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Bruce Ching

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# Mirandizing Terrorism Suspects? The Public Safety Exception, the Rescue Doctrine, and Implicit Analogies to Self-Defense, Defense of Others, and Battered Woman Syndrome

## **Cover Page Footnote**

Assistant Clinical Professor, Michigan State University College of Law. B.A., University of Missouri-St. Louis; M.A. and J.D., University of Michigan. I extend thanks for the support and opinions received from the Michigan State University College of Law summer faculty research workshop, and from professors Bill Chin, Barbara O'Brien, and Sue Liemer. I am also grateful for research help provided by the Michigan State University College of Law Library, and for the work of my research assistants Jessica Levitt, Rachel Rattner, and Lauren Betz.

# MIRANDIZING TERRORISM SUSPECTS? THE PUBLIC SAFETY EXCEPTION, THE RESCUE DOCTRINE, AND IMPLICIT ANALOGIES TO SELF- DEFENSE, DEFENSE OF OTHERS, AND BATTERED WOMAN SYNDROME

*Bruce Ching*<sup>+</sup>

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<sup>+</sup> Assistant Clinical Professor, Michigan State University College of Law. B.A., University of Missouri-St. Louis; M.A. and J.D., University of Michigan. I extend thanks for the support and opinions received from the Michigan State University College of Law summer faculty research workshop, and from professors Bill Chin, Barbara O’Brien, and Sue Liemer. I am also grateful for research help provided by the Michigan State University College of Law Library, and for the work of my research assistants Jessica Levitt, Rachel Rattner, and Lauren Betz.

For nearly twenty years after the Supreme Court's 1966 ruling in the landmark case *Miranda v. Arizona*,<sup>1</sup> whenever criminal suspects were subjected to custodial interrogation by law enforcement without first having been advised of safeguards to protect their Fifth Amendment right to remain silent, the suspects' responses were generally inadmissible at trial.<sup>2</sup> However, in its 1984 decision *New York v. Quarles*,<sup>3</sup> the Supreme Court announced the public safety exception, under which statements made by un-*Mirandized* suspects can still be admissible when the statements were made in response to questions reasonably asked to protect the safety of the arresting officers or the general public.<sup>4</sup> During investigation of terrorism cases, law enforcement agencies have begun to extend the time of un-*Mirandized* questioning of suspects, with the hope that courts will find that the public safety exception makes the suspects' statements admissible in the ensuing prosecutions.<sup>5</sup>

This Article argues that in announcing the public safety exception, the Court implicitly analogized the role of police interrogation in situations implicating public safety (which justifies the un-*Mirandized* questioning and so makes the suspects' responses admissible) to the actions of criminal defendants in situations of self-defense and defense of others (justifying the defendants' actions and so avoiding liability for violence). Recognizing the implicit analogy can provide guidance on the applicability and limits of the public safety exception and related issues, such as the rescue doctrine. Moreover, the comparison can draw upon the reasoning involved in recognizing battered woman syndrome, which has been used to broaden the circumstances under which suspects might have reasonably acted in self-defense. By analogy with evaluating the reasonableness of self-defense involving battered woman syndrome, evaluating the admissibility of terrorism suspects' un-*Mirandized* statements under the public safety exception might be influenced by the frequency and severity of terrorist activities that took place in the time leading up to the arrest of the suspects.

#### I. CRIMINAL PROCEDURE: THE RIGHT TO REMAIN SILENT, THE *MIRANDA* REQUIREMENTS, AND EXCEPTIONS TO THE *MIRANDA* RULE

The Fifth Amendment of the U.S. Constitution provides a privilege against self-incrimination, stating in relevant part that no person "shall be compelled in any criminal case to be a witness against himself."<sup>6</sup> In 1966, the Supreme Court

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1. 384 U.S. 436 (1966).

2. See *New York v. Quarles*, 467 U.S. 469, 654 (1984) (describing the effect of *Miranda*'s holding on statements made in "inherently coercive" circumstances).

3. 467 U.S. 649 (1984).

4. *Id.* at 655–58.

5. See David T. Hartmann, comment, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 *GEO. MASON U. C.R. L.J.* 219, 234, 241–44 (2012).

6. U.S. CONST. amend. V.

decided the *Miranda* case, which required the use of procedural measures to safeguard a suspect's Fifth Amendment privilege against incriminating himself.<sup>7</sup> The Court explained that when a suspect is subjected to custodial interrogation<sup>8</sup> by law enforcement,

[he] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.<sup>9</sup>

The Court also stated that other safeguards may be used for protecting the privilege, "so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."<sup>10</sup>

Failure to administer the *Miranda* warnings during investigation of a crime made the suspect's statements inadmissible in the ensuing trial.<sup>11</sup> Explaining why the suspect needs such warnings during pretrial questioning by law enforcement, the Court declared that,

[w]ithout the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."<sup>12</sup>

Thus, interrogation is not allowed to begin or continue if the suspect indicates that he does not wish to be questioned.<sup>13</sup> Similarly, if the suspect indicates that he wants to speak with an attorney before making a statement to police, interrogation cannot begin or continue until the suspect has had the opportunity to consult with counsel.<sup>14</sup>

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

8. The Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

9. *Id.* at 479. The *Miranda* decision referred back to the Court's previous decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964). See, e.g., *Miranda*, 384 U.S. at 440. In *Escobedo*, the Court found the police committed a violation of the Sixth Amendment when they questioned a suspect, refused his request to speak with his lawyer, and did not advise him of his right to remain silent; accordingly, the Court held that statements the suspect made to the police during the interrogation were not admissible against him at the subsequent criminal trial. 378 U.S. at 490–91.

10. *Miranda*, 384 U.S. at 490.

11. *Id.* at 444.

12. *Id.* at 466 (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

13. *Id.* at 445.

14. *Id.* at 444–45.

But in *Quarles*, the Supreme Court announced a “public safety” exception to the *Miranda* requirements.<sup>15</sup> *Quarles* dealt with circumstances in which a rape victim approached police, described her assailant, and stated that he had gone into a nearby supermarket while armed with a gun.<sup>16</sup> After chasing the suspect through the supermarket, an officer stopped him, frisked him, and “discovered that he was wearing a shoulder holster which was then empty.”<sup>17</sup> The officer handcuffed the suspect and asked about the gun’s location without first advising the suspect of his *Miranda* rights.<sup>18</sup> The Court held that the suspect’s indication of the gun’s location among some empty cartons was admissible even though the suspect had not been advised of his *Miranda* rights before making the statement.<sup>19</sup> The Court also held that the questioning the police undertook before advising the suspect of his *Miranda* rights did not taint the admissibility of further statements the suspect made after being advised of his rights.<sup>20</sup> The *Quarles* majority concluded that during the act of capturing the suspect, the police “were confronted with the immediate necessity of ascertaining the whereabouts of [the] gun” because the missing gun “obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.”<sup>21</sup>

In creating the public safety exception, the *Quarles* majority emphasized that, as a practical matter, arresting officers would probably act from a combination of mixed motives, including a desire to safeguard their own safety and that of others: “Undoubtedly most police officers, if placed in [the arresting officer’s] position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.”<sup>22</sup> The majority then stated that

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15. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

16. *Id.* at 651–52.

17. *Id.* at 652.

18. *Id.*

19. *Id.* at 652, 659–60.

20. *Id.*

21. *Id.* at 657. However, the dissent contested the majority’s characterization of the facts by noting that, “[c]ontrary to the majority’s speculations, . . . Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns.” *Id.* at 675 (Marshall, J., dissenting). The dissent further observed that the incident occurred late at night, when “no customers or employees were wandering about the store in danger of coming across Quarles’ discarded weapon.” *Id.* at 676.

22. *Id.* at 656 (majority opinion) (emphasis added). Thus, in commenting on the *Quarles* decision, one author has asserted that “[a] good analogy to police action in an emergency situation is self-defense, where there is no requirement that the actor’s sole motive in employing force be self-protection.” William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 583 (1985). Pizzi further notes that, according to the drafters of the Model Penal Code, a situation of mixed motives does not invalidate a defendant’s claim of self-defense. *Id.* at 583 n.113 (discussing MODEL PENAL CODE § 3.04 (Tentative Draft No. 8, 1958)).

the availability of a public safety exception “does not depend upon the motivation of the individual officers involved” and that the situation facing the officers was a “kaleidoscopic” one demanding immediate response.<sup>23</sup> The majority also declared that, “[w]hatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”<sup>24</sup> The majority described the public safety exception as a “narrow exception to the *Miranda* rule” and further declared a faith that “police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”<sup>25</sup>

But in arguing against the creation of the public safety exception, the *Quarles* dissent observed that strict adherence to the *Miranda* rule would not limit the scope of interrogation that law enforcement agents could undertake to protect the public:

If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . [N]othing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.<sup>26</sup>

Thus, closely applying the *Miranda* requirements would merely make the results of un-*Mirandized* questioning unavailable for the purpose of prosecuting the defendant.<sup>27</sup>

The characterization of the precise status of the *Miranda* requirements has changed over time. In the *Miranda* case itself, the Court referred to its own previous decisions that “recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.”<sup>28</sup> Apparently picking up on the *Miranda* decision’s reference to “prophylaxis,” the *Quarles* Court referred to the underlying facts in *Quarles* as “a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.”<sup>29</sup> The *Quarles* decision further found that “prophylactic *Miranda* warnings therefore are not themselves rights protected by the Constitution but are instead measures

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

24. *Id.*

25. *Id.* at 658–59.

26. *Id.* at 686 (Marshall, J., dissenting).

27. *Id.*

28. *Miranda v. Arizona*, 384 U.S. 436, 463 (1966).

29. *Quarles*, 467 U.S. at 653.



to insure that the right against compulsory self-incrimination is protected.”<sup>30</sup> The *Quarles* majority therefore concluded 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.”<sup>31</sup> But the 2000 case of *Dickerson v. United States*<sup>32</sup> declared that *Miranda* did not merely provide prophylactic guidelines, but rather “announced a constitutional rule that Congress may not supersede legislatively.”<sup>33</sup> The *Dickerson* majority stated that exceptions to the *Miranda* rule—such as the public safety exception created in *Quarles*—illustrate the normal workings of constitutional law as new situations arise.<sup>34</sup> Thus, the Supreme Court has most recently treated the *Miranda* requirements as a constitutional rule with limited exceptions.

The public safety exception has applied to the locations of various types of weapons and other dangerous objects. As in the *Quarles* decision, subsequent cases have often applied the exception to situations where the police ask suspects about the locations of firearms.<sup>35</sup> Courts have also found that the exception applies to law enforcement questions about the locations of knives.<sup>36</sup> In addition, the public safety exception has applied to questioning drug crime

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30. *Id.* at 654 (citation omitted). Moreover, the dissent also described the *Miranda* requirements as a “prophylactic barrier” and a “prophylactic rule.” *See id.* at 681 (Marshall, J., dissenting).

31. *Id.* at 657 (majority opinion).

32. 530 U.S. 428 (2000).

33. *Id.* at 444.

34. *Id.* at 441. The other exception noted by the *Dickerson* majority occurred in *Harris v. New York*, 401 U.S. 222, 224, 226 (1971), where the Supreme Court found that a suspect’s un-*Mirandized* statements during custodial interrogation were admissible for purposes of impeaching the credibility of the suspect’s trial testimony. *Dickerson*, 530 U.S. at 441. During its case in chief, the *Harris* prosecution had not attempted to use the suspect’s statements. *Harris*, 401 U.S. at 223–24.

35. *See, e.g.*, *Allen v. Roe*, 305 F.3d 1046, 1051 (9th Cir. 2002) (finding that the public safety exception applied when the gun was not at the scene where the crime was committed and also was not in the suspect’s possession when he was arrested); *United States v. Kelly*, 991 F.2d 1308, 1311, 1313 (7th Cir. 1993) (concluding that the public safety exception applied because, before police conducted a consensual pat-down search for drugs, the suspect removed several items—including bullets—from his pants pocket, thus raising concern about whether he was carrying a gun).

36. *See, e.g.*, *People v. Cole*, 165 Cal. App. 3d 41, 51–52 (Cal. Ct. App. 1985) (holding that, having been informed the suspect had a knife that was not found during a pat-down search, the arresting officer’s question was “reasonably prompted by a concern for public safety” because “[h]e was . . . confronted with the immediate necessity of ascertaining where the knife was. Until the knife was discovered, it posed a threat to public safety.”). However, the *Cole* dissent rejected the idea that the discarded knife presented a threat to public safety. *See id.* at 58–59 (White, J., dissenting). The dissent further urged that the public safety exception should apply only to the sort of circumstances that were present in the *Quarles* case: “a factual context of a firearm in places of public at large accommodation.” *Id.* at 58. *See also* *People v. Waiters*, 502 N.Y.S.2d 530, 531 (N.Y. App. Div. 1986) (explaining that when police arrived, the suspect—without being questioned—stated that she stabbed the victim in self-defense; the public safety exception applied to the suspect’s identification of the knife’s location in response to police questioning).

suspects about whether they are carrying hypodermic needles.<sup>37</sup> The public safety exception has also applied to questioning suspects about the location of bombs or bomb components,<sup>38</sup> and to questioning a suspect about the location of vials containing bubonic plague bacteria.<sup>39</sup>

The suspect's status as someone involved in actions that typically involve possession of dangerous weapons—particularly if he is believed to be a drug dealer—has sometimes helped the prosecution establish the applicability of the public safety exception.<sup>40</sup> However, attempts to invoke the public safety exception have failed when courts have found there was no immediate necessity to ask the suspect about dangerous items. For example, the public safety exception did not apply to a suspect's statement about the location of guns in a house when law enforcement agents had “performed two sweeps of the house[,] . . . had both occupants of the house in handcuffs[,]” and the agents asked only about guns inside the house; these facts undercut the prosecution's argument that members of the public outside the house were endangered by the possibility of finding the suspect's firearms.<sup>41</sup> Similarly, the public safety exception did not apply when officers handcuffed a suspect in a private residence in which it had been confirmed no one else was present at the time, the suspect was wearing only his underwear, and “[n]umerous officers participated in the arrest, fanning out through the apartment.”<sup>42</sup> The public safety exception was also inapplicable when law enforcement agents arrested a suspect outside his house and

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37. See, e.g., *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994) (finding that the public safety exception applied when, before searching the suspect, the police officer asked whether “he had any drugs or needles on his person,” and the suspect responded by saying, “No, I don't use drugs, I sell them”). In *Carrillo*, the police officer testified that, in previous searches, “he had been poked by needles and suffered headaches and skin irritation from contact with illegal drugs.” *Id.* at 1049 n.1.

38. *United States v. Khalil*, 214 F.3d 111, 115, 121 (2d Cir. 2000) (explaining that the public safety exception applied when police officers questioned suspects about pipe bombs found in their apartment); *United States v. Dodge*, 852 F. Supp. 139, 142 (D. Conn. 1994) (concluding that the public safety exception applied when a police officer questioned a suspect about the location of bomb components that easily could have been assembled).

39. *United States v. Harris*, 961 F. Supp. 1127, 1129–30, 1134 (S.D. Ohio 1997).

40. See, e.g., *United States v. Estrada*, 430 F.3d 606, 608, 613 (2d Cir. 2005) (holding that the public safety exception applied to the arresting officer's question about whether weapons were in the vicinity; the involved officers reasonably believed they needed the information to protect their own safety because the suspect had previously been convicted of assault and was known to be a drug dealer, and another individual was at the apartment when the suspect was arrested); *United States v. Reyes*, 353 F.3d 148, 154–55 (2d Cir. 2003) (finding that the public safety exception applied because the arresting officer reasonably believed that the heroin dealer might be “carrying sharp objects or firearms”); *United States v. Edwards*, 885 F.2d 377, 384 (7th Cir. 1989) (holding that the public safety exception justified a detective's question about whether the suspect had a gun because “drug dealers are known to arm themselves, particularly when making a sale, in order to protect themselves, their goods and the large quantities of cash often associated with such transactions”).

41. *United States v. Brathwaite*, 458 F.3d 376, 382–83 n.8 (5th Cir. 2006).

42. *United States v. Salahuddin*, 668 F. Supp. 2d 1136, 1142–43 (E.D. Wis. 2009).

questioned him about whether there were any traps or explosives inside the house; although the agents testified that they had information about the house having such dangerous items, they conceded that providing the *Miranda* warnings would not have done harm in that situation, they did not need to enter the suspect's residence immediately, and they did not convey the information about the traps and explosives to the officers who entered the residence.<sup>43</sup>

Courts are divided about whether the public safety exception applies when the risk threatens a specific individual rather than the more general public at large. Some have declared that the public safety exception applies in such circumstances.<sup>44</sup> However, others have stated that the admissibility of a suspect's un-*Mirandized* statements made in response to officers' questioning aimed at saving specific, identified individuals should be analyzed under a separate "private safety exception" or "rescue doctrine" rather than under the public safety exception.<sup>45</sup> For example, the rescue doctrine may apply to law enforcement officers questioning a suspect about the location of a missing person whom the police have not yet located.<sup>46</sup> Moreover, at least one court has held that both the public safety exception and the rescue doctrine apply to questions prompted by a concern for the suspect's own safety.<sup>47</sup>

In creating the public safety exception, the *Quarles* decision emphasized the "immediate necessity" of obtaining information from the suspect.<sup>48</sup> However, subsequent cases have sometimes applied the public safety exception to justify the admissibility of a suspect's statements made in response to law enforcement questions asked at a point removed from the immediate place and time of the arrest.<sup>49</sup> Moreover, the rescue doctrine has been used to justify the admissibility

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43. *United States v. Rumble*, 714 F. Supp. 2d 388, 390, 392–93 (N.D.N.Y. 2010).

44. *See, e.g., United States v. Padilla*, 819 F.2d 952, 960 (10th Cir. 1987) (finding that the public safety exception applied when an officer asked a suspect about the safety of person(s) "inside the [suspect's] house"); *Bailey v. State*, 763 N.E.2d 998, 1000–02 (Ind. 2002) (internal quotation omitted) (holding that the public safety exception applied when an officer asked a suspect about the location of a murder victim whose death had not yet been confirmed).

45. *See, e.g., State v. Kunkel*, 404 N.W.2d 69, 76 (Wis. Ct. App. 1987) ("The companion to the public safety exception must be a private safety exception, whether labelled as such or as a 'rescue doctrine.' In our calculus the possible imminent loss of the life of a known and identifiable individual is entitled to the same weight as the public safety.").

46. *See, e.g., People v. Davis*, 208 P.3d 78, 123–24 (Cal. 2009) (concluding that the rescue doctrine applied when the suspect was questioned about the location of a kidnapping victim); *Kunkel*, 404 N.W.2d at 71–72, 76 (determining that the rescue doctrine applied when a suspect was questioned about the location of his missing son).

47. *See Benson v. State*, 698 So. 2d 333, 333, 336–37 (Fla. Dist. Ct. App. 1997) (finding that the public safety exception and the rescue doctrine applied when the suspect started eating rocks of crack cocaine during arrest, police asked how many he had eaten, and an officer labeled the situation an "emergency" because of the possibility that the suspect could overdose).

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

49. *See, e.g., United States v. Ferguson*, 702 F.3d 89, 90–91, 96 (2d Cir. 2012) (holding that the public safety exception applied when a suspect was arrested outside his apartment building and was questioned at the police station "an hour or more after his arrest" because the suspect's missing

of a suspect's statements in response to custodial interrogation that occurred long after the victim was first missing.<sup>50</sup> Thus, case law suggests that in at least some circumstances, the exceptions to the *Miranda* rule may apply for an extended period rather than only for a short, discrete window of time when questioning the suspect.

II. CRIMINAL PROCEDURE DRAWING ON CRIMINAL LAW: THE PUBLIC SAFETY EXCEPTION IMPLICITLY ANALOGIZES THE ROLE OF LAW ENFORCEMENT OFFICERS WHO INTERROGATE SUSPECTS TO THAT OF CRIMINAL DEFENDANTS IN SITUATIONS OF SELF-DEFENSE AND DEFENSE OF OTHERS

The *Quarles* majority's focus on law enforcement officers questioning suspects to preserve the officers' "own safety [and] the safety of others"<sup>51</sup> is an implicit invocation of the criminal law doctrines of self-defense and defense of others. In order for the public safety exception to justify the use of an un-Mirandized suspect's statements, there must have been an "immediate necessity" to obtain information from the suspect, and the questions directed to the suspect must have been "reasonably prompted by a concern for the public safety."<sup>52</sup> Similarly, in the realm of criminal law, one jurisdiction has summarized that an actor may "use physical force upon another person when and to the extent he *reasonably believes* such to be necessary to defend himself or a third person from what he *reasonably believes* to be the use or imminent use of unlawful physical force by such other person."<sup>53</sup>

The wording of the public safety exception is nearly identical to wording for doctrines of self-defense and defense of others. In formulating the public safety exception, the *Quarles* Court implemented the phrases "immediate necessity"<sup>54</sup> and "reasonably prompted by a concern for the public safety"<sup>55</sup> and referenced police officers asking "questions necessary to secure their own safety or the safety of the public."<sup>56</sup> This language is very similar to the terms used to describe criminal law justifications for use of force in situations of self-defense and defense of others: "imminent"<sup>57</sup> and "*reasonably believes* such to be necessary to defend himself or a third person."<sup>58</sup> In effect, the *Quarles* decision

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pistol posed a threat, especially in light of the fact that the apartment was close to a playground and other public facilities).

50. See, e.g., *Davis*, 208 P.3d at 122–23 (explaining that the suspect responded to custodial interrogation sixty-two days after a kidnapping victim's disappearance).

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

52. *Id.* at 656–57.

53. *People v. Goetz*, 497 N.E.2d 41, 47 (N.Y. 1986) (quoting N.Y. PENAL LAW § 35.15(1) (McKinney 2004)).

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

55. *Id.* at 656.

56. *Id.* at 659.

57. *Goetz*, 497 N.E.2d at 47 (quoting N.Y. PENAL LAW § 35.15(1)).

58. *Id.*

imported the criminal law doctrines of self-defense and defense of others into the field of criminal procedure. In criminal law, the doctrines of self-defense and defense of others justify conduct that would otherwise result in liability for the defendant; likewise, in criminal procedure, the public safety exception justifies law enforcement interrogation of a suspect that would otherwise make the suspects' statements subject to the exclusionary rule at trial.<sup>59</sup>

A. *Results of Applying Self-Defense and Defense of Others Concepts to the Miranda Requirement Exceptions*

Further examining the criminal law doctrines of self-defense and defense of others may shed light on the proper contours of the exceptions to the criminal procedure *Miranda* requirements. Under the right circumstances, a defendant can deploy an affirmative defense of necessity for using physical force to defend himself or others.<sup>60</sup> One may be justified in using physical force in self-defense or defense of another person if the actor has a reasonable belief that such force is needed to defend against an attacker's "imminent use of unlawful physical force."<sup>61</sup> In addition, the actor must not have been responsible for creating the confrontation.<sup>62</sup> One court has given the following summary of the necessary conditions to support the defendant's argument of self-defense involving deadly force:

- (1) The accused must have had reasonable grounds to believe himself in apparent imminent or immediate danger of death or serious bodily harm from his assailant or potential assailant;
- (2) The accused must have in fact believed himself in this danger;
- (3) The accused claiming the right of self defense must not have been the aggressor or provoked the conflict; and
- (4) The force used must have not been unreasonable and excessive, that is, the force must not have been more force than the exigency demanded.<sup>63</sup>

The public safety exception to the *Miranda* requirements may apply when law enforcement officers question a suspect in a situation that presents an immediate threat to the officers' own safety.<sup>64</sup> This is the criminal procedure equivalent to the criminal law doctrine of self-defense outlined above: the arresting officers

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59. See *Quarles*, 467 U.S. at 651. More generally expounding on the relationship between criminal law and criminal procedure, one commentator stated that "constitutional criminal procedure is a species of substantive criminal law for the police." Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 20 HARV. J.L. & PUB. POL'Y 435, 439 (1997).

60. See, e.g., *State v. Williford*, 551 N.E.2d 1279, 1281 (Ohio 1990).

61. See, e.g., *Goetz*, 497 N.E.2d at 47 (quoting N.Y. PENAL LAW § 35.15(1)); *Williford*, 551 N.E.2d at 1281 (explaining that one may use force in defense of a family member to the same extent that would be justified in a self-defense situation).

62. *Williford*, 551 N.E.2d at 1281.

63. *Watkins v. State*, 613 A.2d 379, 384 (Md. 1992).

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

may ask questions to obtain information that is immediately necessary to preserving their own safety, and the public safety exception prevents the exclusionary rule from making the suspect's answers inadmissible at trial.

The public safety exception may also apply when officers question a suspect in a situation that poses an immediate danger to the general public.<sup>65</sup> Somewhat similarly, the rescue doctrine exception to the *Miranda* requirements applies to law enforcement officers' questioning of a suspect when a specific individual's safety is at risk.<sup>66</sup> Together, these situations present a criminal procedure analogue to the criminal law doctrine of defense of others that was summarized at the start of this subsection: officers may ask questions to obtain information that is immediately necessary for dealing with threats to the safety of other people, and the public safety exception and the rescue doctrine can prevent the exclusionary rule from making the suspect's answers inadmissible at trial. In summary, as in situations of self-defense or defense of others—where the use of force is justified only when the actor reasonably believes there is an imminent danger that must be dealt with by force<sup>67</sup>—the *Miranda* rule exceptions apply only when law enforcement officers encounter an “immediate necessity” to “ask questions reasonably prompted by a concern for the public safety.”<sup>68</sup>

The nature of the suspect's occupation may play a role in determining whether law enforcement officers reasonably believed they needed to protect their own safety by asking questions of the suspect. For example, the public safety exception applied when officers arrested and questioned suspects known to be drug dealers because such suspects typically carry weapons; therefore, the questions were aimed at securing the officers' own safety.<sup>69</sup> The public safety exception has also applied to questioning drug crime suspects before searching them in order to protect officers from being harmed by implements such as hypodermic needles that are common in the use of illegal drugs.<sup>70</sup> However, law enforcement agents' assertion of an immediate necessity to protect themselves from harm may be undercut if their conduct is inconsistent with that assertion, such as when officers asked a suspect about traps or explosives in his house but then did not convey the resulting information about such dangerous items to officers who entered the house to conduct a search.<sup>71</sup>

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65. *Id.*

66. *See, e.g.,* *People v. Davis*, 208 P.3d 78, 122–24 (Cal. 2009); *State v. Kunkel*, 404 N.W.2d 69, 76 (Wis. Ct. App. 1987).

67. *See, e.g.,* *Watkins*, 613 A.2d at 384; *People v. Goetz*, 497 N.E.2d 41, 47 (N.Y. 1986); *Williford*, 851 N.E.2d at 1281.

68. *Quarles*, 467 U.S. at 656–57.

69. *See, e.g.,* *United States v. Estrada*, 430 F.3d 606, 613 (2d Cir. 2005); *United States v. Reyes*, 353 F.3d 148, 154 (2d Cir. 2003); *United States v. Edwards*, 885 F.2d 377, 384 (7th Cir. 1989).

70. *See, e.g.,* *United States v. Carrillo*, 16 F.3d 1046, 1049 (9th Cir. 1994).

71. *United States v. Rumble*, 714 F. Supp. 2d 388, 390, 392–93 (N.D.N.Y. 2010).

*B. Analogizing to Battered Woman Syndrome Could Extend the Range of Circumstances to Which the Public Safety Exception Applies*

In a majority of jurisdictions within the United States, expert testimony about battered woman syndrome can be admissible as relevant to a defendant's theory of self-defense.<sup>72</sup> Less frequently, battered woman syndrome can be invoked in support of a defendant's theory of defense of others.<sup>73</sup> A few jurisdictions treat battered woman syndrome testimony as relevant to a defense of insanity;<sup>74</sup> however, the insanity defense is not relevant to this Article, so this subsection focuses on how battered woman syndrome's relationship to the concept of self-defense can contribute to understanding the scope of the *Miranda* exceptions. In particular, analogizing to battered woman syndrome suggests that under some circumstances, law enforcement officers might reasonably believe that they face an immediate necessity to obtain information from a terrorism suspect, even under circumstances that at first glance do not seem to support a finding of *immediate* necessity.

Battered woman syndrome is a psychological explanation for the conduct of some women in abusive relationships, including why someone might remain in the relationship rather than leave a partner who physically and psychologically

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72. See generally, e.g., Barrett v. State, 918 So. 2d 942 (Ala. Crim. App. 2005); Ambrose v. State, No. A-5112, 1995 WL 17220777 (Alaska Ct. App. Apr. 26, 1995); Thompson v. State, 813 S.W.2d 249 (Ark. 1991); Wonnun v. State, 942 A.2d 569 (Del. 2007); Nixon v. United States, 728 A.2d 582 (D.C. 1999); Gonzalez-Valdes v. State, 834 So. 2d 933 (Fla. Dist. Ct. App. 2003); Thigpen v. State, 546 S.E.2d 60 (Ga. Ct. App. 2001); State v. Augustin, 63 P.3d 1097 (Haw. 2002); Schwartz v. State, 177 P.3d 400 (Idaho Ct. App. 2008); People v. Evans, 631 N.E.2d 281 (Ill. App. Ct. 1994); State v. Rodriquez, 636 N.W.2d 234 (Iowa 2001); State v. Stewart, 763 P.2d 572 (Kan. 1988); Springer v. Commonwealth, 998 S.W.2d 439 (Ky. 1999); State v. Peterson, 857 A.2d 1132 (Md. Ct. Spec. App. 2004); People v. Sandoval-Ceron, No. 286985, 2010 WL 3021861 (Mich. Ct. App. Aug. 3, 2010); State v. Hennem, 441 N.W.2d 793 (Minn. 1989); Lentz v. State, 604 So. 2d 243 (Miss. 1992); State v. Martin, 666 S.W.2d 895 (Mo. Ct. App. 1984); Boykins v. State, 995 P.2d 474 (Nev. 2000); State v. Briand, 547 A.2d 235 (N.H. 1988); State v. Tierney, 813 A.2d 560 (N.J. Super. Ct. App. Div. 2003); State v. Swavola, 840 P.2d 1238 (N.M. Ct. App. 1992); People v. Wilcox, 788 N.Y.S.2d 503 (N.Y. App. Div. 2005); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); State v. Goff, 942 N.E.2d 1075 (Ohio 2010); Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992); State v. Moore, 695 P.2d 985 (Or. Ct. App. 1985); Commonwealth v. Miller, 634 A.2d 614 (Pa. Super. Ct. 1993); State v. Urena, 899 A.2d 1281 (R.I. 2006); State v. Hill, 339 S.E.2d 121 (S.C. 1986); State v. Burtzlaff, 493 N.W.2d 1, 4 (S.D. 1992); State v. Gurley, 919 S.W.2d 635 (Tenn. Crim. App. 1995); State v. Valdez, No. 20030089-CA, WL 1017848 (Utah Ct. App. Apr. 5, 2007); State v. Swift, 844 A.2d 802 (Vt. 2004); State v. Hendrickson, 914 P.2d 1194 (Wash. Ct. App. 1996); State v. Stewart, 719 S.E.2d 876 (W. Va. 2011); State v. Richardson, 525 N.W.2d 378 (Wis. Ct. App. 1994). See also, e.g., WYO. STAT. ANN. § 6-1-203(b) (West 2014).

73. See, e.g., MO. ANN. STAT. § 563.033(1) (West 2014) ("Evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another." (emphasis added)).

74. See, e.g., IND. CODE ANN. § 35-41-3-11 (West 2014); LA. REV. STAT. ANN. § 14:14 (2014); MASS. GEN. LAWS ANN. ch. 123, § 15 (West 2014); MONT. CODE ANN. § 46-14-101 (West 2013); OHIO REV. CODE ANN. § 2945.392 (West 2014).

abuses her.<sup>75</sup> In particular, “[i]f she tries to leave the relationship, she is located and returned and the violence increases.”<sup>76</sup> Apparently in recognition that the psychological dynamics may also apply to others—not just to women—some sources have started to refer to “battered spouse syndrome,”<sup>77</sup> although the applicability of that term is questionable when the defendant was never married to the alleged batterer.<sup>78</sup> In addition, at least one court has recognized an analogous “battered child syndrome” that may apply to situations in which a child defendant presents a claim of self-defense for using physical force against a parent.<sup>79</sup>

Expert testimony on battered woman syndrome has been offered as relevant to evaluating assertions of self-defense undertaken by defendants who eventually used physical force—particularly deadly force—against the batterers who abused them, rather than leaving the relationship before the conflict escalated to such a situation.<sup>80</sup> The syndrome is regarded as a form of post-traumatic stress disorder.<sup>81</sup> The theory of battered woman syndrome posits recurring cycles consisting of a “tension-building” phase during which the battered woman, based on her relationship with the batterer, quickly perceives danger signals indicating that a violent episode will occur; an “acute-explosion” phase in which the abuse occurs; and a “loving, contrition” phase in which the abuser gives assurances of better behavior in the future.<sup>82</sup> Battered women tend to retaliate against their abusers when “the cycle lapses back into phase one from phase three” as signs of violence from the batterer start again.<sup>83</sup>

A court has explained that “[e]xpert testimony relating to battered woman’s syndrome is germane to the jury’s assessment of the *subjective honesty* as well as the *objective reasonableness* of a defendant’s belief that deadly force was necessary to protect herself against death or serious bodily harm.”<sup>84</sup> At trial, “in determining objective reasonableness” of the defendant’s belief in the necessity of using force, the factfinder “must view the situation from the *defendant’s perspective*.”<sup>85</sup> In particular, “[w]here ‘the circumstances’ include domestic violence, the battered woman syndrome is relevant to the reasonableness of an

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75. See, e.g., *Tierney*, 813 A.2d at 564–65.

76. *Stewart*, 763 P.2d at 582 (citing Gail Rodwan, *The Defense of Those Who Defend Themselves*, 65 MICH. B.J. 64, 66–67 (1986)) (paraphrasing expert witness testimony).

77. See, e.g., *Copeland v. Washington*, 232 F.3d 969, 975–76 (8th Cir. 2000); *Weiland v. State*, 732 So. 2d 1044, 1048 (Fla. 1999).

78. *But see State v. Williams*, 787 S.W.2d 308, 311–12 (Mo. Ct. App.) (holding that the applicability of battered spouse syndrome does not depend on the marital status of the defendant).

79. *State v. Nemeth*, 694 N.E.2d 1332, 1334–35 (Ohio 1998).

80. See *Tierney*, 813 A.2d at 566.

81. *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Crim. App. 1992).

82. *Id.* at 10.

83. *Williams*, 787 S.W.2d at 312 (citing LENORE E. WALKER, *THE BATTERED WOMAN* 70 (1979)).

84. *Tierney*, 813 A.2d at 566 (emphasis added).

85. *People v. Humphrey*, 921 P.2d 1, 8 (Cal. 1996).



individual's belief" that the batterer presents an imminent danger of "death or great bodily harm."<sup>86</sup> A court has noted that commentators have made an analogy to a hostage situation, in that "the battered woman lives under long-term, life-threatening conditions in constant fear of another eruption of violence."<sup>87</sup> Thus, a "battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating. . . . Thus from the perspective of the battered wife, the danger is constantly 'immediate.'"<sup>88</sup>

Jurisdictions disagree about whether battered woman syndrome and claims of self-defense may justify a defendant's use of force when the batterer did not engage in immediately threatening conduct. Some courts have held that battered woman syndrome may explain why—notwithstanding the apparent absence of imminent danger if viewed from an outsider's perspective—the defendant could reasonably believe that the batterer presented an immediate threat.<sup>89</sup> Under this view, "the issue is not whether the danger was in *fact* imminent, but whether, given the circumstances as she perceived them, the defendant's *belief was reasonable that the danger was imminent.*"<sup>90</sup> But other courts have declared that if the batterer did not engage in immediately threatening behavior, then the defendant could not have reasonably believed she was in imminent danger, and so the justification of self-defense was unavailable.<sup>91</sup> Moreover, even if the defendant "presents credible evidence that she is a victim of the battered woman syndrome," hiring a third party to kill the batterer makes a claim of self-defense unavailable.<sup>92</sup>

### III. TERRORISM: POLITICALLY MOTIVATED VIOLENCE

Terrorism is characterized by violence as a tool of political coercion. For example, the federal terrorism statute contains a requirement of intent that defines "[f]ederal crime of terrorism" as "an offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."<sup>93</sup> The corresponding section of the New

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86. *Boykins v. State*, 995 P.2d 474, 478 (Nev. 2000).

87. *Bechtel*, 840 P.2d at 12 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW (2d ed. 1986); P. ROBINSON, 2 CRIMINAL LAW DEFENSES (1984)).

88. *Id.* at 12 n.12 (quoting Loraine Patricia Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 928–29 (1981)).

89. *See, e.g., State v. Allery*, 682 P.2d 312, 313–15 (Wash. 1984) (holding that self-defense might apply despite the fact that, after the batterer threatened to kill the defendant, the batterer was lying on a couch when the defendant retrieved and loaded a shotgun and killed the batterer).

90. *Bechtel*, 840 P.2d at 12.

91. *See, e.g., State v. Stewart*, 763 P.2d 572, 575–76, 578 (Kan. 1988) (holding that self-defense was inapplicable in the defense of a battered woman who killed her husband when he was sleeping).

92. *People v. Yaklich*, 833 P.2d 758, 760 (Colo. App. 1991).

93. 18 U.S.C. § 2332b(g)(5)(A) (2012).

York state terrorism statute provides that:

[a] person is guilty of a crime of terrorism when, with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping, he or she commits a specified offense.<sup>94</sup>

For federal prosecution of terrorism, a preliminary decision is whether to pursue criminal charges in ordinary civilian courts within the United States or charge the defendants as accused enemy combatants<sup>95</sup> in military commissions set up in the U.S. Marine Corps base in Guantanamo, Cuba.<sup>96</sup> Civil rights guarantees such as *Miranda* requirements apply more fully in the civilian courts,<sup>97</sup> and the Obama administration has pursued terrorism prosecutions in that setting rather than in military commissions.<sup>98</sup>

However, the Obama administration has also been aggressively pursuing the use of the public safety exception to justify extended questioning of terrorism suspects before advising them of their *Miranda* rights.<sup>99</sup> In 2010, FBI director Robert Mueller testified that his agency was interpreting the public safety exception broadly when dealing with terrorism cases.<sup>100</sup> The FBI also stated this policy in an internal memorandum dated October 21, 2010, advising that in questioning terrorism suspects, agents should first “ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or

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94. N.Y. Penal Law § 490.25(1) (McKinney 2001).

95. For a discussion of the use of due process rights to contest facts allegedly justifying detention of a U.S. citizen as an enemy combatant, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

96. See Hartmann, *supra* note 5, at 221. Hartmann’s paper includes empirical data showing that the civilian court system is the more effective forum for obtaining convictions in terrorism prosecutions. *Id.* at 239. Moreover, the results of trials in the military commission system have been notably unimpressive for the prosecution. Of the cases that went to trial rather than being plea-bargained, only two resulted in convictions, and both were subsequently overturned by appellate courts. Jennifer Steinhauer & Charlie Savage, *U.S. Defends Prosecuting Benghazi Suspect in Civilian Rather than Military Court*, N.Y. TIMES, June 17, 2014, [http://www.nytimes.com/2014/06/18/world/middleeast/us-defends-prosecuting-benghazi-suspect-in-civilian-rather-than-military-court.html?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A13%22%7D&\\_r=1](http://www.nytimes.com/2014/06/18/world/middleeast/us-defends-prosecuting-benghazi-suspect-in-civilian-rather-than-military-court.html?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A13%22%7D&_r=1).

97. For this reason, various members of Congress—including Senator Lindsey Graham and Congressman Trey Gowdy—have urged that terrorism suspects should be tried by military commissions rather than by courts that enforce *Miranda* rights. Steinhauer & Savage, *supra* note 96.

98. *Id.*

99. 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?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A13%22%7D>.

100. *Id.*

the arresting agents without advising the arrestee of his *Miranda* rights.”<sup>101</sup> Thus, the memo urged agents to take advantage of what is allowed by the public safety exception, to which the memo explicitly later refers.<sup>102</sup> The memo stated that the complex nature of terrorist attacks justifies “significantly more extensive public safety interrogation without *Miranda* warnings than would be permissible in an ordinary criminal case.”<sup>103</sup> In particular, the memo advised that interrogating un-*Mirandized* suspects could appropriately include “questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pos[e] an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.”<sup>104</sup>

Also in 2010, Attorney General Eric Holder proposed that Congress should enact a law to reduce the *Miranda* requirements when law enforcement agents interrogate terrorism suspects.<sup>105</sup> Michael McCaul, Chairman of the Homeland Security Committee in the House of Representatives, similarly suggested that the *Miranda* requirements should be changed to allow at least forty-eight hours for questioning a suspect under the public safety exception.<sup>106</sup> But such legislative reduction of the *Miranda* rule would be invalid in light of the Supreme Court’s holding in the *Dickerson* case: “In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.”<sup>107</sup>

A. *The Rescue Doctrine Justifies Extended Interrogation of Un-Mirandized Suspects When Specific, Identified Individuals are Threatened*

Straightforward application of the rescue doctrine suggests that law enforcement officers may legitimately question un-*Mirandized* suspects about ongoing threats to particular individuals, and that the prosecution may use the suspects’ responses at trial. For example, in the case of *People v. Davis*,<sup>108</sup> the California Supreme Court held that the rescue doctrine was applicable to interrogation of a kidnapping suspect when the victim had been missing for

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101. The text of the FBI memo was obtained and disclosed by the *New York Times* in its piece, *F.B.I. Memorandum*, N.Y. TIMES, Mar. 25, 2011, [http://www.nytimes.com/2011/03/25/us/25-miranda-text.html?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A16%22%7D&\\_r=0](http://www.nytimes.com/2011/03/25/us/25-miranda-text.html?module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A16%22%7D&_r=0).

102. *Id.*

103. *Id.*

104. *Id.*

105. Charlie Savage, *Holder Backs a Miranda Limit for Terror Suspects*, N.Y. TIMES, May 9, 2010, <http://www.nytimes.com/2010/05/10/us/politics/10holder.html?pagewanted=all&module=Search&mabReward=relbias%3Ar%2C%7B%22%22%3A%22RI%3A13%22%7D>.

106. Sabrina Siddiqui, *Michael McCaul: ‘Rush to Mirandize’ Dzhokhar Tsarnaev Cost Valuable Intelligence*, HUFFINGTON POST, (Apr. 26, 2013), [http://www.huffingtonpost.com/2013/04/26/michael-mccaul-mirandize-dzhokhar-tsarnaev\\_n\\_3165907.html](http://www.huffingtonpost.com/2013/04/26/michael-mccaul-mirandize-dzhokhar-tsarnaev_n_3165907.html).

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

108. 208 P.3d 78 (Cal. 2009).

sixty-four days.<sup>109</sup> The *Davis* court explained that such questioning was justified because “the length of time a kidnap victim has been missing is not, by itself, dispositive of whether a rescue is still reasonably possible.”<sup>110</sup> Thus, the continuing nature of a threat to an identified individual triggers the rescue doctrine exception to the *Miranda* requirements. Identifying a specific victim or potential victim tends to keep the rescue doctrine within the bounds of what is reasonable, rather than degenerating into speculation about a general threat that is not specifically directed.

In the context of handling suspected terrorists, the rescue doctrine should support un-*Mirandized* interrogation to recover kidnapped officials, or to protect officials who have been threatened with violence, such as kidnapping or assassination. For example, if law enforcement officers had chosen to conduct questioning of un-*Mirandized* suspects during investigation into the assassination plot that targeted then-Senator Obama during his presidential campaign in 2008,<sup>111</sup> the rescue doctrine could have justified it. Sometime after the suspects were arrested, officials stated that the suspects believed in white supremacist ideology and discussed planning to steal guns to engage in “killing 88 people [(primarily black schoolchildren)] and beheading 14 African-Americans,” according to an affidavit filed by a federal agent.<sup>112</sup> The affidavit also explained that the numbers eighty-eight and fourteen have special significance “in the white power movement,” being coded references to white supremacist slogans.<sup>113</sup> The planned killing spree was designed to culminate with the assassination of Obama, “the first black presidential nominee from a major [political] party.”<sup>114</sup> The plan for politically motivated violence that included at least one specifically identified individual—a presidential candidate—thus constituted a terrorist plan that could justify law enforcement agents using the rescue doctrine exception to the *Miranda* requirements. The rescue doctrine exception could have been used to question the suspects about the same sort of items listed in the FBI memo regarding use of the public safety exception—coordinated attacks, location of weapons, and “accomplices who may be plotting additional imminent attacks.”<sup>115</sup> In addition, the specificity of the attack plans—such as the particular number of African-American victims to be killed and the number to be beheaded—might also be enough to support the

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109. *Id.* at 123.

110. *Id.*

111. For one news source summarizing the plot, see Jack Date, *Feds Thwart Alleged Obama Assassination Plot*, ABC NEWS (Oct. 27, 2008), <http://abcnews.go.com/TheLaw/Vote2008/story?id=6122962>.

112. Eric Lichtblau, *Arrests in Plan to Kill Obama and Black Schoolchildren*, N.Y. TIMES (Oct. 28, 2008), [http://www.nytimes.com/2008/10/28/world/americas/28iht-28plot.17300436.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/10/28/world/americas/28iht-28plot.17300436.html?pagewanted=all&_r=0).

113. Date, *supra* note 111.

114. Lichtblau, *supra* note 112.

115. See *F.B.I. Memorandum*, *supra* note 101.

idea of a possible ongoing threat to the general public, and thus invoke application of the public safety exception, at least until the suspects' answers dispelled the idea of such an ongoing threat.

*B. By Analogy with Battered Woman Syndrome, the Course of Terrorist Activity in the Recent Past Could Be Relevant in Determining Whether the Public Safety Exception Applies to Interrogating Terrorism Suspects*

A period of frequent and severe terrorist attacks may justify extending the public safety exception, even if the suspect himself has been apprehended and does not appear to pose an immediate danger to the public safety. That situation would be analogous to claims of self-defense by sufferers of battered woman syndrome in jurisdictions that recognize the syndrome as relevant to determining the reasonableness of the actor's belief that the batterer presented an imminent danger.

An example of the use of battered woman syndrome, in a case where the batterer might not have seemed to present an immediate threat, occurred in *State v. Allery*,<sup>116</sup> where the Washington Supreme Court determined that expert testimony regarding battered woman syndrome should have been admissible in support of the defendant's theory of self-defense for shooting her estranged husband.<sup>117</sup> Moreover, the court stated that "[t]he jury should have been instructed to consider the self-defense issue from the defendant's perspective in light of all that she knew and had experienced with the victim."<sup>118</sup> For a period of several years, the defendant was abused by her husband; "[s]he suffered periodic pistol whippings, assaults with knives, and numerous beatings from her husband's fists throughout the marriage."<sup>119</sup> He also hit her head with a tire iron, and "[d]uring the last year of their marriage, the beatings increased in frequency and severity."<sup>120</sup> The defendant started divorce proceedings and obtained a restraining order, but when she returned to her house one night, her husband was lying on the couch and threatened to kill her.<sup>121</sup> The defendant unsuccessfully tried to exit through a bedroom window, and she heard a sound that she believed indicated her husband was getting a knife in the kitchen.<sup>122</sup> She loaded a shotgun in the bedroom, moved into the kitchen, and "fired the shot that killed her husband while he remained lying on the couch."<sup>123</sup>

Similarly, in *State v. Nemeth*,<sup>124</sup> the Ohio Supreme Court held that evidence of battered child syndrome—which is similar to battered woman syndrome—

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116. 682 P.2d 312 (Wash. 1984).

117. *Id.* at 313–15.

118. *Id.* at 315.

119. *Id.* at 313.

120. *Id.*

121. *Id.*

122. *Id.* at 313–14.

123. *Id.* at 314.

124. 694 N.E.2d 1332 (Ohio 1998).

was admissible for several issues, including the defendant's contention that he acted in self-defense when he retrieved a bow and some arrows from his bedroom, walked into the hallway, and shot five arrows into his mother's head and neck when she was lying on the living room couch.<sup>125</sup> The defendant "testified that his mother had been abusive toward him for several years" and she frequently engaged in excessive drinking that would result in her hitting him, verbally threatening him, and "pounding and kicking on his bedroom door" for hours.<sup>126</sup> She had also cut him with a coat hanger, burned him with a cigarette, used a stick to hit him, and threw objects at him.<sup>127</sup> The court reasoned that the battered child syndrome evidence was relevant for several purposes, including determining whether the defendant "had an honest belief that he was in imminent danger, a necessary element in the affirmative defense of self-defense."<sup>128</sup>

Additionally, in *State v. Williams*,<sup>129</sup> the Missouri Court of Appeals ruled that the defendant should have been permitted to present a claim of self-defense, and that battered woman syndrome evidence was admissible in support of that claim.<sup>130</sup> As she was leaving from an argument in which her abusive boyfriend had hit her, the defendant used her vehicle to strike a man that she mistakenly believed to be the boyfriend, and then turned the vehicle around to strike him again when she saw him rise to his knees.<sup>131</sup> The abuser had beaten the defendant between ten and seventeen times during their five-year relationship, and had also vandalized the defendant's furniture and her automobile windshield.<sup>132</sup> The batterer had also told the defendant that "if she ever hurt him she had better kill him, because if she didn't he would kill her."<sup>133</sup> Based on this evidence, the court found that the defendant's theory of self-defense, based on battered woman syndrome, should have been available at trial.<sup>134</sup>

The Oklahoma Court of Criminal Appeals likewise held in *Bechtel v. State*<sup>135</sup> that testimony about battered woman syndrome should have been admissible at the trial of a defendant who claimed self-defense in killing her husband after being subjected to "approximately 23 battering incidents" in roughly two years.<sup>136</sup> The court noted the following incidents, among others: the defendant's husband had pounded her head against the ground and other surfaces, and the

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125. *Id.* at 1333, 1334–36.

126. *Id.* at 1333.

127. *Id.*

128. *Id.* at 1336.

129. 787 S.W.2d 308 (Mo. Ct. App. 1990).

130. *Id.* at 313.

131. *Id.* at 310. At the time, the defendant's vision was impaired because her glasses fell off when her boyfriend struck her, and she was crying as she got into the car; this led to her misidentification of the person she struck with the car. *Id.*

132. *Id.* at 309.

133. *Id.* at 310.

134. *Id.* at 313.

135. 840 P.2d 1 (Okla. Crim. App. 1992).

136. *Id.* at 6.

defendant was treated at a hospital emergency room on three occasions, including one involving a neck injury.<sup>137</sup> On the day that the defendant killed her husband, he had sexually abused her, “beat her head against the headboard” of their bed, and threatened to kill her.<sup>138</sup> As described by the court, after the defendant was able to move from underneath her husband, she lit a cigarette and prepared to smoke it, but then “she heard a gurgling sound, looked up and saw the contorted look and glazed eyes of the deceased with his arms raised.”<sup>139</sup> The defendant then “reached for the gun under the bed” and shot her husband while trying to run away from him.<sup>140</sup>

A particularly striking use of a theory of self-defense involving battered woman syndrome occurred in *State v. Leidholm*,<sup>141</sup> in which the North Dakota Supreme Court reversed the conviction of a woman who had stabbed her husband to death *when he was sleeping*, and remanded the case for a new trial.<sup>142</sup> The court did not give a detailed account of the abuse that occurred before the day of the stabbing, simply stating that “the Leidholm marriage relationship in the end was an unhappy one, filled with a mixture of alcohol abuse, moments of kindness toward one another, and moments of violence.”<sup>143</sup> But on the day of the fatal stabbing, the defendant’s husband pushed her down several times both inside and outside their house, and he pushed her away from the telephone to prevent her from calling law enforcement.<sup>144</sup> Later, after defendant and her husband went to bed and the husband fell asleep, the defendant went to the kitchen, got a knife, and returned to the bedroom where she stabbed him; he died minutes later.<sup>145</sup> The court held in part that the jury instruction about self-

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137. *Id.* at 4.

138. *Id.* at 5.

139. *Id.* at 5–6.

140. *Id.* at 6.

141. 334 N.W.2d 811 (N.D. 1983).

142. *Id.* at 813–14. *But see* *State v. Norman*, 378 S.E.2d 8, 12 (N.C. 1989) (holding that the defendant “was not entitled to a jury instruction on either perfect or imperfect self-defense” because there was no evidence that the defendant “reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from *imminent* death or great bodily harm”). The *Norman* defendant’s husband had abused her during the final twenty years of their marriage. *Id.* at 10. The abuse included his striking her, throwing objects at her, burning her with her own cigarettes, and “throwing hot coffee on her.” *Id.* On the day of the shooting, the husband again struck the defendant, burned her with a cigarette, threatened to kill her, deprived her of food, “called her a ‘dog’ and made her lie on the floor when he lay down on the bed.” *Id.* at 11. When the couple’s infant grandchild started to cry, the defendant “took [the baby] to her mother’s house so [the baby] would not wake up her husband.” *Id.* The defendant then “took a pistol from her mother’s purse,” returned to her home, and attempted to shoot her husband in the back of his head, but the gun jammed. *Id.* at 9, 11. The defendant cleared the gun and then shot her sleeping husband three times in the back of his head. *Id.* at 9. The final two shots were fired when she discovered that he was still breathing after the first shot. *Id.* The North Carolina Supreme Court affirmed the trial court judgment of voluntary manslaughter. *Id.*

143. *Leidholm*, 334 N.W.2d at 813.

144. *Id.* at 814.

145. *Id.*

defense was faulty because it referred to “reasonably prudent persons, regardless of their sex, similarly situated” to determine whether the defendant had “the reasonable belief that the other person was then about to kill her or do serious bodily harm to her.”<sup>146</sup> The court explained that under North Dakota law, the applicable standard was not that of “a reasonably cautious person,” but rather “what [the defendant] in good faith honestly believed and had reasonable ground to believe was necessary for h[er] to do to protect h[er]self from apprehended death or great bodily injury.”<sup>147</sup> Thus, the jury should have taken into account “the unique physical and psychological characteristics of an accused” in determining whether the defendant acted reasonably.<sup>148</sup>

Each of these cases in which the defendants claimed self-defense featured traumatic incidents that a batterer inflicted upon the defendant for an extended period of time leading up to the defendant’s use of deadly force. Each case raised a question at trial about whether—at the time of using force against the batterer (or the person mistaken to be the batterer)—the defendant reasonably believed such force was necessary to deal with an imminent threat posed by the batterer. Battered woman syndrome or battered child syndrome was relevant to determining the reasonableness of the defendant’s belief in each of these cases, where a “snapshot” summary of the moment of the defendant’s use of force would fail to reveal the complexity of continuing incidents of battering that culminated in the defendant using force against the batterer.

By analogy with the battered woman syndrome cases, law enforcement officers may be justified in taking into account the events that occurred in the time leading up to their interrogation of a suspected terrorist. For example, the public safety exception would likely have applied if terrorism suspects were apprehended and interrogated in the days immediately following the attacks that the radical Islamist organization al-Qaeda launched against targets in the United States on September 11, 2001 (9/11)—which left thousands dead<sup>149</sup>—because the authorities could reasonably anticipate follow-up attacks by al-Qaeda or similar groups. On the morning of 9/11, al-Qaeda operatives hijacked several passenger airliners, crashing them into the two towers of the World Trade Center in New York City and a wall of the Pentagon (headquarters of the U.S. military) in Washington, D.C.<sup>150</sup> Another hijacked airplane crashed in a field in rural Pennsylvania, apparently as a result of passengers fighting against the hijackers.<sup>151</sup> By that time, the Federal Aviation Administration had stopped

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146. *Id.* at 818.

147. *Id.*

148. *Id.*

149. *9/11 Attacks*, HIST., <http://www.history.com/topics/9-11-attacks> (last visited Dec. 16, 2014).

150. *Id.*

151. *Id.*



flight operations at airports throughout the country.<sup>152</sup> In total, more than 3,000 people died in the incidents, and approximately 10,000 were wounded.<sup>153</sup> If any suspects had been apprehended during what appeared to be the commission of further terrorist activities in the days immediately following 9/11, law enforcement officers would probably have been in the sort of “kaleidoscopic” situation that the *Quarles* Court found demands immediate response and justifies use of the public safety exception.<sup>154</sup> Just as battered woman syndrome is a form of post-traumatic stress disorder and can be relevant to determining whether use of force against the batterer was based on a reasonable belief that the batterer presented an imminent danger,<sup>155</sup> the trauma caused by events such as the 9/11 attacks could reasonably be factored into the assessment of whether the public safety exception applies.

A series of smaller-scale terrorist incidents might also constitute a situation in which law enforcement would be justified in using the public safety exception. Consider hypothetical scenario A, in which ten terrorist strikes against the United States occurred in the four months immediately preceding apprehension of a suspect and each of those incidents resulted in dozens of casualties. That background would tend to render reasonable the arresting officers’ belief that there is an immediate necessity to obtain information from the suspect in order to protect the public from additional pending attack, because—as in a battered woman syndrome situation—the separate attacks can be seen as a continuous cycle of violence, thus justifying anticipation of further violence.

In contrast, consider hypothetical scenario B, in which no major terrorist incident has occurred in the United States for several years. Those circumstances would tend to refute law enforcement agents’ claims that they reasonably believed it was immediately necessary to interrogate the suspect to protect the public from further attacks. Thus, in determining whether officers had a *reasonable belief* that there was an immediate necessity to obtain information by interrogating the suspect without first administering *Miranda* warnings, the severity and frequency of incidents leading up to the most recent event are relevant.

In addition, by analogy with drug dealer cases, a suspect’s activity in a group that is known to engage in terrorism might also be relevant to determine whether the public safety exception applies. In *United States v. Reyes*,<sup>156</sup> the court found the public safety exception applied because the arresting officer reasonably believed that the suspect—a heroin dealer—might be “carrying sharp objects or firearms,” as such objects are known to be used by drug dealers.<sup>157</sup> Similarly,

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152. *September 11: Chronology of Terror*, CNN.COM (Sept. 12, 2001, 12:27 PM), <http://edition.cnn.com/2001/US/09/11/chronology.attack/>.

153. *9/11 Attacks*, *supra* note 149.

154. *See* *New York v. Quarles*, 467 U.S. 469, 656 (1984).

155. *See* *Bechtel v. State*, 840 P.2d 1, 6–7 (Okla. Crim. App. 1992).

156. 353 F.3d 148 (2d Cir. 2003).

157. *Id.* at 154.

in *United States v. Edwards*,<sup>158</sup> the public safety exception justified a detective's question about whether the suspect had a gun because "drug dealers are known to arm themselves, particularly when making a sale, in order to protect themselves, their goods and the large quantities of cash often associated with such transactions."<sup>159</sup>

The nature of a suspect's participation in a group that authorities have designated a terrorist organization may likewise be considered a factor in determining whether the public safety exception applies. Although not explicitly on point with this interpretation, the federal Second Circuit case *United States v. Khalil*<sup>160</sup> is at least suggestive. In *Khalil*, an informant told police about two suspects who had pipe bombs that they planned to explode soon; the suspects were motivated by political events in Palestine.<sup>161</sup> Police raided the suspects' apartment, wounded both suspects during their apprehension, handcuffed them, and took them to a hospital.<sup>162</sup> The police then noticed that some switches had been flipped on one of the pipe bombs, and other officers conducted un-Mirandized questioning about that with one of the suspects at the hospital.<sup>163</sup> The suspect answered the questions about the bombs, and he "was also asked whether he had planned to kill himself in the explosion, to which he responded simply, 'Poof.'"<sup>164</sup> After *Miranda* warnings were given, the suspect was questioned again, and he stated that "he had made the bombs, 'want[ing] to blow up a train and kill as many Jews as possible' because he opposed United States support for Israel" and he gave details about the plan.<sup>165</sup> He also asserted his association with Hamas, which the court identified as "a terrorist organization."<sup>166</sup>

The suspect challenged the trial court's admission of his answer of "poof" in response to the officers' question about whether he meant to kill himself in the intended bombing.<sup>167</sup> However, the Second Circuit found that the public safety exception applied because the question "had the potential for shedding light on the bomb's stability."<sup>168</sup>

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158. 885 F.2d 377 (7th Cir. 1989).

159. *Id.* at 384.

160. 214 F.3d 111 (2d Cir. 2000).

161. *Id.* at 115.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 115–16 (alteration in original) (citations omitted).

166. *Id.* at 116. The Second Circuit's mention of Hamas as a terrorist group might have been based on the "Designated Foreign Terrorist Organizations" list maintained by the Department of State. See *Foreign Terrorist Organizations*, U.S. DEP'T ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> (last visited Apr. 27, 2015).

167. *Khalil*, 214 F.3d at 121.

168. *Id.* In the alternative, the court also declared that if the public safety exception did not apply, then the admission of the suspect's statement of "poof" was harmless error. *Id.*

The Second Circuit's mention of Hamas as "a terrorist organization"<sup>169</sup> implied that a suspect's status as an operative of such a group might help to establish conditions for application of the public safety exception.<sup>170</sup> That implication became more explicit in *United States v. Abdulmutallab*,<sup>171</sup> in which one of the factors that justified applying the public safety exception was that the suspect's activities were "on behalf of al-Qaeda."<sup>172</sup> Deciding to delay *Miranda* warnings based on a suspect's affiliation with a particular group might raise concerns about First Amendment protections for freedom of speech and freedom of association.<sup>173</sup> But judges have found no violation of those First Amendment provisions in another context addressing support for terrorist organizations—namely, legislative prohibitions on funding for terrorist groups.<sup>174</sup> Similarly, First Amendment rights of free speech and freedom of association might also be undisturbed by questioning aimed at protecting the public safety—prompted in part by the suspect's activity in an organization that government agencies have named a terrorist group.

Although not an exact match, some correlation can be made between the three phases asserted in battered woman syndrome theory and some general stages of terrorist activity. The "tension-building" phase of battered woman syndrome, characterized by danger signals foreshadowing a violent episode,<sup>175</sup> suggests a

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169. *Id.* at 116.

170. In fact, in distinguishing the situation of the surviving Boston Marathon bombing suspect Dzhokhar Tsarnaev from that of the "underwear bomber" case involving Umar Farouk Abdulmutallab, the lawyers for Tsarnaev specifically noted that Abdulmutallab "claimed to be acting on behalf of al-Qaeda," which raised a more serious possibility of additional attacks in Abdulmutallab's circumstances. Def.'s Mot. to Suppress Statements at 14, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. May 7, 2014) (quoting *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at \*3 (E.D. Mich. Sept. 16, 2011)), available at [http://c.o0bg.com/rw/Boston/2011-020/2014/05/07/BostonGlobe.com/Metro/Graphics/tsarnaev\\_motion.pdf](http://c.o0bg.com/rw/Boston/2011-020/2014/05/07/BostonGlobe.com/Metro/Graphics/tsarnaev_motion.pdf).

171. No. 10-20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011).

172. *Id.* at \*6. The Abdulmutallab case is discussed further in Part IV.A., *infra*.

173. U.S. CONST. amend. I; *First Amendment: An Overview*, LEGAL INFO. INST., [http://www.law.cornell.edu/wex/first\\_amendment](http://www.law.cornell.edu/wex/first_amendment) (last visited Aug. 30, 2014); *see also* *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–29 (1984) (holding that the Minnesota Human Rights Act's ban against discrimination on the basis of sex did not violate the First Amendment's "freedom of expressive association" for the United States Jaycees' selection of members); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (holding that a city ordinance regulating picketing near schools violated the First Amendment right to free speech by making "an impermissible distinction between labor picketing and other peaceful picketing").

174. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 39–40 (2010) (holding that blocking funding for a designated terrorist group under 18 U.S.C. § 2339B (2012) did not violate freedom of speech or freedom of association when the statute prohibited material support for terrorist groups); *Islamic Am. Relief Agency (IARA-USA) v. Gonzales*, 477 F.3d 728, 736 (D.C. Cir. 2007) (finding that prohibiting funding of a designated terrorist group under 50 U.S.C. §§ 1701–1707 (2012) did not violate freedom of association).

175. *Bechtel v. State*, 840 P.2d 1, 10 (Okla. Crim. App. 1992).

comparison to increases in “terrorist chatter,”<sup>176</sup> terrorist group communications observed by government intelligence agencies. Of course, the “acute-explosion” phase of battered woman syndrome, in which violent episodes occur,<sup>177</sup> is analogous to an actualized terrorist incident such as occurred in the 9/11 attacks. Battered woman syndrome’s “loving, contrition” phase, during which the batterer expresses remorse and promises better behavior in the future,<sup>178</sup> does not have an exact correspondence to a stage of terrorist activity; however, both individual victims of batterers and nation-state victims of terrorism may experience periods of calm within an ongoing cycle of recurring violence. Battered woman syndrome thus offers insights into situations of self-defense that might be useful in determining whether, by analogy, the public safety exception should apply to law enforcement agents’ questioning of suspected terrorists.

#### IV. INVOCATION OF THE PUBLIC SAFETY EXCEPTION DURING INVESTIGATIONS OF RECENT TERRORISM INCIDENTS HAS BEEN JUSTIFIED—SOMETIMES

This section examines and critiques the way that the public safety exception has been invoked during interrogation of suspects in some of the most highly publicized terrorism cases in recent years. Considerations include the scope of questioning, the presence or absence of information linking the suspect to terrorist groups, and whether the suspect actually invoked his rights.

##### *A. The “Underwear Bomber” a.k.a. “Christmas Day Bomber”*

In August of 2009, Umar Farouk Abdulmutallab journeyed to Yemen to participate in the activities of a group affiliated with al-Qaeda.<sup>179</sup> He agreed to perpetrate a suicide bombing that would take place on an airplane in U.S. airspace.<sup>180</sup> On December 25, 2009, Abdulmutallab boarded a flight to go from Amsterdam to Detroit while wearing a non-metal bomb (that could slip past airport security) in his underwear.<sup>181</sup> But when Abdulmutallab attempted to detonate the bomb as the airplane approached Detroit, the effect was smaller than he anticipated:

The result was a single, loud pop, which other passengers described as sounding like a firecracker. The explosive device did not work as intended, and caused only a large fireball around Abdulmutallab and then a fire coming out of Abdulmutallab’s pants, igniting the

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176. For an account of action taken in response to an increase in “terrorist chatter,” see Dan Roberts & Robert Booth, *NSA Defenders: Embassy Closures Followed Pre-9/11 Levels of ‘Chatter’*, *GUARDIAN* (Aug. 4, 2013, 3:48 AM), <http://www.theguardian.com/world/2013/aug/04/nsa-us-embassy-closures-terrorist-threat>.

177. *Bechtel*, 840 P.2d at 10.

178. *Id.*

179. *United States v. Abdulmutallab*, 739 F.3d 891, 895 (6th Cir. 2014).

180. *Id.*

181. *Id.*

carpeting, walls, and seat. A number of passengers restrained Abdulmutallab and attempted to put the fire out.<sup>182</sup>

After the airplane landed, Abdulmutallab was transported to a hospital for treatment of his injuries.<sup>183</sup>

At the hospital, an FBI agent questioned Abdulmutallab for approximately fifty minutes.<sup>184</sup> The agent knew the circumstances of Abdulmutallab having tried to detonate the bomb.<sup>185</sup> Those facts—not just the circumstances that existed at the time the suspect was hospitalized—were contemplated by the federal District Court when considering the suspect’s motion to suppress the statements he made in response to the interrogation at the hospital.<sup>186</sup> As argued above, this sort of use of the suspect’s past actions bears a striking resemblance to contemplating a batterer’s course of conduct in deciding whether a sufferer of battered woman syndrome reasonably took action in self-defense. The investigating agents also knew of the suspect’s “self-proclaimed association with al-Qaeda and . . . the group’s past history of large, coordinated plots and attacks,” and so they “feared that there could be additional, imminent aircraft attacks in the United States and elsewhere in the world.”<sup>187</sup> The questioning at the hospital was aimed at uncovering “where [the suspect] traveled, when he had traveled, how, and with whom; the details of the explosive device; the details regarding the bomb-maker, including where [the suspect] had received the bomb; his intentions in attacking Flight 253; and who else might be planning an attack.”<sup>188</sup> The court ruled that the public safety exception applied,<sup>189</sup> finding that “[e]very question sought to identify any other potential attackers and to prevent another potential attack,” and that the suspect’s responses provided “information that helped the agents to determine where to go next and investigate if anyone else might be planning to or was already in the process of carrying a similar device on an aircraft.”<sup>190</sup>

Because of the risk of further impending attacks, the nature of the questions asked at the hospital, especially those inquiring about the bomb and the possibility of additional incidents of similar devices being carried onto airplanes, could be justified as having been—in the language of *Quarles*—“reasonably prompted by a concern for the public safety.”<sup>191</sup> In further compliance with the scope of the public safety exception, after the agents who questioned

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182. *Id.*

183. *Id.*

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

185. *Id.*

186. *Id.* at \*6.

187. *Id.* at \*1.

188. *Id.* at \*2.

189. *Id.* at \*6.

190. *Id.* at \*2.

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

Abdulmutallab obtained enough information to protect the public, they “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.”<sup>192</sup>

Before the suspect’s trial could reach the point at which his un-Mirandized statements would have been introduced into evidence, he entered a plea of guilty to various terrorism charges and related crimes and was sentenced to four terms of life imprisonment, three terms of imprisonment for 240 months, and one term of imprisonment for thirty years.<sup>193</sup>

### B. The “Times Square Bomber”

In the early evening of May 1, 2010,<sup>194</sup> a vehicle parked at the curb in Times Square, New York City with “its engine running and its hazard lights on” began to emit smoke.<sup>195</sup> The vehicle contained a bomb consisting of “three propane tanks, two gallons of petrol and a load of fertilizer, with fireworks and some cheap alarm clocks as a trigger.”<sup>196</sup> The vehicle contained “more than 100 pounds of fertilizer, but not the kind that would explode.”<sup>197</sup> Apparently, the would-be bomber mistakenly used the wrong type of fertilizer; if the same type that was “used by Oklahoma City bomber Timothy McVeigh” had been present in the vehicle in Times Square, then it “would have had the force of more than 100 pounds of TNT.”<sup>198</sup>

Just over fifty-three hours after the bomb failed to detonate,<sup>199</sup> investigators went to New York’s John F. Kennedy Airport and arrested the suspect, Faisal Shahzad, as he was onboard an airplane that was scheduled to depart for

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192. *Abdulmutallab*, 2011 WL 4345243 at \*6. The *Abdulmutallab* situation was thus distinguishable from that in *United States v. Rumble*, 714 F. Supp. 2d 388, 390, 392–93 (N.D.N.Y. 2010), where the prosecution’s argument that the public safety exception applied was refuted by, *inter alia*, the fact that officers who interrogated the suspect did not convey information about traps and explosives at his home to the officers who entered the residence.

193. *United States v. Abdulmutallab*, 739 F.3d 891, 898–99 (6th Cir. 2014).

194. Tom Hays & Larry Neumeister, *Would be Times Square Bomber Sentenced, Warns of More Attacks*, DENV. POST (Oct. 6, 2010, 1:00 AM), [http://www.denverpost.com/ci\\_16262681](http://www.denverpost.com/ci_16262681).

195. Al Baker & William K. Rashbaum, *Police Find Car Bomb in Times Square*, N.Y. TIMES (May 1, 2010), [http://www.nytimes.com/2010/05/02/nyregion/02timesquare.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/05/02/nyregion/02timesquare.html?pagewanted=all&_r=0).

196. *Times Square Bombing: Trail that led to Faisal Shahzad*, GUARDIAN (May 5, 2010), <http://www.theguardian.com/world/2010/may/05/times-square-bombing-faisal-shahzad>.

197. Richard Esposito, Pierre Thomas & Brian Ross, *Authorities have Identified Person of Interest in Times Square Bomb Attempt*, ABC NEWS (May 4, 2010), <http://abcnews.go.com/Blotter/times-square-car-bomber-police-release-video-suspect/story?id=10534834>.

198. *Id.*

199. William K. Rashbaum & Al Baker, *Smoking Car to an Arrest in 53 Hours*, N.Y. TIMES (May 4, 2010), [http://www.nytimes.com/2010/05/05/nyregion/05tictoc.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/05/05/nyregion/05tictoc.html?pagewanted=all&_r=0).

Dubai.<sup>200</sup> Shahzad is a U.S. citizen originally from Pakistan.<sup>201</sup> Soon after his arrest in New York, Pakistani government authorities “detained 13 people in their [concurrent] investigation of the attempted [Times Square] bombing.”<sup>202</sup> On May 5, 2010, “Pakistan’s foreign minister . . . claimed the failed bomb attack in Times Square could be a direct response to US action against the Taliban.”<sup>203</sup>

Shahzad was initially questioned without *Miranda* warnings.<sup>204</sup> Reports do not indicate how much time was involved in that initial interrogation. Prosecutors stated that Shahzad later “was advised of and waived his *Miranda* rights to remain silent.”<sup>205</sup> Shahzad was reported to have “extensively cooperated with authorities, providing many hours of information”<sup>206</sup> in the nearly two weeks that elapsed between his arrest and his meeting with a lawyer.<sup>207</sup> However, according to a reporter, Shahzad claimed during his sentencing hearing that “[o]n the second day of [his] arrest, [he] asked for the *Miranda* [sic],’ . . . referring to the required notification of his right to counsel.”<sup>208</sup> He further told the court that “the F.B.I. denied it to [him] for two weeks’ and threatened his wife and children.”<sup>209</sup> But during the hearing, no one responded to Shahzad’s allegations, and his attorney “had no comment on the statements after the hearing.”<sup>210</sup>

At some point in response to the questioning conducted by law enforcement, Shahzad told investigators that during a return visit to Pakistan, he received training in the use of explosives with the group Tehrik-e-Taliban, which is “a militant extremist group.”<sup>211</sup> That group is on the U.S. Department of State’s list of foreign terrorist organizations.<sup>212</sup> While pleading guilty to “a 10-count indictment” encompassing several terrorism-related charges, Shahzad

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200. *Times Square Suspect Had Explosives Training, Documents Say*, CNN (May 5, 2010), <http://edition.cnn.com/2010/CRIME/05/04/new.york.car.bomb/index.html>.

201. Patricia Hurtado & Justin Blum, *Times Square Bomb Suspect is Cooperating, Officials Say*, BLOOMBERG (May 4, 2010), <http://www.bloomberg.com/news/print/2010-05-03/new-york-city-plans-to-deploy-more-cameras-mayor-says.html>.

202. *Id.*

203. Chris McGreal, *Faisal Shahzad Co-operates as FBI Explores Links to Islamist Groups*, GUARDIAN (May 5, 2010), <http://www.theguardian.com/world/2010/may/05/faisal-shahzad-pakistan-islamist-groups>.

204. Hurtado & Blum, *supra* note 201.

205. Chad Bray, *Bomber Pleads Guilty in Plot*, WALL ST. J. (updated June 22, 2010, 12:10 AM), <http://online.wsj.com/news/articles/SB10001424052748704895204575320581980487938>.

206. *Id.*

207. Clay Flaherty, *NYC Car Bomber Sentenced to Life in Prison*, JURIST (Oct. 5, 2011, 12:00 AM), <http://jurist.org/thistday/2011/10/nyc-car-bomber-sentenced-to-life-in-prison.php>.

208. Michael Wilson, *Shahzad Gets Life Term for Times Square Bombing Attempt*, N.Y. TIMES (Oct. 5, 2010), <http://www.nytimes.com/2010/10/06/nyregion/06shahzad.html>.

209. *Id.* There does not appear to be any other source corroborating Shahzad’s allegations.

210. *Id.*

211. Bray, *supra* note 205.

212. *Foreign Terrorist Organizations*, *supra* note 166.

condemned the presence of U.S. military forces in Afghanistan and Pakistan, as well as the use of “unmanned drone strikes against terror suspects.”<sup>213</sup>

Initial un-*Mirandized* questioning of Shahzad appears to be justified in light of the threat that his bomb could have created for the residents of New York City. Especially in light of Abdulmutallab’s “underwear bombing” attempt just a few months before that, and Abdulmutallab’s confessed link to the terrorist group al-Qaeda, authorities could plausibly perceive a need to question Shahzad to discover the scale of any similar plot in the Times Square incident. For sufferers of battered woman syndrome, recent attacks heighten the perception of warning signs pointing to further attacks;<sup>214</sup> a similar perception could justify a sense of a need for immediate information to deal with a series of terrorism incidents. However, Shahzad’s allegation that agents denied his request for a lawyer and threatened his family<sup>215</sup> is troubling. The public safety exception simply does not allow investigators to continue questioning a suspect in spite of his request for a lawyer,<sup>216</sup> and no legal doctrine justifies threatening a suspect’s family in order to obtain his compliance during questioning. Thus, if Shahzad’s claims about the interrogation were found to be credible, then his statements made in response to being denied a lawyer and his family being threatened would have been inadmissible for his criminal trial. However, the absence of comment by anyone at the hearing—including Shahzad’s attorney<sup>217</sup>—does not lend credibility to his claims. Rather than go to trial, Shahzad pleaded guilty to federal terrorism charges and related crimes, with resulting judgments of six life terms, two ten-year terms, and two twenty-year terms.<sup>218</sup>

### C. The Boston Marathon Bombing<sup>219</sup>

On the afternoon of April 15, 2013, two bombs exploded along the final section of the Boston Marathon course.<sup>220</sup> Investigators found “that the bombs were probably fashioned from pressure cookers, filled with nails and ball bearings to increase the carnage.”<sup>221</sup> The bombing killed three people and

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213. Bray, *supra* note 205.

214. See Bechtel v. State, 840 P.2d 1, 10 (Okla. Crim. App. 1992).

215. Wilson, *supra* note 208.

216. See *infra* footnotes 245–259 and accompanying text.

217. Wilson, *supra* note 208.

218. United States v. Shahzad, No. 10 Cr. 541 (MGC)-1 (S.D.N.Y. Nov. 17, 2010) (judgment in a criminal case).

219. Proceedings for the Boston Marathon bombing case are ongoing at the time of the writing of this Article.

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

221. *Id.*



wounded more than 260 others.<sup>222</sup> Based on video recordings of the crowd at the marathon, the FBI released photographs of two suspects who turned out to be brothers Tamerlan and Dzhokhar Tsarnaev.<sup>223</sup> During a shootout on April 19, 2013, Tamerlan (the older brother) was killed and Dzhokhar was wounded; Dzhokhar was eventually arrested that evening.<sup>224</sup> Apparently, Dzhokhar had written a note along the wall of a boat where he hid from authorities before his arrest; a news source described it as “part manifesto, part suicide note and part justification for the killing and maiming of innocent civilians.”<sup>225</sup> A media source stated that the boat message was “scrawled with a marker on the interior wall of the cabin” and “said the bombings were retribution for U.S. military action in Afghanistan and Iraq, and called the Boston victims ‘collateral damage’ in the same way Muslims have been in the American-led wars.”<sup>226</sup> Dzhokhar received emergency surgery for his wounds on the same day he was apprehended,<sup>227</sup> and the government announced that he would be interrogated without being advised of his *Miranda* rights.<sup>228</sup>

The interrogation took place during April 20–22.<sup>229</sup> Including time for breaks, the questioning was conducted for more than twenty-seven hours.<sup>230</sup> Dzhokhar was unable to speak because of his injuries and surgery, so he wrote his answers to the agents’ questions.<sup>231</sup> According to the defense, his written responses stated that there were no additional bombs, and he made repeated requests for rest and for a lawyer, writing “the word ‘lawyer’ ten times, sometimes circling it.”<sup>232</sup> The FBI report of the interview indicates that Dzhokhar was told he needed to answer questions before he would be allowed to speak with a lawyer, in order “to ensure that the public safety was no longer in danger from other individuals, devices, or otherwise.”<sup>233</sup> The defense also stated that “[t]he FBI report and notes make[] it clear that the interrogation was wide-ranging, covering everything from how and where the bombs were made to his beliefs

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222. *Remembering the Tragedy: Timeline of Events in the Boston Marathon Bombing*, HUFFINGTON POST (Apr. 14, 2014, 8:00 AM), [http://www.huffingtonpost.com/2014/04/14/boston-marathon-timeline\\_n\\_5145615.html](http://www.huffingtonpost.com/2014/04/14/boston-marathon-timeline_n_5145615.html).

223. Russell & Farragher, *supra* note 220.

224. *Remembering the Tragedy*, *supra* note 222.

225. *Boston Bombings Suspect Dzhokhar Tsarnaev Left Note in Boat He Hid In, Sources Say*, CBSNEWS (May 16, 2013, 4:21 PM), <http://www.cbsnews.com/news/boston-bombings-suspect-dzhokhar-tsarnaev-left-note-in-boat-he-hid-in-sources-say/>.

226. *Id.*

227. Def.’s Mot. to Suppress Statements, *supra* note 170, at 2.

228. *Interrogators Wait to Query—But Not Mirandize—Wounded Bomb Suspect*, CBSNEWS (Apr. 12, 2013, 11:53 AM), <http://www.cbsnews.com/news/interrogators-wait-to-query-but-not-mirandize-wounded-bomb-suspect/>.

229. Def.’s Mot. to Suppress Statements, *supra* note 170, at 2–3.

230. *Id.* at 7.

231. *Id.* at 4.

232. *Id.*

233. *Id.* at 5.

about Islam and U.S. foreign policy, as well as his sports activities, future career goals, and school history.”<sup>234</sup> During interrogation, Dzhokhar disclosed to law enforcement agents that in the aftermath of the Boston Marathon bombing, he and his brother had decided to drive to New York City to bomb Times Square.<sup>235</sup>

Finally, the day after the first criminal charges were filed in the case, a federal magistrate judge presented the charges to Dzhokhar Tsarnaev in the hospital and gave him the *Miranda* warnings.<sup>236</sup> By that time, he “had been in custody for more than 60 hours,” which is reportedly the longest period for a criminal suspect to be held without being advised of his *Miranda* rights.<sup>237</sup> He “stopped speaking as soon as his rights were read to him.”<sup>238</sup>

The prosecution eventually filed a total of thirty counts of federal terrorism charges and related crimes against Dzhokhar.<sup>239</sup> In response to the defendant’s motion to suppress the statements made in the hospital, the prosecution stated that “[i]n light of the history of coordinated terrorist attacks (and planned attacks) such as the ones in Mumbai, India, Times Square, the New York subway system, and on September 11, the FBI had a duty to be investigate [sic] whether any additional attacks were imminent.”<sup>240</sup> This framing of the scope of the problem—examining a series of past incidents of violence (and attempted violence) in order to justify recent action taken against the perpetrator of the incidents—bears a striking resemblance to the use of battered woman syndrome in the context of self-defense, as described above.

The case docket shows that in spite of initially opposing the defendant’s motion to suppress the use of his un-*Mirandized* statements, the prosecution later indicated it would not use Dzhokhar’s statements; as a result, the District Court dismissed without prejudice the defendant’s motion for suppression of the statements.<sup>241</sup> However, if the prosecution had tried to introduce into evidence

234. *Id.*

235. Greg Botelho & Josh Levs, *Boston Bombing Suspects Planned Times Square Attack, Bloomberg Says*, CNN (Apr. 26, 2013, 10:54 PM), <http://www.cnn.com/2013/04/25/us/boston-attack/index.html>.

236. Devlin Barrett, Siobhan Gorman & Tamer El-Ghobashy, *Judge Made Call to Advise Suspect of Rights*, WALL ST. J. (Apr. 25, 2013, 7:40 PM), <http://online.wsj.com/news/articles/SB10001424127887323789704578444940173125374>.

237. Meredith Clark, *Now Charged, Boston Suspect Was Longest Held Without Miranda Rights*, MSNBC (Apr. 21, 2013, 3:08 PM), <http://www.msnbc.com/up-with-steve-kornacki/now-charged-boston-suspect-was-longest-held>.

238. Erin Fuchs, *Judge Insisted on Miranda Rights for Boston Suspect and FBI ‘Was Not Happy’*, BUSINESS INSIDER (Apr. 25, 2013, 5:08 PM), <http://www.businessinsider.com/judge-mirandized-dzhokhar-tsarnaev-2013-4>.

239. *United States v. Tsarnaev*, No. 13-CR-10200-GAO-1 (D. Mass. June 27, 2013) (criminal docket).

240. Government’s Opp’n to Def.’s Mot. to Suppress Statements at 1, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. May 21, 2014), available at [http://thebostonmarathonbombings.weebly.com/uploads/2/4/2/6/24264849/thebostonmarath\\_-1-.pdf](http://thebostonmarathonbombings.weebly.com/uploads/2/4/2/6/24264849/thebostonmarath_-1-.pdf).

241. Docket entry 612, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. Oct. 20, 2014). See also Victoria Liberty, *Dzhokhar Tsarnaev Case: The Shortest Status Conference Ever*,

the statements that Dzhokhar wrote when he was interrogated in the hospital, a couple of matters should have rendered at least some of those statements inadmissible.

First, the wide-ranging interrogation went beyond what is allowed under the public safety exception. Pursuant to *Quarles*, the public safety exception applies only when there is an immediate necessity to obtain information to protect the officers or the public.<sup>242</sup> As noted above, an internal memorandum of the FBI states that the public safety exception justifies inquiries such as “questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might pose [sic] an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.”<sup>243</sup> Answers to the questions that agents asked about the bombs that the Tsarnaev brothers used might have been admissible if the prosecution could show that the information was relevant to determining whether they had left other bombs that posed an immediate threat to the public. However, the questions regarding Dzhokhar’s views “about Islam and U.S. foreign policy, as well as his sports activities, future career goals, and school history”<sup>244</sup> do not relate to an immediate threat, so the public safety exception would not have made his answers on those topics admissible for the prosecution’s use at trial.

Moreover, Tsarnaev invoked his right to a lawyer even before he was *Mirandized*. As the defense correctly observed, the Supreme Court has not authorized continued questioning of a suspect after he has invoked his right to counsel.<sup>245</sup> Instead, in *Edwards v. Arizona*,<sup>246</sup> the Court held that “an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”<sup>247</sup> Furthermore, the circumstances of Dzhokhar’s interrogation match those described in the pre-*Miranda* case of *Escobedo v. Illinois*,<sup>248</sup> in which the Supreme Court found the police committed a violation of the Sixth Amendment when they questioned a suspect, refused his request to speak with his lawyer, and did not advise him of his right to remain silent.<sup>249</sup> The *Escobedo* Court thus ruled that the statements the suspect made to

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FREEDOM BULL. (Oct. 20, 2014, 9:38 PM), <http://thefreedombulletin.com/2014/10/dzhokhar-tsarnaev-case-the-shortest-status-conference-ever/> (last visited May 10, 2015).

242. *New York v. Quarles*, 467 U.S. 469, 655–56 (1984).

243. See *F.B.I. Memorandum*, *supra* note 101.

244. Def.’s Mot. to Suppress Statements, *supra* note 170, at 5.

245. *Id.* at 14.

246. 451 U.S. 477 (1981).

247. *Id.* at 484–85.

248. 378 U.S. 478 (1964).

249. *Id.* at 491.

the police during the interrogation were not admissible against him at the subsequent criminal trial.<sup>250</sup>

Neither *Quarles* nor other Supreme Court opinions permit continued interrogation after a suspect requests a lawyer.<sup>251</sup> The public safety exception—when it applies at all—allows only for a delay in informing a suspect of his *Miranda* rights.<sup>252</sup> As discussed above in connection with the case of *Edwards*, the authorities are not permitted to violate rights that the suspect has actually invoked.<sup>253</sup> The Boston Marathon bombing prosecutors nevertheless argued at first that the statements obtained during Tsarnaev's interrogation were admissible pursuant to the federal Ninth Circuit case of *United States v. DeSantis*<sup>254</sup> and its subsequent line of decisions.<sup>255</sup> In the *DeSantis* case, the court held that the public safety exception applied to questioning about the location of weapons in the suspect's apartment, even if the suspect had "asked to call his lawyer as soon as the inspectors entered the apartment," and the police did not permit him to do so.<sup>256</sup> However, the *DeSantis* court relied on the *Quarles* Court's characterization of the *Miranda* rule as a mere "prophylactic" measure to protect criminal suspects' rights.<sup>257</sup> As explained above, the subsequent Supreme Court case of *Dickerson* held that *Miranda* had announced a Constitutional rule, not merely prophylactic guidelines.<sup>258</sup> Thus, the prosecution's reliance on the *DeSantis* line of cases is rather dubious, and any answers that Dzhokhar gave in response to questions that were asked after he first requested a lawyer would probably have been inadmissible at trial.<sup>259</sup>

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250. *Id.*

251. *Id.* at 491–92.

252. *New York v. Quarles*, 467 U.S. 469, 655–56 (1984).

253. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

254. 870 F.2d 536 (9th Cir. 1989).

255. Government's Opp'n to Def.'s Mot. to Suppress Statements, *supra* note 240, at 1 (citing *United States v. Mobley*, 40 F.3d 688 (4th Cir. 1994); *United States v. DeSantis*, 870 F.2d 536 (9th Cir. 1989); *Trice v. United States*, 662 A.2d 891 (D.C. 1995)). Notably, all of those cases cited by the prosecution were decided before the Supreme Court case *Dickerson v. United States*, 530 U.S. 428, 444 (2000), which held that the *Miranda* case had announced a constitutional rule rather than merely prophylactic measures aimed at safeguarding the rights of criminal suspects.

256. *DeSantis*, 870 F.2d at 537. The parties disagreed on whether the suspect had made the request to speak with his lawyer, and in its review of the case, the Ninth Circuit analyzed the case based on the suspect's version of the incident. *Id.* at 538. After federal marshals advised him of his *Miranda* rights, the suspect "asked if he would be going to court." *Id.* at 537. Upon receiving an affirmative answer, "he asked if he could change his clothes" and stated that the clothing was in a nearby bedroom. *Id.* The marshals then asked about whether the bedroom contained any weapons, and the suspect stated that a gun was on a closet shelf. *Id.*

257. *Id.* at 540–41.

258. *Dickerson*, 530 U.S. at 444.

259. For a contrary view, see 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, 138 (2013) ("It seems highly probable, if not inevitable, that a court will admit Tsarnaev's un-Mirandized statements based on the [public safety exception].").

On April 8, 2015, the jury convicted Dzhokar on all thirty counts of which he was charged, and on May 15, 2015, the jury delivered its verdict of the death penalty.<sup>260</sup>

#### V. CONCLUSION

In creating the public safety exception to the *Miranda* rule, the Supreme Court drew an implicit analogy between the criminal procedure role of police during interrogation of suspects under dangerous circumstances and the role of criminal defendants utilizing justifications of self-defense and defense of others. The comparison is especially instructive when applied to cases involving the interrogation of terrorism suspects. Just as battered woman syndrome can extend the range of circumstances in which the self-defense doctrine applies, a recent history of heightened terrorist activity could extend the breadth of the public safety exception at a particular time; conversely, a recent history of reduced terrorist activity could diminish the breadth of the public safety exception for a particular period.

In considering claims of self-defense based on battered woman syndrome, a crucial focus is whether the defendant reasonably believed that the batterer presented an imminent danger based on the history of violence that the batterer had perpetrated upon the defendant.<sup>261</sup> The trauma experienced by the defendant has a bearing on the reasonableness of the defendant's perception of imminent danger.<sup>262</sup>

Similarly, the applicability of the public safety exception depends on whether law enforcement agents could reasonably believe that there was an immediate necessity to protect themselves or the public from danger posed by the suspect or the suspect's possible accomplices.<sup>263</sup> In terrorism cases, that inquiry can take into account the recent history of terrorist activities—which has a bearing on the extent to which “our body politic has been traumatized”<sup>264</sup>—and its influence on the reasonableness of believing that un-*Mirandized* questioning is needed to deal with an immediate threat to the safety of law enforcement officers and the general public.

Thus, both self-defense under conditions of battered woman syndrome and the public safety exception under conditions of terrorist threat can invoke

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260. Jury Verdict, *United States v. Tsarnaev*, No. 13-CR-10200-GAO (D. Mass. Apr. 8, 2015); Milton J. Valencia, *Dzhokhar Tsarnaev Gets Death Penalty for Placing Marathon Bomb*, BOSTON GLOBE (May 15, 2015), <http://www.bostonglobe.com/metro/2015/05/15/dzhokhar-tsarnaev-death-penalty-sentencing-jury-boston-marathon-bombing/canMEfLmeQJxQ4rFU0sERJ/story.html?hotPostID=585e84a4950b0618fd31dbded2dcaf0c>; Michael McLaughlin, *Dzhokhar Tsarnaev Sentenced to Death*, HUFFINGTON POST (May 15, 2015, 3:30 PM), [http://www.huffingtonpost.com/2015/05/15/dzhokhar-tsarnaev-sentenced\\_n\\_7283680.html?utm\\_hp\\_ref=politics&ir=Politics](http://www.huffingtonpost.com/2015/05/15/dzhokhar-tsarnaev-sentenced_n_7283680.html?utm_hp_ref=politics&ir=Politics).

261. *Boykins v. State*, 995 P.2d 474 (Nev. 2000).

262. *Id.*

263. *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

264. I am indebted to Professor Sue Liemer for this phrasing.

dynamic histories of violent interaction, rather than relying on a static “snapshot” view of a single moment in time. Applying this perspective offers courts that may be struggling to come to terms with the boundaries of the public safety exception in terrorism cases the guidance of the defined and developed body of law addressing battered woman syndrome.

