COLUMBIA LAW REVIEW
SIDEBAR

VOL. 113 **SEPTMEMBER 28, 2013** **PAGES 136-155**

APPLYING *MIRANDA*'S PUBLIC SAFETY EXCEPTION TO DZHOKHAR TSARNAEV: RESTRICTING CRIMINAL PROCEDURE RIGHTS BY EXPANDING JUDICIAL EXCEPTIONS

Joanna Wright[*]

INTRODUCTION

When the Federal Bureau of Investigation (FBI) finally apprehended Dzhokhar Tsarnaev, the only surviving suspect in the April 15, 2013, Boston Marathon Bombing, he was suffering from a gunshot wound and taken directly to the hospital, where he drifted in and out of consciousness for the better part of forty-eight hours.[1] His medical state postponed his interrogation, which would have otherwise occurred immediately after his arrest. While Tsarnaev was unconscious, the media vigorously debated his constitutional rights, specifically whether or not the FBI should Mirandize him or if it should invoke the public safety exception (PSE) to *Miranda*.[2] When Tsarnaev regained

* Joanna Wright received a J.D. from Columbia Law School in 2012 and was a law clerk to the Honorable David F. Hamilton, U.S. Court of Appeals for the Seventh Circuit, for the 2012–2013 term. She will be a law clerk to the Honorable Alvin K. Hellerstein, U.S. District Court for the Southern District of New York, for the 2013–2014 term. I would like to thank Professor Daniel C. Richman, Chris Burke, Tulsi Gaonkar, Maren Hulden, Tejas Narechania, Jeremy Peterman, and the *Columbia Law Review* editorial board and staff for invaluable comments on earlier drafts. All errors are my own.

1. Jennifer Griffin et al., Boston Marathon Suspect in No Condition Yet to Be Questioned, Boston Police Chief Says, FOXNews.com (Apr. 22, 2013), http://www.foxnews.com /us/2013/04/22/second-boston-bombing-suspect-under-heavy-guard/ (on file with the *Columbia Law Review*); Alyssa Newcomb, Authorities: Boston Bombing Suspect Is Responding to Questions in Writing, ABC News (Apr. 21, 2013), http://abcnews.go.com/US/authorities-boston-bombing-suspect-responding-questions-writing/story?id=19009283 (on file with the *Columbia Law Review*); Josh Voorhees, Dzhokhar Tsarnaev Said to Be Awake and Answering Questions, Slate: The Slatest (Apr. 22, 2013, 9:10 AM), http://www.slate.com/blogs/ the_slatest/2013/04/22/dzhokhar_tsarnaev_is_awake_suspect_ reportedly_answering_fbi_ question_in.html (on file with the *Columbia Law Review*).

2. Erwin Chemerinsky, Op-Ed., Dzhokhar Tsarnaev Has Rights: The Constitution Applies to Us All, Including the Boston Bombings Suspect, L.A. Times (Apr. 23, 2013), http://articles.latimes.com/2013/apr/23/opinion/la-oe-chemerinsky-miranda-rights-for-tsarnaev-

consciousness, the FBI interrogated him for sixteen hours over the course of two days without Mirandizing him.[3] Tsarnaev has since pled not guilty and the Department of Justice (DOJ) has made it clear that it plans to invoke the PSE to argue for the admission of Tsarnaev's un-Mirandized statements at his trial.[4] Tsarnaev will likely move to suppress these statements based on the Supreme Court rule created in *Miranda v. Arizona*, which makes all un-Mirandized statements inadmissible because, unless Mirandized, the suspect was not properly alerted to her Fifth Amendment privilege against self-incrimination.[5] Ultimately, a federal court will determine the admissibility of Tsarnaev's statements, deciding whether or not the PSE justifies the admission of sixteen hours of un-Mirandized testimony obtained five days after the commission of the crime.[6]

In *New York v. Quarles*, the Burger Court created the PSE, which permits the admission of un-Mirandized statements in response to a question posed by law enforcement intended to secure the public's safety. The PSE was created, in part, to enable law enforcement to interrogate a suspect in order to locate a missing weapon in the intense seconds immediately following the commission of a crime.[7] As a result of the PSE, law enforcement no longer has to choose between (1) Mirandizing suspects to protect the admissibility of their statements while risking that, as a result of the *Miranda* warnings, the suspects

---

20130423 (on file with the *Columbia Law Review*); Glenn Greenwald, What Rights Should Dzhokhar Tsarnaev Get and Why Does It Matter?, The Guardian: Glenn Greenwald on Security and Liberty (Apr. 20, 2013, 9:24 AM), http://www.guardian.co.uk/commentisfree/2013/apr/20/boston-marathon-dzhokhar-tsarnaev-mirnada-rights (on file with the *Columbia Law Review*); Eric Posner, The New Law We Need In Order to Deal with Dzhokhar Tsarnaev: Congress Should Authorize the Isolation and Detention of Suspected Terrorists, Slate: View from Chicago (Apr. 22, 2013, 12:21 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/dzhokhar_tsarnaev_and_the_law_authorize_the_isolation_and_detention_of_suspected.html (on file with the *Columbia Law Review*).

3. After Tsarnaev was apprehended, the Department of Justice reported that "[t]he suspect is en route to the hospital for immediate treatment . . . [b]ut we plan to invoke the public safety exception to *Miranda* in order to question the suspect extensively about other potential explosive devices or accomplices and to gain critical intelligence." Brian Beutler, DOJ Official: No *Miranda* Rights for Boston Bombing Suspect Yet, Talking Points Memo (Apr. 19, 2013, 10:18 PM) (internal quotation marks omitted), http://livewire.talkingpointsmemo.com/entry/doj-official-no-miranda-rights-for-boston-bombing (on file with the *Columbia Law Review*).

4. Beutler, supra note 3; Ethan Bronner & Michael S. Schmidt, In Questions At First, No *Miranda* for Suspect, N.Y. Times (Apr. 22, 2013), http://www.nytimes.com/2013/04/23/us/miranda-rights-withheld-for-marathon-suspect-official-says.html (on file with the *Columbia Law Review*); G. Jeffrey MacDonald & John Bacon, Tsarnaev Pleads Not Guilty, USA Today (July 10, 2013), http://www.usatoday.com/story/news/nation/2013/07/10/tsarnaev-boston-marathon-bombing-hearing/2504681/ (on file with the *Columbia Law Review*); Amy Davidson, What Happened to the *Miranda* Warning in Boston?, New Yorker: Close Read (Apr. 21, 2013), http://www.newyorker.com/online/blogs/closeread/2013/04/what-happened-to-the-miranda-warning-in-boston.html (on file with the *Columbia Law Review*).

5. 384 U.S. 436, 467–69 (1966).

6. Richard A. Serrano, Dzhokhar Tsarnaev Pleads Not Guilty to Boston Bombing Charges, L.A. Times (July 10, 2013), http://articles.latimes.com/2013/jul/10/news/la-pn-dzhokhar-tsarnaev-pleads-not-guilty-20130710 (on file with the *Columbia Law Review*).

7. 467 U.S. 649, 657 (1984).

will remain silent and (2) foregoing the *Miranda* warnings to increase the likelihood that suspects will respond to questions while sacrificing the admissibility of these responses at trial. The *Quarles* Court was sensitive to the fact that these kinds of situations require law enforcement to make important decisions in a fast-paced, developing situation, only seconds after an arrest.[8] The PSE eliminates this dilemma because law enforcement can ask questions necessary to secure the public's safety without Mirandizing the suspect and without sacrificing the admissibility of the subsequent statements. After Tsarnaev's arrest, however, law enforcement did not face this type of rushed, "on-the-scene" decisionmaking that is required in a rapidly evolving situation. Tsarnaev was apprehended four days after the actual bombing and he was unconscious for two more days; this delay gave law enforcement more than enough time to fully consider the ramifications of Mirandizing him in a calm, considered manner, even allowing for multiple, thorough consultations with the DOJ. The original PSE, as created by *Quarles*, therefore likely would not apply to a situation like Tsarnaev's arrest.

The scope of the PSE, however, has been steadily and considerably expanded by lower courts in their application of it to fact patterns less and less like *Quarles*. The PSE has been so expanded that it seems highly probable, if not inevitable, that a court will admit Tsarnaev's un-Mirandized statements based on the PSE. The expansion of judicial exceptions like the PSE is a method of rights restriction that often occurs under the radar as compared to more common methods of rights restriction like the passage of legislation eliminating constitutional rights. After the failed attempted bombings of 2009 and 2010 by Umar Farouk Abdulmutallab (the so-called "Christmas Day Bomber") and Faisal Shahzad (the so-called "Times Square Bomber"), respectively, legislators, advocates, academics, journalists, and ordinary citizens publicly debated criminal procedure rules as applied to suspected terrorists and the appropriate scope of these rights.[9] Congress proposed

---

8. Id. ("The police . . . were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they . . . believe[d] the suspect had just . . . discarded in the supermarket. . . . [I]t obviously posed more than one danger to the public safety. . . .").

9. See, e.g., William K. Rashbaum, Mark Mazzetti & Peter Baker, Arrest Made in Times Square Bomb Case, N.Y. Times (May 3, 2010), http://www.nytimes.com /2010/05/04/nyregion/04bomb.html (on file with the *Columbia Law Review*) (highlighting White House response to Shahzad arrest); Charlie Savage, Delayed *Miranda* Warning Ordered for Terror Suspects, N.Y. Times (Mar. 24, 2011), http://www.nytimes.com /2011/03/25/us/25miranda.html?_r=1& (on file with the *Columbia Law Review*); Peter Baker, Arrest Renews Debate About Rights of Suspects in Terrorism Cases, N.Y. Times (May 5, 2010) http://query.nytimes.com/gst/fullpage.html?res=9801E6DB153EF936A35756C0A9669D8B63 (on file with the *Columbia Law Review*) (discussing debate between Republicans and Democrats sparked by arrest of Shahzad); Emily Bazelon, *Miranda* Worked! The Bizarre Criticism of the Faisal Shahzad Interrogation, Slate (May 5, 2010), http://www.slate.com/id/2253056 (on file with the *Columbia Law Review*) (arguing current system of *Miranda* rights suffices even in cases of suspected terrorists); Officials Describe Arrest of Christmas Day Bomber for First Time, FOXNews.com (Jan. 26, 2010), http://www.foxnews.com/story/2010/01/26/officials-describe-arrest-christmas-day-bomber-for-first-time/ (on file with the *Columbia Law Review*) (discussing debate among politicians regarding procedure used in Abdulmutallab arrest); see also Jeff Zeleny

different kinds of legislation that would essentially eliminate suspected terrorists' *Miranda* rights.[10] The Obama Administration originally resisted such proposals, briefly flirted with supporting them, and then ultimately concluded that the PSE (the first method of rights restriction) was flexible and capacious enough to allow law enforcement to successfully interrogate suspected terrorists.[11] Long before such proposals, however, Congress passed legislation intended to override *Miranda* by making all voluntary confessions admissible, whether or not the suspect was Mirandized.[12] The Supreme Court found that this legislation was unconstitutional, striking it down because it impermissibly repealed a constitutionally guaranteed safeguard without providing an equally effective alternative.[13]

This Essay explores both methods of rights restriction: the expansion of judicially created exceptions to criminal procedure rights and legislation eliminating criminal procedure rights for certain groups of people or for all people in certain situations. Part I shows that the original application of the PSE would not permit the admission of Tsarnaev's un-Mirandized testimony, but the expanded and evolved PSE that currently exists almost certainly can and will adapt to justify its admission. Part II considers Congress's multiple attempts to eliminate *Miranda* rights through legislation and observes that every attempt has been unsuccessful. Parts I and II, taken together, show that if the PSE is applied to Tsarnaev's testimony it will effectively render the same result for criminal procedure rights as if Congress had passed the proposed legislation in 2011 eliminating *Miranda* warnings for suspected terrorists. Tsarnaev, for all practical purposes, was deprived of all *Miranda* rights and their constitutional safeguards during his interrogation, yet the statements may still be admitted as evidence against him based on the PSE. This raises an interesting question, namely, why the same net restriction of constitutional rights is acceptable or at least permitted via one method of rights restriction (the expansion of judicial exceptions discussed in Part I) but not via the other method (legislation eliminating a right altogether discussed in Part II). Part III considers this interesting inconsistency in which legislation attempting to eliminate or restrict certain constitutional protections is rejected by the Supreme Court, yet the judiciary's own expansion of exceptions to constitutional rights and safeguards proceeds without any successful challenge or even attention. Part III also offers some possible explanations for this incongruence.

& Charlie Savage, Official Says Terrorism Suspect Is Cooperating, N.Y. Times (Feb. 2, 2010), http://www.nytimes.com/2010/02/03/us/03terror.html?_r=0 (on file with the *Columbia Law Review*) (making note of congressional hearings held in response to "Christmas Day Bomber").

10. See, e.g., Baker, supra note 9 (describing Senator Joseph I. Lieberman's proposal to strip citizenship of Americans tied to terrorism).

11. Joanna Wright, Note, Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception, 111 Colum. L. Rev. 1296, 1298–99 & nn. 15–17 (2011).

12. See infra notes 51–56 and accompanying text (discussing passage of 18 U.S.C. § 3501 as part of Omnibus Crime Control and Safe Streets Act of 1968).

13. See infra notes 53–55 and accompanying text (reviewing procedural history of *United States v. Dickerson*).

I. THE PUBLIC SAFETY EXCEPTION AS APPLIED TO TSARNAEV

This Part charts the judicial expansion of the PSE to show the extent to which a judicial exception can grow far beyond its original boundaries. Part I observes the expanding contexts in which the government invokes and courts apply the PSE to admit un-Mirandized testimony in situations further and further away from the immediate need to locate a missing weapon in the seconds after an arrest. Part I.A establishes the original boundaries of the *Quarles* PSE, observing *Quarles*'s explicit determination of situations in which the PSE should not be applied. Part I.A, I.B, and I.C then discuss cases in which courts have, in fact, applied the PSE in ways that transgress the boundaries *Quarles* set, while also offering an explanation for how and why this expansion can happen so easily and quickly. Part I.D considers the unique institutional incentives involved in this method of rights restriction, showing that, rather than checking the judiciary's discretion to expand the PSE, the executive branch actively participates in and contributes to this expansion. Part I.E brings all of this analysis together, considering the most recent application of the PSE to the interrogation of a suspected terrorist in *United States v. Abdulmutallab*. Finally, Part I.F predicts the likelihood that a court will apply the PSE to admit all sixteen hours of Tsarnaev's un-Mirandized testimony. While a comprehensive account of the expansion of the PSE exceeds the scope of this paper, the examples sketched below provide a demonstrative sample of how the three branches interact to restrict criminal procedure rights via judicial exceptions.[14]

A. *The Explicit Boundaries of the PSE Identified in Quarles*

In *Quarles*, the Court weighed the necessity of individual criminal procedure protections against the collective concern of public safety and determined that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[15] Later courts have justified the expansion of the PSE by applying the *Quarles* cost-benefit analysis. Thus, while *Quarles* may have explicitly bound the application of the PSE, the cost-benefit analysis it used to create the exception enables the PSE's expansion. In drawing the confines of this exception, *Quarles* explained that it would be inappropriate to apply the PSE in situations like *Orozco v. Texas*.[16] As the *Quarles* Court explained, in *Orozco*, police entered the defendant's house four hours after a murder of which he was suspected and asked him whether or not he was at the scene of the shooting and if he owned a gun, all

14. The PSE is by no means the only judicially created exception that has diluted the protection provided by *Miranda*. For a review of many of the exceptions to *Miranda*'s exclusionary rule, see Louis D. Bilionis, Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law, 52 UCLA L. Rev. 979, 995–97 (2005) (detailing weakening of Supreme Court decisions during implementation).

15. New York v. Quarles, 467 U.S. 649, 657 (1984).

16. Id. at 659 n.8 (citing Orozco v. Texas, 394 U.S. 324 (1969)).

before Mirandizing him. In response to the questions, Orozco told police where to find his gun.[17] The *Quarles* Court determined that the questions police asked Orozco "were clearly investigatory" and did not "in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon."[18] Since there was "no exigency requiring immediate action by the officers *beyond the normal need expeditiously to solve a serious crime*," the PSE should not apply and such testimony would remain inadmissible even after *Quarles*.[19]

This limit is important because without it the PSE could have logically applied to all situations in which there was a missing weapon. *Quarles*, however, decided that such an exception would reach too broadly and therefore seems to have restricted the PSE to situations only immediately following an arrest, at or near the scene of the crime, in which the missing weapon is nearby.[20] Despite these explicit confines, courts today routinely apply the PSE to admit un-Mirandized statements in cases similar to *Orozco*. For example, in *People v. Oquendo*, a court admitted un-Mirandized statements Oquendo made in response to questions about the whereabouts of a gun after he had been in custody for five hours.[21] The court acknowledged that the five-hour time lapse between the crime and the questioning was much longer than the few seconds in *Quarles* but explained that "these differences do not detract from the essential similarity of the public danger in both cases, namely a missing (possibly loaded) gun, which was left in a publicly accessible place but could not be found readily without the suspect's cooperation."[22] The defendant in *Allen v. Roe* made the same point Oquendo did, arguing that his un-Mirandized statements should be suppressed because too much time passed between the commission of the crime and his arrest.[23] Characterizing this argument as "miss[ing] the point," the Ninth Circuit explained that the missing weapon justified the admission of the testimony based on the PSE because the danger of a missing gun "does not dissipate over time."[24] *Quarles* considered the public safety threat posed by the missing gun in *Orozco* as an ordinary risk inherent in all serious crimes that should not therefore benefit from the PSE. Yet, today, courts reason that the outstanding risk of a missing weapon should justify the application of the PSE absent any real outer temporal boundary. Based on the cost-benefit analysis employed to expand the PSE's original temporal boundary, no limit may really exist when, for example, a pending

17. Id.

18. Id.

19. Id. (emphasis added).

20. The prototypical PSE case still remains faithful to this architecture. See Wright, supra note 11, at 1323–25 (showing prototypical PSE cases after empirically reviewing all PSE cases since creation of PSE in *Quarles* up through 2010).

21. 685 N.Y.S.2d 437, 440 (App. Div. 1999).

22. Id. at 439.

23. 305 F.3d 1046, 1051 (9th Cir. 2002).

24. Id.

terrorist attack may be looming, as the DOJ argued before the FBI interrogated Tsarnaev for sixteen hours without Mirandizing him.

B. *The PSE's Application to Other Constitutionally Guaranteed Procedural Protections*

This cost-benefit analysis not only enables courts to expand the PSE to broader and broader fact situations, it also justifies the expansion of the PSE to other criminal procedure safeguards. As in Part I.A, these expansions occur via reference to and application of the cost-benefit analysis that weighs collective concerns of national security against individual criminal procedure protections and determines when the individual constitutional rights must yield to the collective public concern. In *United States v. DeSantis*, the defendant invoked his Sixth Amendment right to counsel. Normally, after the Supreme Court decisions in *Edwards v. Arizona* and *Michigan v. Jackson*, this request would mandate that the police immediately stop interrogating the defendant until he is provided an attorney.[25] In this case, however, police did not stop interrogating the defendant and he responded to continued police questioning. Using the same logic the *Quarles* Court did to justify the infringement of the Fifth Amendment, the Ninth Circuit found that the PSE should apply to a suspect's invocation of his Sixth Amendment right to counsel. The Ninth Circuit explained that the

> thrust of the *Quarles* decision is its recognition that certain exigencies require the courts to relax rules that act as prophylactic safeguards . . . .
>
> The same considerations that allow the police to dispense with providing *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel.[26]

Thus, the PSE, at least in the Ninth Circuit, applies to the Fifth Amendment privilege against self-incrimination and to the Sixth Amendment right to counsel. In *United States v. Mobley* the Fourth Circuit openly embraced *DeSantis*'s reasoning, explaining that it agreed with the Ninth Circuit that *Quarles* should apply to suspects' invocation of counsel,[27] although the court ultimately determined that the facts of the case fell outside of the scope of the PSE. The First Circuit will likely have a chance to opine on this application

---

25. Michigan v. Jackson, 475 U.S. 625, 633 (1986), overruled by Montejo v. Louisiana, 129 S. Ct. 2079 (2009); Edwards v. Arizona, 451 U.S. 477, 487 (1981); United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989); see also Carol S. Steiker, Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers, 94 Mich. L. Rev. 2466, 2476–79 (1996) (noting strict waiver of counsel standard formulated by Burger and Rehnquist Courts).

26. *DeSantis*, 870 F.2d at 540–41.

27. 40 F.3d 688, 692 (4th Cir. 1994).

soon as well, since Tsarnaev asked several times for a lawyer but that request was ignored because he was allegedly being questioned under the PSE.[28]

C. *Combining Precedential Exceptions to Expand the PSE*

The third method of judicial expansion involves a subtle combination of the first two methods. In *Trice v. United States*, a shooting victim called 911 and identified the shooter. Four days later, police entered the suspect's home and arrested him.[29] The defendant was Mirandized at the police station, at which point he invoked his Fifth Amendment right to silence.[30] Once a suspect invokes her constitutionally guaranteed right to silence, as when a suspect invokes her constitutionally guaranteed right to an attorney, the police must immediately stop interrogating the suspect.[31] The police did not stop the interrogation, however. The suspect eventually told the police that he had borrowed the gun and returned it to the owner. Relying heavily on *DeSantis*, the court admitted this statement despite the Supreme Court rule that law enforcement scrupulously honor a suspect's right to silence, reasoning that if the PSE could apply after the invocation of the right to counsel as it did in *DeSantis*, it could also apply after the invocation of the right to remain silent, which the court characterized as an "*Edwards*-type situation."[32] The *Trice* court was equally untroubled by the long temporal lapse between the commission of the crime and the suspect's apprehension and interrogation. The court explained that "there is no temporal relationship between the ongoing exigency and the timing of a *Miranda* refusal."[33] Thus far, the case law shows that two of the relevant limitations the *Quarles* Court created to bound the PSE—(1) the caveat that the PSE is not justified by the normal exigencies of a crime involving a missing weapon and (2) the temporal limit that comes with this boundary—have been eroded. This erosion has extended beyond the Fifth Amendment privilege against self-incrimination to other criminal procedure rights, like the Sixth Amendment right to counsel.

D. *Executive Expansion of the PSE*

Courts do not expand the PSE by themselves. The PSE was created for law enforcement's benefit and law enforcement activity drives its expansion. In 2010, the DOJ issued a memorandum on FBI policies and procedures for interrogating suspected terrorists. The memorandum explained that "agents on the scene who are interacting with the arrestee are in the best position to assess what questions are necessary to secure their safety and the safety of the

28. Richard A. Serrano et al., *Miranda* Reading Silences Boston Suspect, L.A. Times (Apr. 26, 2013), http://articles.latimes.com/2013/apr/26/nation/la-na-boston-bombing-20130426 (on file with the *Columbia Law Review*).

29. 662 A.2d 891, 892 (D.C. 1995).

30. Id.

31. Michigan v. Mosley, 423 U.S. 96, 104 (1975).

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

33. Id.

public."[34] The assessment of the public's safety and the decisions made by the agent regarding the interrogation based on that assessment create the facts later cited by the government in court when arguing that the PSE should apply to avoid *Miranda*'s exclusionary rule allowing for the admission of the testimony.[35] Thus, the more creatively and expansively the FBI uses and the DOJ then argues for the PSE, the broader the situations in which the courts must consider and rule on its application. This institutional dynamic in which courts are likely to defer, at least somewhat, to the government's account of the public safety risks creates a situation that encourages the expansion of the PSE.

The DOJ thus instructs its federal agents on how to question suspects so that a court will be amenable to applying the PSE to the interrogation at issue.[36] The executive branch has a functional monopoly on the creation of the fact patterns that the courts consider as regards the PSE since it can always choose not to contest the suppression of un-Mirandized testimony and/or the FBI can always choose to go ahead and Mirandize the suspect. The executive branch, therefore, shapes the PSE by conducting the interrogation in a manner that highlights the exigency purportedly being addressed and selecting the fact situations in which the PSE will be invoked, thus directing when and how a court will consider the PSE. In this way, the FBI's actions and the DOJ's narrative framing those actions drive the PSE jurisprudence, especially since courts will generally defer to law enforcement's analysis of public safety threats and its account of what the exigencies of the moment called for.[37]

---

34. Memorandum from U.S. Dep't of Justice to FBI (Oct. 21, 2010), text available at http://www.nytimes.com/2011/03/25/us/25miranda-text.html (on file with the *Columbia Law Review*). These "significantly more extensive" interrogations will include questioning that could extend to "questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might post an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks." Id; see also Carl A. Benoit, The "Public Safety" Exception to *Miranda*, FBI L. Enforcement Bull. (FBI, U.S. Dep't of Justice), Feb. 2011, at 25, 26, available at http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/february2011/february-2011-leb.pdf (on file with the *Columbia Law Review*) (providing "guidance for law enforcement officers confronted with an emergency that may require interrogating a suspect held in custody about an imminent threat to public safety without providing *Miranda* warnings").

35. See, e.g., William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 4 (1997) ("High crime rates [let] prosecutors . . . substitute cases without strong procedural claims for cases with such claims. Underfunding of criminal defense counsel limits the number of procedural claims that can be pressed. Both phenomena make criminal procedure doctrines seem inexpensive to the appellate judges who define those doctrines."); see also id. at 12 ("Perhaps more so than anywhere else in constitutional law, in criminal procedure the broad exercise of judicial power tends to be justified precisely by legislators' unwillingness to protect constitutional interests.").

36. See supra note 34 (discussing DOJ's "more extensive" interrogation questions); see also Stephen Holmes, In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror, 97 Calif. L. Rev. 301, 308 (2009) (noting "[i]n a moment of crisis, in fact, the absence of clear instructions written in advance is more likely to produce dazed paralysis [from agents] than effective action").

37. William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 510 (2001) ("[B]asic allocation of power over criminal law [is thus]: legislators make it,

E. *Putting It All Together: Judicial Application of the PSE to Abdulmutallab*

In *United States v. Abdulmutallab*, the Eastern District of Michigan considered whether or not to suppress un-Mirandized statements made by Abdulmutallab, the so-called "Christmas Day Bomber," to the FBI while hospitalized after his arrest.[38] This un-Mirandized testimony resulted from the fifty-minute interrogation that took place four hours after Abdulmutallab was arrested on the same day of the attempted bombing.[39] The court explained that the FBI "concluded their interview and immediately passed that information on to other law enforcement and intelligence agencies worldwide, further underscoring that it was obtained for purposes of public safety, to deal with other possible threats."[40] What is more instructive, however, is the way the exception was applied.

The court applied the PSE to all of the questioning, including "whether [Abdulmutallab] associated with, lived with, or attended the same mosque with others who had a similar mind-set as [Abdulmutallab] about jihad, martyrdom, support for al-Qaeda, and a desire to attack the United States by using a similar explosive device on a plane, and what these individuals looked like."[41] Here, the court expanded the PSE to justify inquiry into the people Abdulmutallab prayed with and whether or not these people had "similar mindsets" to him. The PSE, originally created to enable police to ask questions in the heat of the moment after apprehending a dangerous suspect, when adrenaline made foresight impossible, was used to interrogate a suspect subdued in his hospital room about the ideologies espoused by people who attended his mosque. Thus, the PSE—the *public safety* exception—has been expanded to reach questions about ideology and other characteristics that may be easily discovered regardless of any public safety threats or similar exigencies. The terrorism context is relevant, but if anything, it shows that the threat posed by potential mass bombings has so weighted the cost-benefit analysis in *Quarles* that the steady dilution of *Miranda* may ultimately amount to its complete disappearance for some criminal defendants.

F. *Applying the New, Expanded PSE to Tsarnaev*

It seems clear that had the PSE retained the scope of application intended at the time of its creation in *Quarles*, it would definitely not justify the admission of Tsarnaev's sixteen hours of un-Mirandized testimony six days

---

prosecutors enforce it, and judges interpret it. . . . [E]ach branch is supposed to check the others. . . . Instead, [there is] tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges . . . .").

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

39. Walter Pincus, Bomb Suspect Was Read *Miranda* Rights Nine Hours After Arrest, Wash. Post (Feb. 15 2010), http://articles.washingtonpost.com/2010-02-15/news/36901616_1_umar-farouk-abdulmutallab-miranda-rights-special-agent (on file with the *Columbia Law Review*) (describing chronology of Abdulmutallab's arrest and interrogation).

40. *Abdulmutallab*, 2011 WL 4345243, at *6.

41. Id. at *5.

after the commission of the crime. If the situation in *Orozco* did not merit the application of the PSE, the prolonged time period in Tsarnaev's case certainly would not. As Part I shows, however, the cost-benefit analysis used to create the PSE and used by lower courts to expand it will almost certainly come into play to justify the further expansion of the PSE to Tsarnaev's case. Media outlets reported that Tsarnaev requested an attorney several times during his extended interrogation and that the FBI ignored this request and continued interrogating him.[42] As Part I.B and I.C address, that decision suggests that the FBI believes other courts will follow the Ninth Circuit's precedent in the *DeSantis* ruling holding that the request for an attorney does not require police to immediately stop questioning the suspect if the questions are intended to secure the public's safety.

Furthermore, this cost-benefit analysis will likely be applied to the content of the questions, as it was in *Abdulmutallab*, to allow questions far beyond those relevant to the public's immediate safety in the moments after the Boston Marathon Bombing. The PSE quickly and easily seems to swallow *Miranda*'s rule altogether in the case of suspected terrorists: Here the suspect demonstrated an alleged ability to perpetrate massive destruction and harm and it was reasonable to believe that he potentially had time-sensitive information about future pending attacks as well as knowledge of the existence of other accomplices at large.[43] And if this is the case and the PSE is then applied to justify the admission of all sixteen hours of Tsarnaev's statements, it seems, at least for the case of suspected terrorists, *Miranda* rights when coupled with the generous and capacious PSE really mean nothing at all. Through the expansion of the PSE, then, courts may have accomplished exactly what legislators aimed to accomplish in 2010 when considering proposing legislation to eliminate *Miranda* warnings for all suspected terrorists. Here the net loss of constitutional protection is the same; the form or method of the restriction is simply different. It is important to realize that if this restriction is unacceptable in one form, via legislation, for example, there is no reason it should be acceptable in a different form, via the expansion of judicial exceptions.

II. LEGISLATION RESTRICTING CRIMINAL PROCEDURE RIGHTS

Congress has attempted more than once to restrict *Miranda* warnings and to increase the scope of un-Mirandized statements that are admissible in court. These attempts, however, have failed in different ways for different, though related, reasons. Part II focuses on this method of rights restriction, specifically considering why it might be the case that legislation that mirrors the expansion of the PSE encounters so much more resistance than the alternative method of rights restriction discussed in Part I. Part II.A discusses the most recent

42. See Serrano et al., supra note 28 ("Tsarnaev had asked several times for a lawyer, but that request was ignored since he was being questioned under the public safety exception to the Miranda rule.").

43. See Wright, supra note 11, at 1325–31 (describing different situations in which PSE would apply).

attempts to eliminate *Miranda* warnings for suspected terrorists, noting the linked relationship between the expansion of the PSE and Congress's inclination to draft, propose, and support such legislation, and showing that the more expansive the PSE, the less likely Congress is to try and pass such rights-restricting legislation. Part II.B reviews the first attempt to repeal *Miranda* via legislation that actually passed but that the DOJ refused to enforce and that the Supreme Court ultimately struck down as unconstitutional. This section shows that one of the reasons legislation may be less successful in restricting rights than the expansion of judicial exceptions is that legislation will always, by design, face institutional checks from the other branches of government—as well as public oversight and debate—that the expansion of judicial exceptions in lower courts will not face. Part II.C steps back and acknowledges that while the increased oversight and institutional checks on legislation do make it a seemingly more democratic method for restricting rights, the ultimate stakes of legislation may be higher, as shown by the United Kingdom's experience with restricting the right to silence via legislation.

A. *Recent Attempts to Eliminate* Miranda *Warnings Through Legislation*

Congress has considered legislation restricting *Miranda* rights for certain groups of people or in certain situations several times in recent history. In 2010 and 2011, after Abdulmutallab's and Shahzad's bombing attempts, legislators seriously and publicly considered several different proposals to either severely restrict or completely eliminate suspected terrorists' *Miranda* rights.[44] The 111th Congress considered at least eight different legislative proposals that would, in one form or another, restrict or eliminate *Miranda* rights without providing an equally effective alternative.[45] Former FBI agents came out against proposals for legislation changing *Miranda* warnings for suspected terrorists, vocally asserting more than once that *Miranda* warnings had never interfered with their ability to successfully interrogate suspected terrorists.[46] The Obama Administration initially came out against such legislation but later reconsidered and suggested that it would be open to legislation limiting suspected terrorists' *Miranda* rights.[47] Ultimately, however, the Obama Administration returned to its original position asserting that the PSE provided law enforcement with enough flexibility to successfully interrogate suspected terrorists.[48]

---

44. See supra note 9 (identifying contemporary commentators' statements on issue).

45. See Charles Doyle, Cong. Research Serv., R41252, Terrorism, *Miranda*, and Related Matters 8–9 (2013), available at http://www.fas.org/sgp/crs/terror/R41252.pdf (on file with the *Columbia Law Review*) (listing proposals eliminating *Miranda* warnings for "unprivileged belligerent[s]" classified as "high-value detainees" or requiring Director of National Intelligence to authorize giving such suspects *Miranda* warnings).

46. Wright, supra note 11, at 1298–99.

47. Id.

48. See Wright, supra note 11, at 1297–300 (discussing political treatment of PSE); Warren Richey, Holder Letter: Why We Read Christmas Day Bomber His Rights, Christian Sci. Monitor (Feb. 3, 2010), http://www.csmonitor.com/USA/Justice/2010/0203/Holder-letter-why-we-read-

Thus, none of these proposals ever became law.[49] A 2012 congressional research memo counseled future Congresses against drafting such legislation, explaining that "[a]lthough the public safety exception, as currently understood, may only be available in limited circumstances in a terrorist context, its existence suggests that the Court might expand its application under compelling circumstances or might recognize other policy-based exceptions to *Miranda*."[50] This recommendation is interesting because it suggests that courts' willingness and ability to expand the PSE curbs the congressional appetite to draft legislation to eliminate criminal procedure rights (the method of rights restriction considered here). Thus, the breadth and depth of the expansion and application of the PSE may affect the extent to which Congress feels the need to legislate to eliminate criminal procedure rights. However, the courts' demonstrated ability to flexibly and generously apply the PSE was not the only basis for that recommendation. Long before September 11th, Congress had considered and, in fact, legislated to eliminate *Miranda* rights.

B. *Past Attempts to Eliminate* Miranda *and the Supreme Court's Response*

In 1968, after the Supreme Court made all un-Mirandized statements inadmissible at trial, Congress enacted 18 U.S.C. § 3501 as part of the Omnibus Crime Control and Safe Streets Act of 1968.[51] Section 3501 made all voluntary, uncoerced confessions admissible whether or not the suspect was Mirandized.[52] Despite the enactment of the law, which enabled law enforcement to more invasively and expansively interrogate suspects without compromising the admissibility of the evidence, the DOJ "steadfastly refused to enforce the provision," as it determined that it was unconstitutional.[53] Scholars writing in the wake of its passage explained that the "conventional wisdom about section 3501" was that the DOJ "never enforced it because of doubts about its constitutionality."[54] In 1999, after the statute had remained unused for over thirty years, the Fourth Circuit took umbrage with the DOJ's decision not to use this statute to increase the universe of un-Mirandized statements admissible in court and sharply criticized the government in *United States v. Dickerson*. In *Dickerson*, the Fourth Circuit invoked § 3501 sua

---

Christmas-Day-bomber-his-rights (on file with the *Columbia Law Review*) ("'The widespread experience of law enforcement agencies, including the FBI, is that many defendants will talk and cooperate with law enforcement agents after being informed of their right to remain silent . . . .'" (quoting U.S. Attorney General, Eric Holder)).

49. See supra note 48 (referencing legislative proposals that never became law).

50. Doyle, supra note 45, at 4.

51. Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. § 3501 (2012)), invalidated by Dickerson v. United States, 530 U.S. 428 (2000).

52. 18 U.S.C. § 3501(a) ("In any criminal prosecution brought by the United States . . . a confession . . . shall be admissible in evidence if it is voluntarily given.").

53. United States v. Dickerson, 166 F.3d 667, 671–72 (4th Cir. 1999), rev'd, 530 U.S. 428.

54. Paul G. Cassell, The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of *Miranda*, 85 Iowa L. Rev. 175, 197 (1999).

sponte to justify the admission of un-Mirandized testimony despite the government's explicit decision not to argue for the testimony's admissibility based on § 3501.[55] The Supreme Court reversed the Fourth Circuit in *Dickerson*, holding that legislation rendering all voluntary confessions admissible was unconstitutional because it effectively repealed *Miranda*.

Dickerson recognized that the Fifth Amendment privilege against self-incrimination required *Miranda* warnings or some equally effective prophylactic.[56] This scenario, in which the Supreme Court exercises judicial review of a law passed by Congress and pronounces upon its constitutionality, represents a conventional example of the checks and balances each branch of government exerts on the other. Thus, the restriction of criminal procedure rights through legislation will encounter institutional oversight built into the government's normal system of checks and balances—a feature not observed in Part I. Even before the Supreme Court exercised its review and invalidated § 3501, however, the separation of powers was functioning admirably to prevent the elimination of constitutionally guaranteed criminal procedure rights as the executive branch made its own determination that the law was unconstitutional and, on that basis, decided not to invoke or enforce it in criminal trials.

Thus, at first glance, legislation eliminating *Miranda* rights for all suspected terrorists seems radical and dangerous due to its extreme restriction of a constitutionally guaranteed criminal procedure protection. Because such a restriction, however, will face much more oversight and experience considerable hurdles before ever becoming law, it might, in the end, be much less dangerous—and create a smaller democratic deficit—than the judicial expansion of exceptions to constitutionally guaranteed protections like *Miranda*.[57] Legislation brings along with it its own inherent risks however, the

---

55. *Dickerson*, 166 F.3d at 671–72. The Fourth Circuit also sharply criticized the executive branch for choosing not to enforce § 3501, claiming it "elevat[ed] politics over law" by prohibiting the U.S. Attorney's office from arguing that the defendant's un-Mirandized confession to multiple bank robberies was admissible under the law. Id. at 672. The Fourth Circuit took it upon itself to invoke the law, explaining that "[f]ortunately we are a court of law and not politics. Thus the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it." Id. Until the Fourth Circuit decided to act, virtually on its own, to enforce § 3501, the provision had not been used by the executive branch because the executive branch had determined that it was unconstitutional in its attempt to repeal *Miranda.* Id. at 671–74; see also Cassell, supra note 54, at 197–98 (noting DOJ has never enforced § 3501 even though "*no* administration, other than the current one, has ever expressed the view that the statute is unconstitutional").

56. *Dickerson*, 530 U.S. at 432.

57. In 2011, as a law student, I made the argument that the PSE was malleable enough in the hands of the judiciary to be applied to terrorist interrogations of this exact kind. Wright, supra note 11, at 1331. That study was motivated by a desire to combat legislation, then being considered, eliminating *Miranda* rights altogether for suspected terrorists. I argued that before legislating to eliminate a constitutionally guaranteed criminal procedure protection for an entire group of people, we should examine the extant legal terrain to determine whether or not the current exceptions to *Miranda* could operate to adequately meet the unique needs of terrorist interrogations. I still agree with that basic operational premise, namely that before making a

gravest of which is probably the mass scale upon which this restriction is enforced and the difficulty of successfully repealing (or even bringing such a constitutional challenge) in the Supreme Court. The story of the abolition of the right to silence in limited cases in the United Kingdom highlights the scale of risk that is always present when rights are restricted via legislation.

C. *The Stakes of Legislation: The United Kingdom as a Cautionary Tale*

The United Kingdom's experience with legislation modifying and curbing the right to silence exposes the risks created by legislation eliminating or restricting criminal procedure rights. Historically, a suspect's right to silence in the United Kingdom prohibited drawing negative inferences from a suspect's decision to remain silent during police interrogations and at trial.[58] In the late 1980s, faced with increased terrorist activity in Northern Ireland, the British government adopted new security measures that modified and limited suspected terrorists' right to silence both during interrogation and at trial.[59] In the beginning, this rights restriction was limited to suspected terrorists in Northern Ireland.[60] Thus, "[c]laims that similar measures might eventually find their way into the criminal law and procedural rules of the rest of the United Kingdom received little attention."[61] Importantly, when the measure was passed, the language incorporated into the emergency legislation was applicable to all suspects and not limited to terrorist suspects. Despite the explanations and promises made by the bill's sponsors that the legislation would be restricted to suspected terrorists,[62] the right to silence was greatly curtailed for everyone in Northern Ireland, not just suspected terrorists.[63]

The question of whether this curtailment would extend to England and Wales was the subject of fierce debate in the early 1990s.[64] In 1994 the British Parliament passed the Criminal Justice and Public Order Act (CJPOA), which

---

change, legislators should take stock of the status quo and determine whether or not that change is, in fact, necessary. I am less sure, however, that civil liberties and criminal procedure rights are actually left in better stead by the judicial expansion of exceptions to constitutional rights, which seems to occur with less institutional oversight, as compared to legislation that is an outright curtailment of such rights.

58. Eileen Skinnider & Frances Gordon, The Right to Silence—International Norms and Domestic Realities 19 (2001), available at http://www.icclr.law.ubc.ca/publications/reports/silence-beijingfinaloct15.pdf (on file with the *Columbia Law Review*).

59. Id.

60. Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011, 1086–87 (2003).

61. Id. at 1087.

62. Id. at 1086 & n.320. Tom King, then the United Kingdom's Secretary of State for Northern Ireland, emphasized that the bill would "help in convicting guilty men . . . [without] undermin[ing] standards of justice." Id. at 1086 n.320 (quoting Ed Moloney, Britain Seeks to Abolish Key Civil Liberty in Ulster, Wash. Post, Oct. 21, 1988, at A1) (internal quotation marks omitted).

63. Id. at 1087.

64. Steven Greer, The Right to Silence: A Review of the Current Debate, 53 Mod. L. Rev. 709, 709, 718 (1990) (noting negative reaction to proposals curbing right to silence); Gross, supra note 60, at 1088.

"reproduced[] almost verbatim" the curtailment of the right to silence in Northern Ireland. As in Northern Ireland, the new rights restrictions were expanded to apply to all suspects, not just those suspected of terrorism.[65] Thus, the battle against this infringement on procedural safeguards was ultimately lost. Scholars attributed this loss, despite such broad public mobilization against it, to a sort of fatigued numbness toward the stakes:

> The British public had been hearing debates on curtailment of the right to silence for over half a decade. The public began to accept that this right might be limited without causing grave harm to the nation's democratic character, and it could no longer be convinced that one of the most important individual rights was at stake.[66]

Thus, while legislation is more high profile—and therefore more publicly accountable—it may ultimately also be riskier. Passing a national law may raise the stakes beyond allowing a circuit to experiment with the expansion of the PSE, as in *DeSantis*, for example.

III. THE DIFFERENT INSTITUTIONAL CHECKS ON EACH METHOD OF RIGHTS RESTRICTION

Dickerson struck down § 3501 because it attempted to repeal a constitutionally guaranteed protection to the Fifth Amendment privilege against self-incrimination. At the same time, *Dickerson* held that the judicial exceptions to *Miranda* are also constitutional even though those exceptions have the same effect, albeit they apply only in certain specific situations. *Dickerson* held that "no constitutional rule is immutable. . . . [T]he sort of modifications represented by . . . cases [like *Quarles*] are as much a normal part of constitutional law as the original decision."[67] Thus, judicially created exceptions to *Miranda* like the PSE are also constitutional. These two holdings are not without tension.[68] The Court explained that the Fifth Amendment privilege against self-incrimination is absolute and its constitutionally required prophylactic measures cannot be repealed legislatively without the simultaneous provision of equally effective alternatives.[69] Yet there are certain situations in which that constitutional right is subordinate to a greater public concern. In these situations, individuals' guaranteed constitutional rights, the Supreme Court held, must yield to a greater public good. Why did the same

---

65. See Gross, supra note 60, at 1088–89 ("[T]he CJPOA was presented as part of a more comprehensive plan for a war against terrorism . . . . [T]hese new limitations on the right to silence were incorporated into criminal legislation and were expanded to apply to every suspected offender, not just those accused of terrorist activities.").

66. Id.

67. Dickerson v. United States, 530 U.S. 428, 441 (2000).

68. For critique of *Dickerson*, see Susan R. Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1071–76 (2001).

69. *Dickerson*, 530 U.S. at 440 & n.6 (explaining *Miranda* does not require particular warnings as long as procedure used effectively secures Fifth Amendment rights).

Court that blessed *Quarles* and furthered its expansion find § 3501 so offensive?

Some scholars have suggested that the Burger and Rehnquist Courts effectively eroded *Miranda*'s substantive criminal procedure protections by carefully modifying only certain parts of *Miranda*, while making sure to leave its core criminal procedure protection in place.[70] Using a framework that compares *Miranda*'s core guarantees to those criminal procedure protections at *Miranda*'s "periphery," this narrative suggests that the Supreme Court internally gauges its political capital and clout to determine how much rights restriction it can get away with and is very careful not to overstep these boundaries by using judicial values and norms like stare decisis to cabin its judicial activism.[71] This characterization means that in decisions like *Quarles*, the Supreme Court acted carefully to restrict criminal procedure protections without drawing too much public attention, so as not to risk greater public accountability. In this version of events, nurturing and expanding judicial exceptions while maintaining the core right to *Miranda* (albeit in fewer and fewer situations) sustains a certain pretext or façade that suggests to the public and those not in frequent contact with the criminal justice system that the nation's commitment to constitutional rights and procedural safeguards remains untouched.[72] This pretext, however, could not survive if § 3501 were allowed to stand, and so the Court acted in *Dickerson* to strike down this challenge to *Miranda*'s core criminal procedure protection.[73]

The Burger and Rehnquist Courts thus sustained a "narrative continuity" regarding *Miranda* rights, avoiding an "[o]utright repudiation of the Warren Court's work" that the Court understood would unsettle and infuriate too many stakeholders.[74] By protecting the symbolic core of the *Miranda* right while simultaneously eroding *Miranda* from every nook and cranny of a suspect's interaction with the government, the Court "cut[] back the remedial expansions" while not harming the "symbolic appeal of the rights spotlighted

---

70. See William J. Stuntz, Local Policing After the Terror, 111 Yale L.J. 2137, 2138 (2002) (explaining scope of Fourth and Fifth Amendment protections has varied over time in relation to crime rates). For an efficient and thorough review of the political science scholarship considering what motivates Supreme Court action, see Bilionis, supra note 14, at 999 n.60.

71. Bilionis, supra note 14, at 986–90.

72. See id. at 993–98 (arguing Court sustained core holdings of Warren Court cases but drained them of practical meaning by construing them narrowly, making public opposition more difficult to mobilize).

73. As one scholar noted:

> That Miranda, the totem of the Warren Court revolution, was spared overruling in *Dickerson v. United States* and expressly reaffirmed in an opinion authored by William H. Rehnquist is one of those delicious facts meant to be savored. Much as some might be tempted to see a climactic high-noon showdown from which *Miranda* emerged standing tall, that view misses the plot altogether. *Miranda* survived because the forces of reformation won the contest long before *Dickerson* declared its victory.

Id. at 998.

74. Id. at 993–94.

by the Warren Court."[75] Thus, the Rehnquist Court could reaffirm *Miranda*'s core value in *Dickerson* because "[a] long string of decisions of lesser public notoriety had recast criminal justice in terms far more favorable to the forces of law and order than popular opinion might ever realize."[76]

This explanation of the Burger and Rehnquist Courts' approach to *Miranda* suggests then that the Supreme Court is institutionally better at checking and bounding other branches of the government than it is at checking and bounding itself and its lower courts. This creates an interesting phenomenon where the Court will ensure that the "core" criminal procedure protections remain intact and cognizable but will allow lower courts to chip away at them systematically to continue to minimize the substantive protection this core value actually provides. When these two phenomena occur simultaneously, the Court looks stalwart in its protection of constitutionally guaranteed criminal procedure rights, rebuking Congress's overreach while permitting its lower courts to continue weakening and diluting some of the substantive protections provided by these constitutional guarantees. While the core of *Miranda* remains intact, Part I shows that this skeletal frame may not truly provide very much to criminal suspects as "the periphery [touched by judicial exceptions] may be metaphysically and rhetorically marginal. In the worldly realm, however, it is where most of legal life is lived."[77]

These peripheral modifications and restrictions are harder to frame as infringements of constitutional rights, harder to talk about, harder to mobilize around, and harder to understand because they occur, for the most part, pretextually. Judicial exceptions, by their very nature, are "attempt[s] to accommodate, within the existing normative structure, security considerations and needs. Though the ordinary system is kept intact as much as possible, some exceptional adjustments are introduced to accommodate exigency."[78] The fact that the "ordinary system" is kept intact means that superficially the elimination of constitutionally guaranteed criminal procedure protections via huge expansions of the PSE is invisible. Thus, it is harder to quantify and explain the net loss to constitutional rights in a way that the public can understand and respond to.

Judicial review of legislation is one of the most important parts of the Supreme Court's mandate and the Court is comfortable and effective in that role. The Supreme Court, via decisions like *Dickerson*, creates and provides a sort of constitutional safety net that ensures that it will not let Congress go too far. The legislative and executive branches, however, do not seem to perform that same function on the judiciary with respect to criminal procedure rights. Furthermore, the Supreme Court has been less likely to step in when a lower court amends, modifies, or erodes the periphery of a constitutional right to a criminal procedure protection like the privilege against self-incrimination, than

75. Id.

76. Id. at 994–95.

77. Id. at 1007.

78. Gross, supra note 60, at 1021.

to step in—as it did in *Dickerson*—when Congress attempts to heavy-handedly eviscerate its "core." Even though a lower court's decision is less far-reaching, since it binds, at most, the area within its jurisdiction, such a restriction still sets persuasive precedent and is less likely to encounter an institutional check or another form of review. Thus, while federal legislation binds the entire country, it seems more likely that high-profile legislation whose constitutionality is in question will undergo an effective judicial check or public scrutiny. That is the moral of *Dickerson*, at least. The Supreme Court will not bless a law that facially violates an individual's constitutionally guaranteed criminal procedure protections, but it will tolerate judicial decisions that effectively do the same thing—albeit in a piecemeal fashion with ad hoc justifications and reasoning.

There may, therefore, be some advantages to endorsing a division of labor where the legislative branch is responsible for determining the breadth and scope of criminal procedure rights and the courts are responsible for determining whether a restriction of criminal procedure rights erodes the right to the point of unconstitutionality. The advantages to this model are in the public accountability that comes along with the drafting, debating, and passing of a law, as well as its judicial review. The creation of judicial exceptions on a piecemeal basis—circuit by circuit, state by state—simply does not enjoy as much visibility, consideration, or debate and therefore remains less scrutinized and subject to less oversight.

Thus, in this safety net context where decisions like *Dickerson* ensure that Congress cannot tread over constitutional rights, legislators might have much to contribute and their efforts should be embraced, particularly for the ex ante social discourse gains. Restricting rights via legislation, however, raises different, equally pressing, concerns, despite the oversight and accountability advantages just addressed. After *Dickerson*, it is rather doubtful that the Supreme Court will tolerate or that the DOJ will enforce legislation eliminating *Miranda* warnings for all suspected terrorists. Yet all three branches of government seem willing to eagerly use and expand the PSE, which, if applied to Tsarnaev, would be tantamount to the exact same legislation. This curious inconsistency warrants serious, further, sustained consideration, especially as cases like Tsarnaev's increase the expansion of the PSE and simultaneously retract constitutionally guaranteed criminal procedure safeguards like *Miranda*.

CONCLUSION

Constitutional rights are not "self-executing"; rather, their protection and preservation require public participation and mobilization, which are partly inspired and encouraged by civil society and particularly inspired and encouraged by impact litigation organizations committed to the protection of criminal procedure rights and civil liberties writ large.[79] If it is the case that

79. David Cole, Where Liberty Lies: Civil Society and Individual Rights After 9/11, 57 Wayne L. Rev. 1203, 1265 (2011).

legislation eliminating *Miranda* rights for suspected terrorists must be struck down as unconstitutional after *Dickerson*, it is not immediately clear why the expansion of the PSE and its ultimate application to Tsarnaev should be allowed to accomplish the exact same thing. The net loss in constitutional protection is the same; the method of restriction is the only difference. This difference cannot be so meaningful that it changes the kind of constitutional protection that must be provided. Yet, functionally, the method seems to matter and may do just that. This Essay argues that the method matters because the two different methods of restricting rights institutionally face different checks and balances from different branches of the government and from the public and the media. These differences largely amount to greater discretion and leeway for lower courts to expand the application of judicial exceptions to constitutional rules that functionally eliminate the right altogether in the same way legislation would. If the PSE is applied to Tsarnaev, it will be very difficult to make the case that his experience would have been any different under a regime in which suspected terrorists had no *Miranda* rights, since he was not Mirandized until he was presented to a magistrate judge. He had no *Miranda* rights during his interrogation; even after he requested an attorney, the interrogation continued. These incursions on constitutional rights and criminal procedure safeguards should not be treated differently when achieved via one method—the expansion of judicial exceptions—as compared to the other method—the passage of legislation eliminating constitutional rights. Yet, they are. This is a real problem and one that the debate surrounding Tsarnaev could help move forward if and when the media and the public consider the application of the PSE to Tsarnaev's sixteen hours of un-Mirandized statements at his upcoming trial.

Preferred Citation: Joanna Wright, *Applying Miranda's Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions*, 113 COLUM. L. REV. SIDEBAR 136 (2013), http://www.columbialawreview.org/Boston-Bombers-Miranda-Rights_Wright.