrorists while using the PSE to accommodate the unique needs of these interrogations. Table 5 examines the judiciary’s application of the PSE based on the different demographics of people in danger or the identity of the “public.”

96. The numbers will not add up perfectly here as some cases had more than one threat and were counted in multiple categories. Additionally, Table 4 does not include the miscellaneous cases that do not fit into the above categories or cases in which the threat was not clearly identified in the opinion.

97. See *supra* Part I.C (discussing *Quarles*).

TABLE 5: APPLICATION OF THE PSE TO ADJUDICATE ADMISSIBILITY CATEGORIZED BY ENDANGERED DEMOGRAPHIC⁹⁸

Adjudication of PSE Categorized by Demographic in All State and Federal Cases				
Demographic in Danger	Total PSE Cases	Evidence Admissible Due to PSE	Evidence Excluded Despite PSE Claim	Percent of Cases in Which PSE Justified Admitting Evidence
Exclusively General Public	54	42	12	78%
Exclusively Law Enforcement	106	85	21	80%
Exclusively Inhabitants ⁹⁹	17	12	5	71%
General Public & Law Enforcement	111	105	6	95%

The major takeaway from Table 5 is the consistency with which the PSE functions, showing a high frequency of admitting evidence solicited in violation of *Miranda*. Table 5 shows that when both the general public and law enforcement are in danger, a likely scenario in the case of terrorist interrogations, courts employ the PSE 95% of the time to admit the evidence. The 5% of cases in which courts rejected the PSE despite the fact that both law enforcement and the general public were in danger may reveal something valuable about the PSE, since the presence of both demographics conceivably creates a situation most sympathetic to the judiciary. These six cases help to depict the outer bounds of the PSE, highlighting potential limitations that could be relevant to the PSE debate.

One of two main themes is present in the six cases in which the general public and the police were in danger and yet the judiciary did not admit the evidence based on the PSE¹⁰⁰: (1) The general public and police were not actually in danger or the danger was de minimis; or (2) the interrogation did not focus on matters relevant to public safety. These

98. The numbers do not add up perfectly as some cases had more than one category of demographic in danger and some cases did not specify the demographic in danger clearly enough to be included in Table 5.

99. The category “Inhabitants” in Table 5 refers to situations in which law enforcement executed a search warrant or entered the home of a suspect and others, usually fellow residents, were present. This category was devised to see if a relationship to the suspect decreased the courts’ concern for public safety, meaning that “public” safety was defined to encompass only external, unknown third parties. Table 5 shows that the association with the suspect does not dramatically affect the judiciary’s analysis of public safety to admit un-Mirandized testimony based on the PSE since its rate of 71% falls roughly in line with the other rates.

100. The six cases are *United States v. Brathwaite*, 458 F.3d 376 (5th Cir. 2006); *United States v. Dutchie*, No. 2:07-CR-537-TC, 2008 WL 4168423 (D. Utah Sept. 2, 2008); *State v. Kane*, 951 P.2d 934 (Haw. 1998); *People v. Dennis*, 866 N.E.2d 1264 (Ill. App. Ct. 2007); *In Interest of B.R.*, 133 Ill. App. 3d 946 (1985); *People v. Gause*, 856 N.Y.S.2d 287 (App. Div. 2008).

themes should not be surprising since they align directly with the Supreme Court's instructions in *Quarles* regarding appropriate application of the PSE.

For example, in *People v. Dennis*, the court declined to admit testimony based on the PSE because the suspect had discarded his firearm in a marsh.¹⁰¹ The low likelihood that anyone would retrieve the firearm from the "unpopulated marsh-like area" did not sufficiently threaten public safety to justify admission of the evidence based on the PSE.¹⁰² In *United States v. Brathwaite*, the public safety was threatened when the suspect disposed of the firearm in an unknown location, yet the interrogation focused on weapons inside of the suspect's house, which law enforcement had already searched and secured, precluding the possibility of anyone retrieving a firearm inside the house.¹⁰³ Questioning concerning possessions inside the house was thus irrelevant to public safety, and therefore the PSE could not justify admitting the un-Mirandized testimony.¹⁰⁴ These six cases are significant, therefore, in that they show a judicial fidelity to the policy concerns motivating the *Quarles* doctrine. Furthermore, since these six cases, together, represent state trial, state appellate, federal district, and federal appellate courts they bolster the suggestion that all levels of the judiciary have displayed a faithful adherence to the boundaries of the PSE.

6. *The Identity of Law Enforcement.* — Table 6 examines whether or not courts treat interrogations conducted by federal and state law enforcement differently. The data test the hypothesis that federal courts are more amenable to PSE claims when the FBI is involved and that state courts are more amenable to PSE claims when local law enforcement is involved. These data are particularly relevant to the PSE debate since the FBI will always be called to lead the interrogation of suspected terrorists. Therefore, data that suggest that state courts are less likely to admit evidence when federal law enforcement is involved are directly relevant to the PSE's ability to accommodate terrorist interrogations.¹⁰⁵ Thus, even before testing for bias, segregating the judiciary's application of the PSE for FBI involvement is an important exercise.

101. 866 N.E.2d at 1264.

102. *Id.* at 1277.

103. 458 F.3d 376.

104. *Id.* at 377.

105. See *supra* note 85 (discussing DOJ High Value Detainee Interrogation Group).

TABLE 6: APPLICATION OF PSE TO ADJUDICATE ADMISSIBILITY BASED ON IDENTITY OF LAW ENFORCEMENT

State Court Adjudication of PSE Divided by Law Enforcement				
Type of Law Enforcement	Total PSE Cases	Evidence Admissible Due to PSE	Evidence Excluded Despite PSE Claim	Percent of Cases in Which PSE Justified Admitting Evidence
State	156	125	31	80%
Federal	0	0	0	N/A
Both	1	1	0	100%
Federal Court Adjudication of PSE Divided by Law Enforcement				
Federal	27	16	11	59%
State	170	143	27	84%
Both	17	13	4	76%

Table 6 shows that state courts have never had the opportunity to apply the PSE when the FBI exclusively interrogated the suspected terrorist. This is interesting and possibly surprising because it suggests that if the FBI is involved (even if the FBI is involved together with state law enforcement) the case will be in federal court. The data regarding the federal judiciary suggest that the identity of law enforcement does not affect the federal courts' application of the PSE. Ultimately, Table 6 may not show very much, except for the revelation that state courts have never ruled on an admissibility issue involving the PSE and federal law enforcement alone. Beyond that, however, the percentages do not lend themselves to reliable conclusions since the sample size for the federal law enforcement variable is so small.

7. *The Prototypical PSE Case.* — Having reviewed the entirety of *Quarles* case law, this section provides a representative portrait of the prototypical case in which the judiciary applies the PSE to admit evidence. This composite is helpful and relevant to the PSE debate in part because many objections to the PSE in terrorist interrogations center on the mundane nature and use of the PSE in routine firearm cases. It is true that most PSE cases involve criminal activity perpetrated by a fleeing suspect known to have or have had a gun. This section shows, however, that these cases are not irrelevant to the PSE debate because they reveal the PSE's flexibility and the judiciary's willingness to employ the PSE consistently and sometimes creatively.

The most likely PSE scenario involves the police pursuit of a suspect who is fleeing from a crime or an ongoing search for an unidentified suspect based on a victim's description, usually within a few hours of or the same day of the crime. In the majority of cases, the threat to public safety is a firearm.¹⁰⁶ Usually, law enforcement has good reason to believe that the suspect is or was armed. Evidence that the suspect has or had a

106. See *supra* Table 4 (categorizing PSE cases by nature of threat).

firearm comes in a few generic forms: (1) the commission of the crime involved a firearm;¹⁰⁷ (2) the victim or criminal informant reported that the suspect had a firearm;¹⁰⁸ (3) law enforcement witnessed the suspect dispose of the firearm during the pursuit;¹⁰⁹ (4) law enforcement observed firearm paraphernalia on the suspect (for example, an empty holster or extra ammunition);¹¹⁰ or (5) the suspect had a police record indicating prior firearm possession.¹¹¹

Typically, upon apprehension of the suspect, the police officer will ask the suspect questions to ascertain one of three things: (1) the location of the firearm, if it is missing;¹¹² (2) whether the firearm is loaded;¹¹³ or (3) whether the suspect is in possession of any other weapons.¹¹⁴ The first question concerning the location of the firearm indicates a nice feature of the PSE: A discarded firearm is considered dangerous even after the suspect is apprehended because the judiciary assumes that someone else, especially a child, could find the gun and accidentally or intentionally discharge it.¹¹⁵

107. See, e.g., *United States v. Guerrero-Heredia*, No. CR 09-1248-PHX-D, 2010 WL 672817, at *5 (D. Ariz. Feb. 24, 2010) (finding that “deputies had strong reason to believe that Defendant or his passenger had recently fired a weapon”); *United States v. Bridges*, No. 1:07CR175 CDP, 2008 WL 1701092, at *1 (E.D. Mo. Apr. 9, 2008) (reporting that officer was informed that “suspect had flourished a black handgun”).

108. See, e.g., *State v. Meadows*, No. A-3860-07T4, 2009 WL 3762882, at *6 (N.J. Super. Ct. App. Div. Nov. 9, 2009) (applying PSE when victim reported he was robbed at gunpoint).

109. See, e.g., *United States v. Davis*, No. 4:07CR646 RWS, 2008 WL 2224788, at *4 (E.D. Mo. May 27, 2008) (applying PSE when officer observed defendant discard a metal object which could have been a handgun); *Anderson v. Commonwealth*, 688 S.E.2d 605, 606–09 (Va. 2010) (applying PSE when officers witnessed defendant discard revolver while running).

110. See, e.g., *United States v. Nazario*, 374 F. App’x 63, 65 (2d Cir. 2010) (applying PSE when officers found bullets in defendant’s possession); *United States v. Avery*, No. 07-20040 Ma/P, 2009 WL 5743215, at *2 (W.D. Tenn. Nov. 4, 2009) (applying PSE when officer felt and saw empty holster on defendant); *United States v. Burke*, Crim. No. 08-012-E-BLW, 2008 WL 4402222, at *1 (D. Idaho Sept. 24, 2008) (applying PSE when officers identified holster on defendant); *United States v. Vann*, No. CR-07-288-M, 2008 WL 3836460, at *1 (W.D. Okla. Aug. 13, 2008) (applying PSE where officers “observed several shotgun shells”).

111. See, e.g., *United States v. Watters*, 572 F.3d 479, 481 (8th Cir. 2009) (applying PSE when background check revealed defendant had prior record of weapons charges); *United States v. Johnson*, No. 09-CR-83, 2010 WL 715506, at *7 (E.D. Wis. Feb. 24, 2010) (applying PSE because officer “was aware that [defendant] was known to carry a gun”).

112. See, e.g., *Meadows*, 2009 WL 3762882, at *3 (applying PSE where officer asked if defendant had a weapon and defendant answered by pointing out its location).

113. See, e.g., *Anderson*, 688 S.E.2d at 606 (applying PSE when officer asked if handgun was loaded).

114. See, e.g., *People v. Reyes*, 881 N.Y.S.2d 36, 38 (App. Div. 2009) (applying PSE when officers asked follow-up question regarding a gun cylinder).

115. See, e.g., *People v. Martinez*, No. C054551, 2009 WL 120462, at *6 (Cal. Ct. App. Jan. 20, 2000) (“Because the gun had not been recovered at the crime scene . . . [the officer] could ask where the gun had been tossed, ‘simply to remove it from a location

Thus in the prototypical PSE case, law enforcement has fairly credible knowledge of a high probability that a suspect is or was armed. The questions eliciting the un-Mirandized testimony are usually intended to either identify the location of the firearm or determine whether or not the firearm is loaded.¹¹⁶ The judiciary will almost always admit statements made in response to these types of questions.¹¹⁷ While these features depict the prototypical PSE case, they by no means describe the only application of the PSE. The judiciary has demonstrated a willingness to apply the PSE quite creatively, requiring only that the public safety could have been threatened.¹¹⁸ Part III takes a closer look at some of these cases in order to gauge the PSE's flexibility.

III. THE PSE APPLIED TO TERRORIST INTERROGATIONS

This empirical project was inspired by the debate regarding whether or not the PSE can adequately accommodate terrorist interrogations. Having reviewed all relevant case law to date, Part III presents a subset of cases that directly responds to the critique concerning the PSE's ability to handle the unique challenges of terrorist interrogations.¹¹⁹ Arguments that the PSE does not provide law enforcement with enough flexibility to interrogate suspected terrorists generally focus on the unique temporal aspects of current, ongoing, and future terrorist plans as well as the multi-textured information any one suspect may have regarding concurrent and future terrorist plots. To assuage these concerns, an acceptable PSE must authorize the admission of testimony about future crimes and other terrorists obtained during a prolonged interrogation.¹²⁰ Part III directly engages this debate and each individual critique of the PSE.

where it might be retrieved by a child or other member of the public.'" (quoting *People v. Gilliard*, 234 Cal. Rptr. 401 (Ct. App. 1987) (internal citations omitted))).

116. See *supra* notes 107–110 (identifying relevant cases in *Quarles* case law).

117. See *supra* Part II.B for actual rates at which the judiciary admits evidence like this, which hover near 80%.

118. See, e.g., *United States v. Harris*, 961 F. Supp. 1127, 1134 (S.D. Ohio 1997) (applying PSE to suspect's possession of freeze-dried bubonic plague even though it turned out to be harmless); *United States v. Gonzalez*, 864 F. Supp. 375, 381–82 (S.D.N.Y. 1994) (applying PSE to information-gathering where suspect claimed to be a police officer); *People v. Chatman*, 71 Cal. Rptr. 2d 867, 869–70 (Ct. App. 1998) (applying PSE during routine medical screening prior to jailing prisoner because information was relevant to safety of prison population); *Thomas v. State*, 737 A.2d 622, 632 (Md. Ct. Spec. App. 1999) (applying PSE where suspect bit police officer and police officer inquired into suspect's health so officer could determine if he needed to be tested for communicative diseases); *State v. Granger*, Nos. 97-3860-CR, 97-3861, 1998 WL 753191, at *5 (Wis. Ct. App. Oct. 29, 1998) (applying PSE where car wreckage indicated serious accident in which potential additional victim could need assistance).

119. For a somewhat dated review of *Quarles* cases that speak to the outer limits of the PSE before 9/11, see Alan Raphael, *The Current Scope of the Public Safety Exception to Miranda Under New York v. Quarles*, 2 N.Y. City L. Rev. 63 (1998).

120. See Krauthammer, *Miranda* and Public Safety, *supra* note 10 (describing drawbacks to requiring *Miranda* warnings in terrorist interrogations and need for expanded PSE); Rick Pildes, *Should Congress Codify the Public-Safety Exception to*

Legislators and commentators argue that the PSE cannot accommodate the elapsing temporal nature of terrorist interrogations.¹²¹ Part III.A introduces *Quarles* case law that displays a clear judicial willingness to use the PSE as long as the danger remains “unabated,” applying it in one case four days after the commission of the crime. Legislators and commentators also worry that the PSE does not allow law enforcement to recover important information regarding future terrorist plots.¹²² Part III.B shows state and federal case law exemplifying the judiciary’s willingness to apply the PSE to future crimes not yet initiated. A related concern stems from the PSE’s ability to admit evidence regarding the identity of accomplices. Part III.C shows the courts’ willingness to apply the PSE to accomplices. Lastly, critics worry that the PSE was not designed for and cannot respond to the severe danger and risks created by explosive devices. Part III.D focuses this conversation by examining every case involving both the PSE and an explosive device, the modus operandi of terrorism. By introducing past uses of the PSE drawn from the *Quarles* case law, Part III convincingly shows that the PSE is fully capable of responding to all of the unique requirements of terrorist interrogations.

A. *The Temporal Flexibility of the PSE*

Legislators worry that the PSE does not provide law enforcement with a long enough window to interrogate suspected terrorists before Mirandizing them. Yet the cases discussed directly below show that the judiciary is very comfortable applying the PSE to extended time periods as long as the threat exists. In *People v. O’Quendo*, the state appellate court explained that:

[The] entire thrust of *Quarles* is that the police should have flexibility to respond to true emergency circumstances, whether the danger is momentary or ongoing That purpose would not be served by setting artificial limits as to the time and location of questions that are objectively necessary for the immediate public safety.¹²³

Miranda for Terrorism Cases?, Balkanization (May 6, 2010 9:00 AM), <http://balkin.blogspot.com/2010/05/should-congress-codify-public-safety.html> (on file with the *Columbia Law Review*) (arguing that PSE must be able to accommodate questions concerning not only immediate danger but also allow for gathering “more general intelligence about others who might have assisted the suspect in the (completed or attempted) act of terrorism,” as well as information about the suspect’s organizational affiliation).

121. See Pildes, *supra* note 120 (discussing need for Congress to create legislation that permits interrogating suspected terrorists for longer periods of time before Mirandizing them).

122. See Krauthammer, *Miranda* and Public Safety, *supra* note 10 (arguing PSE should “allow law enforcement to . . . interrogate . . . until law enforcement is satisfied that vital intelligence related to other possible plots . . . has been sufficiently acquired”).

123. 685 N.Y.S.2d 437, 439 (App. Div. 1999).

The *O'Quendo* court cited *People v. Manzella*, in which police faced a suspect locked in his house, refusing to surrender during a siege.¹²⁴ The police questioned the suspect by phone for several hours, attempting to persuade him to surrender peacefully. The *Manzella* court did not hesitate to apply the PSE to this extended time period, explaining that, "so long as the emergency condition continued unabated, the overriding concern for the public . . . is paramount to defendant's individual right against self-incrimination."¹²⁵

Similarly, in *People v. Zalevsky*, law enforcement questioned a suspect continuously for eight hours regarding the location of a potential kidnapping victim. The court was not concerned by this extended timeframe, confidently using the PSE to admit the evidence, reasoning that, "while life hangs in the balance, there is no room for admonitions concerning the right to counsel and to remain silent."¹²⁶ In *Trice v. United States*, the court applied the PSE despite defendant's request for counsel and even though four days had passed since the commission of the crime because the potential of a missing gun accessible to children outweighed the defendant's private interest.¹²⁷ The court explained that the "application of the public safety exception is not limited to the moments immediately following the commission of the crime or the suspect's arrest."¹²⁸

Federal courts are equally willing to apply the PSE in an elapsed, ongoing timeframe. In *Allen v. Roe*, the Ninth Circuit was explicit about its intention to apply the PSE as long the public safety was in danger.¹²⁹ The *Allen* court rejected the defendant's argument that the time period between the commission of the crime and the interrogation was too long to justify the use of the PSE, characterizing it as "miss[ing] the point."¹³⁰ The court reasoned that "[i]f the gun was discarded in a public place, it posed a continuing immediate danger because anyone could have found the gun at any time. Moreover, the danger posed by the gun *does not dissipate over time*."¹³¹

B. *The PSE Applied to Future Crimes*

When interrogating suspected terrorists, law enforcement must be able to gather time-sensitive information regarding concurrent or future terrorist plots unfolding in real time that threaten public safety. Even outside of this dramatic "ticking time bomb" scenario, courts have displayed the ability to apply the PSE to future crimes in which the danger

124. 571 N.Y.S.2d 875, 879 (Sup. Ct. 1991).

125. *Id.* at 879.

126. *People v. Zalevsky*, No. 4320/04, 2007 WL 28459, at *3 (N.Y. Sup. Ct. Jan. 4, 2007) (quoting *State v. Londo*, 158 P.3d 201, 204 (Ariz. Ct. App. 2006)).

127. 662 A.2d 891, 895 (D.C. 1995).

128. *Id.* at 896.

129. 305 F.3d 1046, 1050 (9th Cir. 2002).

130. *Id.* at 1051.

131. *Id.* (emphasis added).

was much less threatening. Past *Quarles* case law shows that courts are willing to apply the PSE to admit statements made about a not yet initiated crime. In *People v. Palmer*, the suspect in custody had already invoked his right to counsel when law enforcement discovered that an accomplice beeped him to schedule a robbery for later that evening.¹³² The police questioned the suspect about the future crime without Mirandizing him. Affirming the state court's decision to admit the un-Mirandized testimony, the district court explained: "Palmer's statement that his accomplices would proceed with the robbery in his absence, was sufficient to raise the 'public safety' exception."¹³³ The Southern District of New York affirmed *Palmer* on the same grounds.¹³⁴ Thus this case offers evidence that the PSE functions adequately in both state and federal courts to admit testimony about future crimes without hamstringing law enforcement's ability to prevent crimes or future threats to the public.

C. *The PSE Applied to Accomplices*

When interrogating suspected terrorists, law enforcement must be able to question suspects about equally dangerous accomplices. The PSE, again, allows for such questioning. In *United States v. Johnson*, police were chasing multiple suspects, one of whom fell.¹³⁵ Upon reaching the suspect, the police officer asked her to identify the other individuals involved in the robbery without Mirandizing her.¹³⁶ After reviewing a wealth of state case law admitting responses to questioning regarding the identity and location of accomplices, the court reasoned that the PSE applied.¹³⁷ The court was sympathetic to the difficult position the officer was in and the necessity of making split-second judgments: "[T]he quickly developing circumstances did not allow for a certain determination of the numbers [of suspects] he was facing Officer Woolsley's questions were based on an objectively reasonable concern for his safety and, therefore, the public safety exception must be applied."¹³⁸ The court also noted that the Fifth Circuit came to the same conclusion in *Fleming v. Collins*.¹³⁹ Thus, both state and federal courts demonstrate that, equipped

132. 693 N.Y.S.2d 539, 540–41 (App. Div. 1999).

133. *Palmer v. Greiner*, No. 00 Civ. 6677 WHPRL, 2003 WL 22019740, at *9 (S.D.N.Y. Aug. 22, 2003).

134. *Id.* ("[T]he [Appellate Division] court correctly relied on clearly established federal law as articulated in *New York v. Quarles*. . . . [and] reasonably applied this [public safety] exception in rejecting Palmer's Fifth and Sixth Amendment challenges.").

135. No. 03-40068-01-RDR, 2003 WL 22715856, at *1 (D. Kan. Sept. 9, 2003).

136. *Id.* at *2.

137. *Id.* at *2–*3. The state case law the court relied on included: *Commonwealth v. Clark*, 730 N.E.2d 872, 884–85 (Mass. 2000) (applying PSE to admit un-Mirandized response to law enforcement questioning if suspect was alone following gun battle); *Joppy v. State*, 719 So. 2d 316, 319 (Fla. Dist. Ct. App. 1998) (applying PSE to admit un-Mirandized response to law enforcement questioning about potential suspects inside dark building).

138. *Johnson*, 2003 WL 22715856, at *3–*4.

139. 954 F.2d 1109, 1112–14 (5th Cir. 1992) (en banc).

with the PSE, they can account for volatile, evolving situations and admit important testimony regarding accomplices without making law enforcement choose between addressing emergency situations and obtaining admissible evidence.

D. *The PSE Applied to Fact Patterns with Explosive Devices*

There are nine cases in the entirety of the *Quarles* case law implicating the PSE in situations involving explosive devices.¹⁴⁰ This section segregates these cases and examines them in depth since, if the past is any indication of future terrorist attacks, terrorist interrogations will likely involve questions concerning explosive devices. The fact pattern most similar to potential terrorist threats occurred in *United States v. Khalil*.¹⁴¹ In *Khalil*, the district court admitted testimony about the nature of the bombs and the appellate court affirmed over the defendant's sole objection to admission of his statement, "poof," made in response to whether or not the defendant intended to kill himself in the explosion.¹⁴² The appellate court reasoned that this response could indicate the potential power of the bomb and was therefore relevant to public safety. This slightly tangential justification demonstrates the willingness of the judiciary to use the PSE to admit evidence when there is a clear threat of imminent danger, as will almost always be the case when explosive devices are involved.

State v. Kane is the only case involving an explosive device in which the court did not admit the un-Mirandized testimony based on the PSE.¹⁴³ In *Kane*, the state court ruled that the PSE did not apply when a police officer, inspecting a vehicle, did not need any additional information to identify an explosive device inside the vehicle. The court reasoned that with or without the suspect's testimony, the police officer's next step would have been to call the bomb squad. Thus the suspect could not offer any additional information relevant to public safety, since no matter what the suspect said, the police officer would have immediately called the bomb squad.¹⁴⁴

It bears noting, however, that this case took place in Hawaii state court, one of the few states which offers broader criminal protections

140. *United States v. Spoerke*, 568 F.3d 1236 (11th Cir. 2009); *United States v. Khalil*, 214 F.3d 111 (2d Cir. 2000); *United States v. Kramer*, No. 07-80136-CR, 2008 WL 169615 (S.D. Fla. Jan. 16, 2008); *United States v. Josephson*, No. CR-3-96-100, 1997 WL 1774873 (S.D. Ohio Aug. 27, 1997); *United States v. Fairchild*, 943 F. Supp. 1174, (W.D. Mo. 1996); *United States v. Dodge*, 852 F. Supp. 139 (D. Conn. 1994); *People v. Trichtler*, 55 Cal. Rptr. 2d 650 (Ct. App. 1996); *State v. Kane* 951 P.2d 934 (Haw. 1998); *State v. Simmons*, 714 N.W.2d 264 (Iowa 2006).

141. 214 F.3d 111; see *supra* notes 6–9 and accompanying text (discussing facts of *Khalil* and Second Circuit ruling).

142. *Khalil*, 214 F.3d at 120.

143. 951 P.2d at 935.

144. *Id.* at 942.

than *Miranda*, making *Miranda* the floor of constitutional safeguards.¹⁴⁵ This is relevant to the analysis for two reasons: (1) Hawaii's state criminal code may influence the state court's application of the PSE, thus leading Hawaii courts to apply the PSE more narrowly than the national trends established in Part II. This would make *Kane* an outlier that is not representative of the overall judicial application of the PSE. (2) More to the point, since *Kane* takes place in state court, it is ultimately irrelevant to the PSE debate. Table 6 showed that cases involving suspected terrorists will almost always take place in federal court, insulating important evidence about terrorists from the proclivities of state court judges and varying state criminal codes.¹⁴⁶ Excepting *Kane* from the analysis for the aforementioned reasons, the data show that when explosive devices are involved, the federal judiciary applies the PSE to admit un-Mirandized testimony 100% of the time.

As just explained, cases involving suspected terrorists will always involve the FBI, making it almost certain that these cases will be in federal court. The federal judiciary's treatment of explosive devices as regards the PSE is, thus, particularly relevant. The federal judiciary is willing to apply the PSE even more broadly, including cases in which it becomes apparent, after the fact, that there was never any real threat to public safety in the first place. In *United States v. Josephson*, the defendant claimed to have brought a bomb on a plane, precipitating an emergency landing.¹⁴⁷ In *Josephson*, the court applied the PSE quite creatively to questioning conducted by a Dayton Fire Department Lieutenant who entered the plane to aid the potential rescue efforts. The court reasoned that, "[i]f the public safety exception allows officers to question a person about the location of a loaded revolver, it certainly will permit inquiries regarding a bomb on an aircraft."¹⁴⁸ *United States v. King* offers a more traditional application of the PSE to fact patterns involving potential explosions.¹⁴⁹ In *King*, the district court admitted un-Mirandized testimony regarding strong odors typically linked to methamphetamine laboratories.¹⁵⁰ *State v. Simmons*, factually similar to *King*, shows that state courts exercise the same willingness to apply the PSE to situations involving potential explo-

145. See *supra* note 77 (discussing state criminal procedure rules which provide greater protection than *Miranda*, specifically discussing Hawaii's criminal protections in relation to *Kane*).

146. See *supra* Part II Table 6 (showing state courts have never adjudicated a case involving a PSE claim when FBI was exclusively involved in interrogation); *supra* note 85 (identifying that FBI High Value Detainee Interrogation Group always leads interrogation of suspected terrorists).

147. No. CR-3-96-100, 1997 WL 1774873 (S.D. Ohio Aug. 27, 1997).

148. *Id.* at *3.

149. 366 F. Supp. 2d 265 (E.D. Pa. 2005).

150. *Id.* at 275.

sions.¹⁵¹ The court in *United States v. Dodge* applied the PSE to an explosive device the government delivered as part of a sting operation.¹⁵² The court allowed this application of the PSE and thus admitted the defendant's testimony in part because the sting had not gone as planned, potentially imperiling the officers.¹⁵³ Here the federal judiciary's application of the PSE enabled the changing, fluctuating nature of the FBI's sting operation, admitting important un-Mirandized testimony.

Part III highlighted cases that prove the PSE's ability and the judiciary's willingness to apply it to the exact contours legislators and commentators identified as crucial to terrorist interrogations. When these cases are considered together with the data in Part II, the fact patterns, analysis, and case studies show that the PSE is a reliable mechanism that consistently operates to admit un-Mirandized testimony in a variety of situations. This study concludes that the PSE is more than capable of handling the unique parameters of terrorist interrogations without compromising law enforcement's ability to both interrogate suspected terrorists and obtain admissible evidence.

CONCLUSION

The data and analysis confirm and perhaps support the Obama Administration's DOJ Memorandum and current stance, which ostensibly endorses the present state of *Miranda* and *Quarles*.¹⁵⁴ A future change in administration or in this Administration's politics, however, could alter the fate of *Miranda* rights. Parts II and III provide neutral data and factual analysis that concretely show and defend the PSE's ability to appropriately handle terrorist interrogations. By reviewing every judicial ruling on the PSE, this Note contributes original findings to the PSE debate. Examining the rate at which and factual scenarios in which the judiciary applies the PSE to admit evidence, this study grounds defenses of the PSE's flexibility in statistical proof and detailed case analysis. Rigorously evaluating this data, this Note concludes that the PSE is a fact-sensitive, capacious device capable of handling terrorist interrogations.

151. 714 N.W.2d 264, 276 (Iowa 2006) (holding that defendant's statements to law enforcement were covered by PSE because they were related to potential manufacture of methamphetamines).

152. 852 F. Supp. 139 (D. Conn. 1994).

153. *Id.* at 142.

154. See *supra* note 17 and accompanying text (discussing DOJ Memorandum).

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