The Right to Remain Silent in Light of the War on Terror

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"The law will not suffer a prisoner to be made the deluded instrument of his own conviction."

> Watts v. Indiana, 338 U.S. 49, 54 (1949) (quoting 2 William Hawkins, A Treatise of the Pleas of the Crown ch. 46 § 34 (8th ed. 1824)).

"[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good . . . . Admissions of guilt resulting from valid Miranda waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'"

> McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

INTRODUCTION

The familiar words of the *Miranda* warning are known by almost all Americans who have watched television at any time since the U.S. Supreme Court's 1966 decision in *Miranda v. Arizona*.[1] The precise rules have evolved over the years, but most people know that they have the right to remain silent and the right to have an attorney appointed if they cannot afford one. There can be difficult issues of proof in court, but litigants, attorneys, and judges fundamentally know how *Miranda* works.[2] That is not to say, however, that *Miranda* is uncontroversial. Few areas of law provoke more consistent debate than interrogation and confessions,[3] and *Miranda*'s exclusion of incriminating

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1 384 U.S. 436 (1966).

2 If a suspect is interrogated while in custody, the officer has to inform the suspect of his or her rights to remain silent and to have an attorney present for questioning, and the suspect must waive those rights or statements made by the suspect will be inadmissible at trial. *Id.* at 444–45.

3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 291 (2d ed. Hornbook Series 1992).

statements in some criminal cases has only added to the controversy. Moreover, the events of September 11, 2001 and the subsequent War on Terror have renewed interest in the issue of interrogation and confessions. The stakes have gotten higher.[4]

The dilemma most often presented is the "ticking bomb" scenario. This is the situation in which the authorities want to interrogate a suspect who is in custody regarding his knowledge about a ticking bomb or a planned terrorist attack.[5] Is this suspect entitled not to incriminate himself? What about the right to have an attorney present, or the right to remain silent? The responses to these questions might seem obvious to many people: an emphatic "no and no."[6] In reality, of course, the more likely scenario is one in which several suspects are in custody, and one or more of them *may* have knowledge relevant to a planned terrorist attack but many others will have no such knowledge. What rights are to be accorded the suspects in that situation?

To properly address this issue, one must resolve several preliminary questions, including: Do standard criminal procedure laws apply? Where are the suspects being held (inside or outside of the United States)? What is their citizenship status? How urgent is the supposed threat? How reliable is the information known by the authorities? Can torture ever be justified, and how is it defined? What about psychological pressure? What is the consequence of violating the rights of the detainee/prisoner? What international obligations apply?[7] Many of these questions

4 "[C]laims of violations of human-rights law or the Constitution must be evaluated in the context of the realities created by Sept. 11." John C. Yoo, *Perspectives on the Rules of War: Sept. 11 Has Changed the Rules*, S.F. CHRON., June 15, 2004, at B9. *See also* M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (proposing a "foreign interrogation" exception to *Miranda*).

5 *See* George J. Terwillinger III, *"Domestic Unlawful Combatants": A Proposal to Adjudicate Constitutional Detentions,* ENGAGE, Oct. 2006, at 55, 55 (setting forth a similar scenario).

6 JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 152 (2006) ("The Fifth Amendment's right to remain silent . . . applies only in the criminal justice system."). Yoo details the problems of providing similar rights to terrorist suspects. *Id.* at 152–53. *But see* United States v. Bin Laden, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (holding that FBI agents sent to Afghanistan to interrogate captured members of the al Qaeda network had to abide by constitutional limitations). The Court stated, "The Supreme Court cases on point suggest that the Fourth Amendment applies to United States citizens abroad. . . . Thus, this Court finds that even though the searches at issue in this case occurred in Kenya, El-Hage can bring a Fourth Amendment challenge." *Id.* at 270–71.

7 *See* James A. Deeken, Note, *A New* Miranda *for Foreign Nationals? The Impact of Federalism on International Treaties that Place Affirmative Obligations on State Governments in the Wake of* Printz v. United States, 31 VAND. J. TRANSNAT'L L. 997 (1998). In early 2007, German prosecutors indicted several CIA agents for allegedly capturing a German citizen, taking him to a third country, and subjecting him to harsh interrogation. Mark Landler, *German Court Challenges C.I.A. over Abduction*, N.Y. TIMES, Feb. 1, 2007,

go beyond the scope of this article, but as this Symposium reveals, the rights of terrorist suspects and the potential applicability of *Miranda* are much more than hypothetical questions. Governmental sources, academic commentators, and the media have all recently devoted a great deal of attention to these subjects.[8] As the United States continues to fight the War on Terror and seek out terrorist activity located outside of this nation, interrogations of non-American citizens by American officials will undoubtedly increase both in number and importance.

Certainly an American citizen arrested within the United States would have the right not to incriminate himself. Presumably a foreign national arrested outside of the United States would not be fully protected.[9] Other scenarios present more difficult issues.[10] American courts, therefore, have to determine whether the Fifth Amendment's privilege against self-incrimination applies to non-American citizens, and whether an American police or military agent conducting an investigation abroad must provide some type of warnings before conducting an interrogation.[11] The initial question would seem to be whether terrorist suspects are even entitled to the right protected by *Miranda*—the right not to incriminate themselves.

I. DEVELOPMENT OF THE LAW OF SELF-INCRIMINATION

The problems with permitting suspects to testify against

at A1.

8 *See* Mark A. Godsey, Miranda*'s Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden*, and a Proposal For a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703 (2002); Robert L. Bartley, *A 'Miranda' Warning for Saddam? Democrats Try to Discredit America's Victory*, OPINIONJOURNAL.COM, July 14, 2003, http://www.opinionjournal.com/forms/printThis.html?id=110003743; Andrew C. McCarthy, *McCain &* Miranda*: "Cruel, Inhuman and Degrading" May Prove More Dangerous than Meets the Eye*, NAT'L REV. ONLINE, Dec. 15, 2005, http://www.nationalreview.com (follow "Search" hyperlink; then follow "National Review Online" hyperlink; then search "more dangerous than meets the eye").

9 *See* United States v. Bowman, 260 U.S. 94, 98 (1922) ("[T]he same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents."). *But see Bin Laden*, 126 F. Supp. 2d at 270 ("The Government seems to concede the general applicability of the Fourth Amendment to American citizens abroad . . . .").

10 When Congress focuses a statute on extraterritorial conduct or provides an explicit extraterritorial provision in the statute, it is clear that there is a basis for prosecuting extraterritorial activities. *See generally* Ellen S. Podgor, *"Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes*, 31 GA. J. INT'L & COMP. L. 1 (2002).

11 Complicating these questions is the fact that the laws of many foreign nations do not provide suspects with the full range of rights embodied in *Miranda*, such as the right to remain silent or the right to speak to an attorney. Thus, informing a foreign national of these rights might actually mislead the suspect, at least as to any prosecution that might take place in that nation. Godsey, *supra* note 8, at 1708.

themselves (which often leads to suspects being forced to testify against themselves) have long been recognized. As early as 866, Pope St. Nicholas I wrote:

> If a [putative] thief or bandit is apprehended and denies the charges against him, you tell me your custom is for a judge to beat him with blows to the head and tear the sides of his body with other sharp iron goads until he confesses the truth. Such a procedure is totally unacceptable under both divine and human law . . . , since a confession should be spontaneous, not forced. It should be proffered voluntarily, not violently extorted. After all, if it should happen that even after inflicting all these torments, you still fail to wrest from the sufferer any self-incrimination regarding the crime of which he is accused, will you not then at least blush for shame and acknowledge how impious is your judicial procedure? Likewise, suppose an accused man is unable to endure such torments and so confesses to a crime he never committed. Upon whom, pray tell, will now devolve the full brunt of responsibility for such an enormity, if not upon him who coerced the accused into confessing such lies about himself?[12]

One way to avoid these problems is to provide suspects with the right to remain silent. For at least 400 years, Great Britain has extended the privilege against self-incrimination to criminal suspects,[13] and scholars have been debating the merits of that privilege all along.[14]

Police and prosecuting authorities consider confessions to be not only persuasive (and in some cases conclusive) of guilt, but also absolutely necessary for the smooth functioning of the criminal legal system. Suspects, however, do not typically confess to civil authorities to cleanse their souls. As one author put it, "by any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a

12 Brian W. Harrison, *The Church and Torture*, THIS ROCK, Dec. 2006, at 23, 25 (quoting Pope Nicholas I, *Ad Consulta Vestra* ch. 86 (Nov. 13, 866)) (first alteration in original). Nicholas went on to suggest a different approach based on scripture (*Hebrews* 6:16), which involved making the person swear innocence on the Holy Gospel and accepting his word at that point. Pope Nicholas I, *Ad Consulta Vestra* ch. 86 (Nov. 13, 866), *available at* http://www.fordham.edu/halsall/basis/866nicholas-bulgar.html.

13 *See* GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 42–43 (2d ed. 1958) (describing the 1568 Court of Common Pleas' release of a defendant imprisoned for not answering the judge's questions).

14 *See*, *e.g.*, *id.* at 48–58 (summarizing criticism of the privilege by Jeremy Bentham, among others); 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 229–41 (Fred B. Rothman & Co. 1995) (1827) (criticizing the exclusion of self-incriminating evidence because the innocent would want to speak, and therefore the privilege would only protect the guilty); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-Incrimination*, 54 CAMBRIDGE L.J. 342, 342–53 (1995) (concluding that the system should apply the privilege in limited contexts and not view it as a human right); David Dolinko, *Is There a Rationale for the Privilege against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986) (describing the privilege as a historical relic).

detective who has been trained in a genuinely deceitful art."[15] Investigators throughout history have resorted to tactics, some of them unsavory, to encourage statements from suspects.[16] The *Miranda* rules are designed to regulate police interrogations by requiring them to inform suspects of their legal rights and by suppressing statements that are taken in violation of those rights.

In the days of the Star Chamber, procedures such as the rack and other instruments of torture were used to obtain confessions. Concern over the harsh tactics to compel statements from prisoners gradually resulted in the development of the right to remain silent.[17] In fact, because of the force that was being used to compel confessions, Great Britain eventually prohibited all parties, including criminal defendants, from testifying as witnesses at their trials.[18]

A complete ban on all testimony from parties was eventually recognized as an obstacle in the pursuit of truth, and the prohibition was lifted.[19] Criminal defendants were permitted to testify, but they also had the right not to testify.[20] Judges, however, could comment on a defendant's failure to testify.[21]

Following English common law, early American courts permitted the introduction of confessions without restriction, even if law enforcement officials abridged the rights of those being inter-

15 DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 199 (1991).

16 In *The Proof of Guilt*, Glanville Williams describes procedures such as the rack and other instruments of torture used to obtain confessions "in the bad old days" of the Star Chamber. WILLIAMS, s*upra* note 13, at 38–41.

17 *See* WILLIAMS, s*upra* note 13 (describing the development of the privilege over hundreds of years). Some historians date the beginning of the concept of a privilege to 1637, with *John Lilburn*, a Star Chamber case. *See* Miranda v. Arizona, 384 U.S. 436, 459 (1966) (identifying *Lilburn* as a critical historical event in the development of the privilege). Parliament abolished the Star Chamber after this trial. *See id.* (noting the Star Chamber's fall following the *Lilburn* trial). Other scholars trace the privilege even further back in time. *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 244 n.2 (Edward W. Cleary ed., 2d ed. 1972) (noting the view that the privilege dates back to canon law); *Miranda*, 384 U.S. at 458–59 n.27 (noting that some commentators find analogous principles in the Bible).

18 Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 485–90 (1939). *See also* WILLIAMS, *supra* note 13, at 43 (describing procedures regarding the defendant as a witness in the 1700s).

19 The House of Commons passed the Criminal Evidence Act of 1898. *See* WILLIAMS, *supra* note 13, at 45–48 (noting that the Criminal Evidence Act of 1898 was developed to counteract unmerited acquittals resulting from defendants not testifying); *see also* Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36 (Eng.) (changing rules regarding the competency of witnesses).

20 *See* Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1(a) (Eng.) (stating that a charged person "shall be a competent witness," but "shall [only] be called . . . upon his own application").

21 *See* WILLIAMS, *supra* note 13, at 59–61. In addition, once a defendant elected to testify, the Act compelled him to answer incriminating questions. *Id.*

rogated.[22] The key issue was whether the confession was *reliable*.[23] Too often, forcibly extracted confessions were given by the suspects solely to stop the interrogation.[24] This focus on reliability dominated American confession law well into the twentieth century.[25]

In the 1944 case *Ashcraft v. Tennessee*, the Supreme Court discussed aggressive interrogation methods known as the "third degree."[26] These techniques were designed to force confessions without brutal force, but with tactics such as powerful lights, persistent questioning over numerous hours, and deprivation of sleep.[27] The Court held that where the manner of interrogation was "inherently coercive," the confession would be inadmissible regardless of reliability.[28] Importantly, if impermissible methods were used, a confession would be inadmissible regardless of the impact that the methods had on that particular defendant.[29]

The problem with the "voluntariness test" was that virtually all confessions are "involuntary" to some extent. As one author put it, "[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful

22 LAFAVE & ISRAEL, *supra* note 3, at 294.

23 *See id.* ("[T]he question was put in terms of whether the defendant's confession had been induced by a promise of benefit or threat of harm, while on other occasions the inquiry was more directly put in terms of whether the circumstances under which the defendant had spoken impaired the reliability of the confession.").

24 The actual number of false confessions is unknown and probably unknowable. It is certainly subject to debate. *Compare* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J. L. & PUB. POL'Y 523, 529 (1999) (stating that "false confessions occur quite infrequently"), *with* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) (arguing that false confessions are much more common).

25 Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 494; *see also* Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979). Military commissions still look to see whether information is relevant and reliable in order to decide issues of admissibility. YOO, *supra* note 6, at 218–19.

26 322 U.S. 143, 150–52 (1944).

27 *Id*. at 150 & n.6. The Court found Ashcraft's confession involuntary, compelled, and thus inadmissible. *Id.* at 153. This conclusion was based on the officers' continual relay-style interrogation over a period of thirty-six hours without rest. *Id.*

28 *Id.* at 154. *See also* Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949) (citing Lisenba v. California, 314 U.S. 219, 236–37 (1941)) (noting that if circumstances indicate that the confession was not given by the free will of the defendant, it will not be deemed voluntary and therefore will be inadmissible, even though the statements may be reliable).

29 *Ashcraft,* 332 U.S. at 160. The Court has noted, however, that the characteristics of a particular defendant might subject him or her to particular peril. *See* Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("[M]ental condition is surely relevant to an individual's susceptibility to police coercion.").

art."[30] Critics also argued that the voluntariness test permitted too much pressure to be applied on suspects, as it only prohibited prosecutors from using evidence obtained by "interrogation methods that would exert so much pressure that the suspect would admit to facts regardless of whether she believed in the truth of the facts admitted."[31] Nevertheless, the voluntariness rule survives even today,[32] though it is often overshadowed by *Miranda*.

In the late 1950s, the Supreme Court put in place the so-called *McNabb-Mallory* rule.[33] Based on a federal statute[34] and the Federal Rules of Criminal Procedure,[35] this rule held that a criminal defendant had to be arraigned "without unnecessary delay" and that any confession obtained during such a delay could be excluded from evidence in any subsequent prosecution.[36] This rule was never constitutionally required, and it was eventually supplanted by *Miranda*.[37]

In the 1960s, the Warren Court dramatically reshaped the way society dealt with criminals and criminal suspects. Prior to that time, protections afforded defendants in state criminal proceedings (where most criminal cases are tried) were often quite limited. The Bill of Rights applied only to the federal govern-

30 SIMON, *supra* note 15, at 199. On the other hand, recent studies suggest that about 20% of the confessions obtained by the police would have been made even if there had been no interrogation. Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions while Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 56 (2006).

31 Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2012 (1998).

32 In *Colorado v. Connelly*, 479 U.S. 157 (1986), a man "heard voices" that commanded him to do things. One of those things was to make a confession. *Id.* at 161. Lower courts, based on testimony from psychologists, concluded that this was not voluntary and therefore was inadmissible. *Id.* at 161–62. The Supreme Court reversed, holding that before a confession could be deemed involuntary, there must be "coercive police activity." Since there was none here, it was not involuntary. *Id.* at 167.

33 *See* McNabb v. United States, 318 U.S. 332, 341–42, 345 (1943); Mallory v. United States, 354 U.S. 449, 453 (1957).

34 18 U.S.C. § 595 (1940) ("It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . .").

35 FED. R. CRIM. P. 5(a).

36 *See McNabb*, 318 U.S. at 341–42, 345; *Mallory*, 354 U.S. at 451, 453. *See also* United States v. Alvarez-Sanchez, 511 U.S. 350, 354 (1994) ("The so-called McNabb-Mallory rule . . . generally rendered inadmissible confessions made during periods of detention that violated the prompt presentment requirement of Rule 5(a) of the Federal Rules of Criminal Procedure. Rule 5(a) provides that a person arrested for a federal offense shall be taken 'without unnecessary delay' before the nearest federal magistrate, or before a state or local judicial officer authorized to set bail for federal offenses under 18 U.S.C. § 3041, for a first appearance, or presentment.") (internal citations omitted).

37 The *Miranda* opinion noted both the history of the "third degree" and the danger of false confessions. It described the modern interrogation process as "psychologically rather than physically oriented." Miranda v. United States, 384 U.S. 436, 445–48 (1966).

ment, and the Fourteenth Amendment, which did apply to the states, gave criminal defendants only those fundamental rights deemed "implicit in the concept of ordered liberty."[38] In the 1960s, the Supreme Court began to read the Fourteenth Amendment in a new manner. Instead of looking for fundamental rights implicit in the concept of ordered liberty, it moved to "selective incorporation" of provisions contained in the Bill of Rights.[39] By moving to this approach, the Supreme Court led a revolution in American criminal procedure and provided all of the following rights to state criminal defendants: the freedom from unreasonable searches and seizures and the exclusionary rule;[40] the prohibition against cruel and unusual punishment;[41] the right to assistance of counsel in felony cases;[42] the privilege against self-incrimination;[43] the right to confront opposing witnesses;[44] the right to a speedy trial;[45] the right to compel defense witnesses to appear at trial;[46] the right to a jury trial;[47] and protection against double jeopardy.[48] In 1972, the death penalty was declared unconstitutional as it was then applied,[49] and in 1973, states were prohibited from outlawing abortions in the early stages of pregnancy.[50]

Regarding interrogations and confessions, the Supreme Court first adopted a rule based upon the Sixth Amendment.[51] *Massiah v. United States* prohibited the police from "deliberately eliciting" statements from an individual after the initiation of judicial proceedings (indictment, information, arraignment, or preliminary hearing) without an attorney being present.[52] The following month, in *Escobedo v. Illinois*, the Court created the "focus" test, enforcing the right to counsel at the point when an investigation focuses on the accused with the purpose of eliciting

38 Palko v. Connecticut, 302 U.S. 319, 324–28 (1937).

39 The selective incorporation doctrine was established by Justice Reed in *Adamson v. California*, 332 U.S. 46, 51–54 (1947).

40 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

41 Robinson v. California, 370 U.S. 660, 667 (1962).

42 Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

43 Malloy v. Hogan, 378 U.S. 1, 6 (1964).

44 Pointer v. Texas, 380 U.S. 400, 403 (1965).

45 Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967).

46 Washington v. Texas, 388 U.S. 14, 23 (1967).

47 Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

48 Benton v. Maryland, 395 U.S. 784, 787 (1969).

49 Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

50 Roe v. Wade, 410 U.S. 113, 164 (1973). *See also* Ronald J. Rychlak, *Abortion, Thinking Americans, and Judicial Politics*, 14 LIFE AND LEARNING 77, 85–86 (2004).

51 Until 1964, the Court held that the Fifth Amendment did not apply to the states. *See*, *e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964).

52 377 U.S. 201, 206 (1964). This test remains valid even after *Miranda*. *See, e.g.,* Fellers v. United States, 540 U.S. 519, 523–24 (2004).

a confession.[53] The next year, the Court switched to a Fifth Amendment analysis and set forth the now-familiar *Miranda* rules.

II. *MIRANDA V. ARIZONA*

The Fifth Amendment protects an individual from being "compelled in any criminal case to be a witness against himself."[54] In the 1966 case *Miranda v. Arizona*,[55] the Court held that certain procedural rights had to be afforded to suspects in a custodial interrogation context in order to safeguard Fifth Amendment rights.[56] The Court examined the facts of four different cases collectively and developed not one holding but what some call "a complex series of holdings."[57] A confession by a suspect in a custodial setting, even though voluntarily made, would be inadmissible unless, preceding the confession, the suspect was given four warnings: (1) that he had the right to remain silent, (2) that any statement could be used against him, (3) that he had the right to have an attorney present at any questioning, and (4) that he had the right to have an attorney appointed if the suspect was without funds. While the Court pointed out that these rights could be waived, such a waiver would be examined to ensure it was made both "knowingly and intelligently."[58] Confusion alone does not make the decision to waive the right to remain silent invalid. In *Connecticut v. Barrett*, the defendant refused to make a written statement, but agreed to "talk."[59] He later argued that

53 378 U.S. 478, 492 (1964).

54 U.S. CONST. amend. V. Before *Miranda*, "compulsion" to testify meant legal compulsion so that the witness faced the potential of perjury or contempt. Reliance on Fifth Amendment application to informal compulsion rejected much precedent but was not contrary to constitutional interpretation. Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 437–38 (1987).

55 384 U.S. 436 (1966).

56 *Id.* at 467. The Court researched police manuals as a source of current police practices and concluded that even without violence or police brutality, "custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Id.* at 455.

57 Schulhofer, *supra* note 54, at 436. Schulhofer divides the holding into three parts: (1) that informal pressure to speak can equal compulsion under the Fifth Amendment, (2) that compulsion exists in any custodial interrogation, and (3) that warnings are necessary to "dispel the compelling pressure of custodial interrogation." *Id.* He finds the most controversial part of the holding to be the third step, but he believes that the central part of the decision lies within the other parts of the holding. *Id.*

58 *Miranda*, 384 U.S. at 479. The Court later weakened these rights by allowing prewarning statements to be used for impeachment purposes only, not as substantive evidence. *See* Oregon v. Hass, 420 U.S. 714, 722 (1975). Some view *Miranda* as a compromise between the "totality of the circumstances" analysis and a complete annihilation of confessions, as it combined the impact of both the custody and the interrogation on the suspect to determine coercion. Yale Kamisar, Miranda*: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1077 (1984) (reviewing LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS (1983)).

59 479 U.S. 523, 525 (1987).

this showed that he was confused about the consequences. The Court, however, held that the oral statement was admissible.[60] Likewise, in *Colorado v. Spring*, the defendant agreed to talk about one crime.[61] In the course of the interrogation, the questioning shifted to another crime and he made incriminating statements. The defendant said that he did not know what he was waiving, but the Court held that these statements were admissible.[62]

The *Miranda* Court did not claim to have discovered something new in the Constitution that had been overlooked for 180 years. Nor did the *Miranda* Court state that these warnings were constitutionally required.[63] Rather, Chief Justice Earl Warren wrote that the warnings were "safeguards" of the Fifth Amendment privilege against self-incrimination.[64] To ensure that an accused person is not coerced into incriminating himself, he "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."[65] The Court immediately added that the suggested words were not intended to be a "constitutional straitjacket," and encouraged Congress and states to be creative about other ways to protect the rights of suspects.[66] The Court did, however, demand that any other methods be at least as effective as the *Miranda* warnings.[67]

The exact constitutional status of the *Miranda* warnings became a matter of dispute. In *Michigan v. Tucker*, Justice Rehnquist wrote that the *Miranda* warnings "were not themselves rights protected by the Constitution . . . ."[68] In *Oregon v. Elstad*, Justice O'Connor explained that "errors . . . made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."[69]

60 *Id.* at 530.

61 479 U.S. 564, 566–68 (1987).

62 *Id.* at 577.

63 *Miranda*, 384 U.S. at 467.

64 *Id.* at 444.

65 *Id.* at 467.

66 *Id*. *But see* Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (finding 18 U.S.C. § 3501 to be unconstitutional).

67 *Miranda*, 384 U.S. at 467. Of course, *Miranda*'s effectiveness is subject to serious debate. *See infra* note 86 and accompanying text. For an interesting proposal to expand the *Miranda* warnings to include, among other things, a reminder of the benefits of a truthful statement, even if it is incriminating, see Milhizer, *supra* note 30, at 99–100. "True and heartfelt confessions of guilt can likewise be greatly beneficial to the common good." *Id.* at 5.

68 Michigan v. Tucker, 417 U.S. 433, 444 (1974). Rather, the Court noted that the warnings were "measures to insure that the right against compulsory self-incrimination was protected." *Id.* at 444.

69 470 U.S. 298, 309 (1985). The Court held that "fruit" of a non-coercive *Miranda* violation, *at least when the fruit is a subsequent confession*, need not be suppressed. *Id.* at

On the other hand, according to *Miranda*, both federal and state law enforcement officials had to give the warnings.[70] Since the Supreme Court did not have the power to create rules of evidence for the states unless that power came from constitutional interpretation, many argued that the Court must have found the warnings to be required by the Constitution. This issue would not be resolved until 2000.[71]

III. THE CONGRESSIONAL REACTION TO *MIRANDA*

Within two years of the *Miranda* decision, Congress tried to change things back. It seemed clear that *Miranda* was intended to discourage suspects from confessing to the police,[72] and it was likely that this would have an adverse impact on criminal prosecutions and ultimately on the crime rate. So, taking heed of Justice John Harlan's dissenting opinion that the "social costs of crime are too great to call the new rules [enunciated in *Miranda*] anything but a hazardous experimentation,"[73] Congress enacted 18 U.S.C. § 3501, which stated, "In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given."[74] Section 3501 was passed

304.

70 *See* 384 U.S. at 498–99.

71 *Dickerson*, 530 U.S. at 442.

72 Milhizer, *supra* note 30, at 21 ("The only plausible explanation for the Court's hyperbolic advice is that it wanted the *Miranda* warnings to discourage suspects from confessing to police.").

73 *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).

74 18 U.S.C. § 3501 (2000).

> § 3501. Admissibility of confessions
>
> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

as part of the Omnibus Crime Control Act of 1968 and required only that a confession be offered voluntarily in order for it to be used in court, thereby bypassing *Miranda*-related legal and evidentiary requirements.

Congress left no doubt that the purpose of § 3501 was to reverse *Miranda*. The statute provided that, while the trial court is deciding whether a confession is voluntary, it should take into account all circumstances surrounding the confession (including whether *Miranda*-type warnings were given).[75] The absence of such warnings, however, would not preclude admissibility of an otherwise voluntary confession.[76]

Even though the Supreme Court frequently noted that the *Miranda* warnings were not required by the Constitution, that they were merely "prophylactic" protections of the Fifth Amendment guarantee against compulsory self-incrimination,[77] for thirty years the Attorneys General refused to enforce § 3501, believing that it was unconstitutional.[78] Then, in February of 1999,

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> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Id.

75 *Id.* § 3501(b)(3).

76 *Id.* § 3501(b)(5).

77 *See* Darmer, *supra* note 4, at 344.

78 In a concurring opinion in *Davis v. United States,* Justice Scalia wondered why, "with limited exceptions [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." 512 U.S. 452, 463–64 (1994) (Scalia, J., concurring). He indicated that while he reserved judgment, it "seems" that the act's voluntariness consideration, not *Miranda*, is

a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled in *United States v. Dickerson* that the *Miranda* warning no longer governed the admissibility of confessions in federal court.[79]

Dickerson involved a bank robber from Maryland who confessed to his part in several heists.[80] A lower court suppressed the confession on the grounds that it had been given before he was read his *Miranda* rights.[81] The Fourth Circuit, however, reversed the decision and ruled that § 3501 was the governing authority, despite the fact that the government did not base its argument on this law.[82] The case then went to the U.S. Supreme Court.

In its 2000 decision in *Dickerson v. United States*, the Court broke with the past and elevated *Miranda* to constitutional status.[83] Section 3501 was found to be insufficient to protect the Fifth Amendment right not to incriminate oneself.[84] *Miranda* rights would now be considered part and parcel of the Fifth Amendment. Thus, according to the *Dickerson* Court, the failure to Mirandize a suspect was inherently coercive—no matter how well the suspect may have been treated, no matter how much his physical comfort had been respected, and no matter how well he may already have known his rights.[85]

IV. THE IMPACT OF *MIRANDA* ON CRIME

Many scholars have attempted to obtain empirical evidence regarding confessions and the impact of *Miranda*, but as pointed out by other panelists at this Symposium, the difficulty of gathering and evaluating the evidence has led to inconclusive results.[86]

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the legal standard for the admissibility of confessions. *Id.* at 464. The refusal of prosecutors to argue for the application of § 3501 means that courts might be wasting their time looking at a "host of '*Miranda*' issues that might be entirely irrelevant under federal law." *Id.* at 465. Further, Justice Scalia said that he would "no longer be open to the argument that [the Supreme Court] should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them." *Id.* at 464. He said he looked forward to a time "when a case that comes [under § 3501] is next presented to [the Supreme Court]." *Id.* at 464.

79 United States v. Dickerson, 166 F.3d 667, 692 (4th Cir. 1999).

80 *Id.* at 671.

81 *Id.*

82 *Id.* at 695.

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

84 *Id.* at 442.

85 *See id.* at 444; McCarthy, *supra* note 8 ("Failing to provide *Miranda* rights is sure to be found by many federal judges to be a form of lawless coercive interrogation that fits within [the] . . . prohibition against *cruel, unusual, and inhumane* treatment. This is especially so given that judges frequently resort to legislative history in construing vague, confusing, inexact statutory terms. Anyone reading the Congressional Record here will find that the whole purpose . . . was to make coercive interrogation illegal.").

86 LAFAVE & ISRAEL, *supra* note 3, at 291. *See also* Paul G. Cassell, Miranda*'s "Neg-*

Some commentators argue that its costs, in terms of lost convictions, are too great to justify the limited benefits *Miranda* supplies.[87] It has been suggested that thousands of violent criminals escape justice each year as a direct result of *Miranda*.[88] As one noted critic of *Miranda* has argued:

> Evidence of *Miranda*'s harmful effects is mounting. For example, along with various co-authors, I have developed empirical evidence of *Miranda*'s substantial harm to law enforcement. In my most recent articles, I have analyzed the precipitous drop in crime clearance rates that followed immediately on the heels of *Miranda* and concluded that *Miranda* severely hampered police effectiveness.[89]

Other commentators argue that the cost of *Miranda* is minimal and the significant benefits include protection of the innocent.[90] Still others have even suggested that the warnings themselves, used properly, are actually helpful in obtaining statements from suspects.[91]

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ligible" Effect on Law Enforcement: Some Skeptical Observations, 20 HARV. J.L. & PUB. POL'Y 327 (1997). As one British court noted, the right not to testify elicits "strong but unfocused" feelings. Regina v. Director of Serious Fraud Office, Ex parte Smith, [1993] A.C. 1, 30–34 (H.L.) (appeal taken from Q.B.) (U.K.) (discussing the right to silence and different immunities encompassed by this term).

87 *See* Dennis, *supra* note 14, at 342–53 (concluding that the criminal justice system should apply the privilege in limited contexts and not view it as a human right); David Dolinko, *Is there a Rationale for the Privilege against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986) (describing the privilege as a historical relic). Philosopher Jeremy Bentham, one of the earliest critics of the privilege, thought that the innocent would want to speak, and therefore the privilege would only protect the guilty. *See* BENTHAM, *supra* note 14, at 238; *see also* Dennis, *supra* at 342 n.2 (citing Bentham's views regarding the privilege against self-incrimination); WILLIAMS, *supra* note 13, at 48–54 (summarizing Bentham's treatise on privilege).

88 Cassell & Fowles, *Handcuffing The Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1126 (1998). *See also* Milhizer, *supra* note 30, at 53 (noting that *Miranda* was based on the "Reid Model" of psychological interrogation, which has since become "widely disfavored within the psychological community").

89 Cassell, *supra* note 24, at 531 (citations omitted).

> [T]he innocent are at risk not only from false confessions, but also from "lost" confessions—that is, confessions that police fail to obtain from guilty criminals that might help innocent persons who would otherwise come under suspicion for committing a crime[or become a victim of the criminals who did not confess].
>
> . . . .
>
> . . . [T]here is good reason to believe that the Supreme Court's decision in *Miranda* has exacerbated the risks to the innocent. The *Miranda* decision has reduced the number of truthful confessions, while at the same time doing nothing about, and probably even worsening, the false confession problem by diverting the focus of courts away from the substantive truth of confessions to procedural issues about how they were obtained.

Id. at 525–527 (citation omitted).

90 *See* SUSAN M. EASTON, THE RIGHT TO SILENCE 60–62 (1991) (arguing that the innocent are protected by the right to silence); Dennis, *supra* note 14, at 348 (describing protection of the innocent against wrongful conviction as a justification for the privilege).

91 *See* SIMON, *supra* note 15, at 199.

Even if *Miranda* can be used by interrogators to help obtain statements from some suspects (and there is every reason to believe that the police try to exploit any remaining "loopholes"),[92] the rules are certainly designed to dissuade suspects from making uninformed statements. If the rules are serving their intended purpose, they make life harder for interrogators and prosecutors. Logically, then, they would have the same impact on those trying to gain information to assist with the War on Terror.

Miranda is essentially an exclusionary rule.[93] Statements taken in violation of it cannot be used against the defendant in a subsequent prosecution, but if the suspect who was interrogated is not prosecuted, the exclusionary aspect of *Miranda* has no application. Moreover, there are many exceptions that negate *Miranda*'s effect in specific cases.[94] There is also a certain lack of logic in a rule that assumes that any statement taken without warnings must have been coerced, but does not presume that waivers of the right to remain silent or to have an attorney have been coerced.[95] As Justice Douglas stated in a pre-*Miranda* case, the "trial of the issue of coercion is seldom helpful," with police officers "usually testify[ing] one way, the accused another."[96] *Miranda* does little to change this problem. It just creates a fact question, and the prosecution has the burden of proof to show that the suspect understood his or her rights before waiving

92 *See* Missouri v. Seibert, 124 S. Ct. 2601 (2004) (plurality opinion).

93 Traditionally, it has been said that there is no violation until the statement is used at trial. *See* Darmer, *supra* note 4, at 345–46 (quoting United States v. Bin Laden, 132 F. Supp. 2d 168, 181–82 (S.D.N.Y. 2001)). In *Chavez v. Martinez*, 538 U.S. 760 (2003), however, the Court ruled that whether the suspect's substantive due process rights had been violated and an action could proceed against the interrogator had to be addressed on remand, even though the statement was not used at trial. *Id.* at 772 ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.").

94 *See, e.g.,* Harris v. New York, 401 U.S. 222 (1971) (holding that un-Mirandized confessions may still be used for impeachment purposes); Bowen v. State, 607 So. 2d 1159 (Miss. 1992) (noting that when a defendant is entitled to *Miranda* warnings and does not receive them, any voluntary statement made by him may be used for impeachment purposes); New York v. Quarles, 467 U.S. 649 (1984) (establishing an exception to *Miranda* for questioning prompted by concern for public safety).

95 As pointed out by Justice White, "if the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?" Miranda v. Arizona, 384 U.S. 436, 536 (1966) (White, J., dissenting).

96 Crooker v. California, 357 U.S. 433, 443–44 (1958) (Douglas, J., dissenting). He went on to note that the nature of the process gives defendants "little chance to prove coercion" at trial.

them.

Some commentators even believe that the police have learned to work with (or around) the *Miranda* rules so well that they have become nothing more than minor inconveniences or perhaps even tools that the authorities can exploit in an interrogation.[97] Certainly there are some officers who would lie, deny-

97 Consider the following passage:

> The detective offers a cigarette, not your brand, and begins an uninterrupted monologue that wanders back and forth for a half hour more, eventually coming to rest in a familiar place: "*You have the absolute right to remain silent*."
>
> Of course you do. You're a criminal. Criminals always have the right to remain silent. At least once in your miserable life, you spent an hour in front of a television set, listening to this book-'em-Danno routine. You think Joe Friday was lying to you? . . . Get it straight: A police detective, a man who gets paid government money to put you in prison, is explaining your absolute right to shut up before you say something stupid.
>
> "*Anything you say or write may be used against you in a court of law*."
>
> . . . . You're now being told that talking to a police detective in an interrogation room can only hurt you. If it could help you, they would probably be pretty quick to say that, wouldn't they? They'd stand up and say you have the right not to worry because what you say or write in this godforsaken cubicle is gonna be used to your benefit in a court of law. No, your best bet is to shut up. Shut up now.
>
> "*You have the right to talk with a lawyer at any time—before any questioning, before answering any questions, or during any questions*."
>
> Talk about helpful. Now the man who wants to arrest you for violating the peace and dignity of the state is saying you can talk to a trained professional, an attorney who has read the relevant portions of the Maryland Annotated Code or can at least get his hands on some Cliffs Notes. And let's face it, pal, you just carved up a drunk in a Dundalk Avenue bar, but that don't make you a neurosurgeon. Take whatever help you can get.
>
> "*If you want a lawyer and cannot afford to hire one, you will not be asked any questions, and the court will be requested to appoint a lawyer for you*."
>
> Translation: You're a derelict. No charge for derelicts.
>
> At this point, if all lobes are working, you ought to have seen enough of this Double Jeopardy category to know that it ain't where you want to be. How about a little something from Criminal Lawyers and Their Clients for $50, Alex?
>
> Whoa, punk, not so fast.
>
> "Before we get started, lemme just get through the paperwork," says the detective, who now produces an Explanation of Rights sheet, BPD Form 69, and passes it across the table.
>
> "EXPLANATION OF RIGHTS," declares the top line in bold block letters. The detective asks you to fill in your name, address, age, and education, then the date and time. That much accomplished, he asks you to read the next section. It begins, "YOU ARE HEREBY ADVISED THAT:"
>
> Read number one, the detective says. Do you understand number one?
>
> "*You have the absolute right to remain silent*."
>
> Yeah, you understand. We did this already.
>
> "Then write your initials next to number one. Now read number two."
>
> And so forth, until you have initialed each component of the Miranda

ing any brutal or coercive conduct that resulted in a statement from the suspect.[98] Those same officers, however, are likely to testify falsely that they gave appropriate *Miranda* warnings. They may also technically comply with *Miranda* while still putting the suspect through a very traumatic experience.[99]

Whatever the effectiveness of *Miranda*, the release of a common criminal may deny justice, but it usually poses a minimal threat to society. Terrorism changes that equation. For that reason, one must ask whether a criminal procedure rule such as *Miranda,* or—more broadly—the right not to be coerced into self-incrimination, should even apply in terrorism cases.

V. IS PROTECTION FROM SELF-INCRIMINATION PROPER IN THE TERRORISM CONTEXT?

In the context of domestic criminal cases, the *Miranda* warnings operate to protect suspects' rights and to make interrogators' and prosecutors' jobs more difficult. The question is whether the same concerns that justify the right not to incriminate oneself in domestic criminal cases are applicable when it comes to the investigation of international terrorism. The two primary concerns are: false testimony brought during interrogation (reliability) and the related issue of brutal tactics being used by police authorities in order to elicit incriminating statements (torture).

A. Reliability

If suspects are forced to speak, investigators might get bad information.[100] Consider the case of *Brown v. Mississippi*, in

> warning. That done, the detective tells you to write your signature on the next line, the one just below the sentence that says, "I HAVE READ THE ABOVE EXPLANATION OF MY RIGHTS AND FULLY UNDERSTAND IT."
>
> You sign your name and the monologue resumes.

SIMON, *supra* note 15, at 193–94. "As a result, the same law enforcement community that once regarded the 1966 *Miranda* decision as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself." *Id.* at 199.

98 "Put bluntly, an officer inclined to take a swing at a suspect surely would not hesitate to ignore the *Miranda* protections yet then insist on the witness stand that he had given the prescribed warnings." Darmer, *supra* note 4, at 341.

99 For example, in *Miller v. Fenton*, 796 F.2d 598, 600 (3d Cir. 1986), a very skillful interrogator, fully compliant with *Miranda*, verbally dominated a suspect to the point that, after confessing, he collapsed in a catatonic state. The court included the transcript of the interrogation in an appendix. *See id.* at app.

100 *See, e.g.*, PHILLIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 109–11 (2003); Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2028–29 (2003); Leo & Ofshe, *supra* note 24; Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at Al; Thomas H. Maugh II, *Glendale Case Raises Issue of Reliability of Confessions*, L.A. TIMES, Apr. 2, 1998, at Al.

which the defendant's conviction was based solely on a confession induced by beatings.[101] He had been hanged twice by the local deputy and other men—the marks on his neck were still visible at trial—then whipped. When he would not confess, he was released only to be picked up two days later, whipped again, and told that the whippings would continue until he confessed and agreed to every detail that the deputy suggested. The defendant's story, in fact, changed several times to fit the facts as they were explained to him. The confession was admitted at trial, and the jury convicted and sentenced him to death.[102] The U.S. Supreme Court held that this violated the Fourteenth Amendment.[103] In fact, it called the Mississippi Supreme Court decision upholding the conviction a denial of due process in and of itself.

As illustrated in the *Brown* case, and totally aside from the related concern for the just treatment of citizens, unrestrained interrogation may lead to bad information. That would serve neither the purpose of justice in a criminal context, nor would it serve governmental forces fighting terror. Moreover, false confessions and bad information are not elicited only when physical abuse is involved. Mental duress can also lead to false confessions.[104] The right not to incriminate oneself helps protect against this concern.

False confessions that have been obtained in criminal cases often have been driven by animus based on factors such as race, politics, the desire of police authorities to "close" a case, or other personal interests. Such factors *could* impact a terror-related interrogation, but the risk is significantly lower, due in part to the different goal. In regular criminal investigations, the goal for the officer is to make an arrest and get the suspect off the street. The evidence will be tested, if ever, at some uncertain date in the future, when someone else (the prosecutor) will try to obtain a conviction and close the case. In that circumstance, the statement is valuable to the arresting officer regardless of whether it is accurate.

Interrogators in the terrorism context are seeking information, not trying to get a conviction, and time is far more likely to be of the essence. They know that a statement, much less a false

101 Brown v. Mississippi, 297 U.S. 278 (1936).

102 *Id.* at 279.

103 *Id.* at 287.

104 *See* Human Rights Watch, *U.S.: CIA Whitewashing Torture: Statements by Goss Contradict U.S. Law and Practice*, PEACE JOURNALISM, Nov. 2005, http://peacejournalism.com/ReadArticle.asp?ArticleID=6948. An American citizen taken into Czech custody on charges of espionage while working as bureau chief for the *Associated Press* in Prague signed a false confession after being interrogated for six days. He had been kept awake for over forty-two straight hours.

statement, will not close their case. Interrogation may, however, help them thwart a serious threat to peace. Importantly, interrogators seem to think that pressure—physical or non-physical—is more beneficial than not.[105] They are in the best position to evaluate the risk of bad information from aggressive interrogation. They know the risks of false statements, and yet—in every society—they continually return to forceful methods of interrogation.[106] Those who are outside of that community are not close enough to the matter to successfully prove that the risk of false statements is sufficiently serious so as to justify providing terrorist suspects with the right not to incriminate themselves.[107] Accordingly, and without intending in any way to condone overly-aggressive interrogation, much less torture, this "potentially bad information" argument is an insufficient justification for the right not to incriminate oneself, at least in a terrorist-related situation. It certainly does not justify applying the *Miranda* rule in this context.

105 Levinson, *supra* note 100, at 2029–31.

106 *Id*. *See also infra* notes 112–126 and accompanying text.

107 In fact, scholars have been debating the empirical evidence ever since *Miranda* was announced. *See*, *e.g.*, Cassell, *supra* note 24, at 527–29.

B. Morality and Torture

A related argument in support of the privilege against self-incrimination is that without it, interrogators might be tempted to coerce suspects into making statements, and they could slide into overly-aggressive interrogation or even torture.[108] At times, of course, they would have an innocent person in custody. This is an ancient concern. St. Augustine wrote of it in the fifth century:

> [The accused] is tortured to discover whether he is guilty, so that, though innocent, he suffers most undoubted punishment for crime that is still doubtful; not because it is proved that he committed it, but because it is not ascertained that he did not commit it. Thus the ignorance of the judge frequently involves an innocent person in suffering . . . [T]he result of this lamentable ignorance is that this very person, whom he tortured that he might not condemn him if innocent, is condemned to death both tortured and innocent. For if he has chosen . . . to quit this life rather than endure any longer such tortures, he declares that he has committed the crime which in fact he has not

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108 For an analysis of slippery slope arguments and how they function, see Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).
In the Eighteenth Century, Saint Alphonsus Liguori in his *Theologia Moralis*, considered three questions:

> (a) Under what conditions can a judge proceed to have an accused person tortured . . . ? Answer: the judge may only "descend to torture" as a last resort, i.e., when full proof cannot be obtained by non-violent means; next, there must already be "semi-complete proof" (*semiplenam probationem*) of the accused's guilt arising from other evidence; and finally, certain classes of persons are to be exempt from torture, either because of their frailty or their great value to society: "men of great dignity[,"] knights of equestrian orders, royal officials, soldiers, doctors [probably in the general sense of learned men] and their children, pre-pubescent children, senile old folks, pregnant women, and those who are still weak after childbirth.
>
> (b) To what extent may the accused be tortured . . . ? Answer: the more convincing the already-existing evidence for his guilt, the more severely he may be tortured, but—taking into account the varying estimated endurance-levels [sic] of different individuals—never so severely that "it is morally impossible for him to endure" the pain. If that level of cruelty is in fact reached, "the confession thus extorted will be involuntary and so must be considered legally null and void[,"] even if the accused, for fear of further torment, subsequently ratifies his confession outside the torture chamber in the presence of the judge.
>
> (c) Whether one who has already been tortured may be tortured again . . . ? Answer: not if he refuses to confess during the first torture session (unless new independent evidence against him subsequently comes to light). In that case he must be set free. But if he confesses under torture, and then retracts that confession before the judge, he may be tortured again—and even a third time if the same thing happens after the second torture session. But if he confesses under torture a third time, and yet again subsequently retracts in the presence of the judge, he must be released. For the judge then must presume that his three confessions were all forced and involuntary—and therefore invalid.

Brian W. Harrison, *Torture and Corporal Punishment as a Problem in Catholic Theology*, LIVING TRADITION, Sept. 2005, at pt. II A11, http://www.rtforum.org/lt/lt119.html (citing *Theologia Moralis* 4:3:3 nos. 202–04) (third alteration in original) (formatting altered).

> committed [and] has been condemned and put to death . . . .[109]

Overly-aggressive interrogation may be a particularly serious threat in the terrorism context.[110]

When it comes to criminal investigations, many authorities have concluded that the harsh practices associated with "the third degree" are less effective in obtaining truthful statements than psychologically-oriented techniques designed to reduce the suspect's resistance in the typical criminal investigation.[111] In terror-related situations, however, the evidence suggests that the less aggressive interrogation tactics tend not to be as successful.[112] Military interrogators are certainly using tactics that are far more aggressive than would be acceptable in common criminal cases. Indeed, the events of September 11 have caused serious scholars to debate the previously unthinkable prospect of legalized torture.[113]

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109 ST. AUGUSTINE, THE CITY OF GOD 19:6 (Marcus Dods trans., Random House, Inc. 1950) (426).

110 Of course, the first issue is to reach a consensus on the meaning of "torture." The practice lacks a clear definition in international agreements and in American law. As Richard Posner, U.S. Circuit Judge for the Seventh Circuit and Senior Lecturer at the University of Chicago Law School, has noted, "Almost all official interrogation is coercive, yet not all coercive interrogation would be called 'torture' by any competent user of the English language, so that what is involved in using the word is picking out the point along a continuum at which the observer's queasiness turns to revulsion." Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION 291, 291 (Sanford Levinson ed., 2004). In other words, there is a continuum of pressure that can be used during interrogation ranging from an uncomfortable chair and warm lights to extreme physical abuse (and perhaps even worse). Posner has written, "only the most doctrinaire civil libertarians (not that there aren't plenty of them) deny [that] if the stakes are high enough, torture is permissible." Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28, 30 (reviewing ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002)). Moreover, Posner has written that "[n]o one who doubts that this is the case should be in a position of responsibility." *Id*.

111 *See* Leo & Ofshe, *supra* note 24, at 434 n.10 ("Interrogators may have become more effective at obtaining confession statements than they were in the prior era of *third degree* interrogation.").

112 YOO, *supra* note 6, at 189.

113 *See, e.g.*, TORTURE: A COLLECTION, *supra* note 110; Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005); Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004, at 4; *Dershowitz: Torture Could Be Justified*, CNN.COM/LAW CENTER, Mar. 4, 2003, http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/ (discussing the possibility with Harvard Law Professor Alan Dershowitz). Dershowitz has proposed "torture warrants" in cases of "ticking time bomb terrorists." ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 141 (2002). *See also* Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at B19; Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19. Dershowitz would restrict warrants to only the most egregious cases. *See, e.g.,* Alan M. Dershowitz, Letter to the Editor, *'Torture Warrants,'* S.F. CHRON., Jan. 28, 2002, at B4 ("My personal hope is that no torture warrant would ever be issued, because the criteria for obtaining one would be so limited and rigorous.").

It is worth noting that the United States is not the only nation to reconsider its interrogation regulations in light of modern terrorism. In Israel, for instance, "interrogators used third-degree practices on alleged Palestinian terrorists, some of whom died in custody. The Supreme Court of Israel recently outlawed these practices, but left open the possibility that torture could be justified in 'ticking bomb' situations."[114]

Similarly, in the early 1970s, "the British and Irish governments . . . found it necessary to reduce the strength of the privilege against self-incrimination in the name of fighting terrorism."[115] They "introduced security measures that . . . , inter alia, allow[ed] courts to draw inferences from a defendant's refusal to answer questions regarding his membership in a terrorist group."[116] They "justified laws allowing courts to draw adverse inferences from an accused's silence and other derogations of the right to silence by pointing out the sophistication of the IRA and other para-military groups in their ability to resist questioning . . . ."[117]

One reason why the right to refuse to testify is so important is because if defendants can be forced to testify, they will—at least sometimes—be intimidated into making false confessions. The concern over the use of torture to obtain confessions is well-embedded in American history. The 1788 debate in the Virginia Convention on the ratification of the Constitution contains this interesting discussion on the topic:

> Patrick Henry: . . . .
>
> . . . .
>
> But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone.

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114 John Parry & Welsh White, *Interrogating a Suspected Terrorist*, JURIST LEGAL INTELLIGENCE (2001), http://jurist.law.pitt.edu/terrorism/terrorismparry.htm.

115 Stacey Carrara Friends, Note, *An Effective Way to Deal with Terrorism? Britain and Ireland Restrict the Right to Silence*, 23 SUFFOLK TRANSNAT'L L. REV. 227, 249 (1999).

116 *Id.* at 227 (citing *Home News: Commons Special Debate*, IRISH TIMES, Sept. 3, 1998). "In December 1998, however, Parliament changed the law slightly in light of the European Court of Human Rights ruling . . . ." *Id.* at 227 n.2 (citing Steve Doughty, *Judges Force Retreat over Right to Silence*, THE DAILY MAIL, Dec. 2, 1998, at 2). "Courts may now only draw inferences from the silence of an accused person that occurs in the presence of the accused's lawyer." *Id.*

117 *Id.* at 250.

> Mr. NICHOLAS: . . . But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . If we had no security against torture but our declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded.
>
> Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.
>
> Mr. NICHOLAS acknowledged the bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity.[118]

This concern about torture applied to both criminal activity and warfare. During the Revolutionary War, General George Washington and leaders of the Continental Congress considered the just treatment of enemy combatants to be an important strategic concern.[119] As Robert F. Kennedy, Jr. has noted, the American concern for just treatment of prisoners "was all the more extraordinary because these courtesies were not reciprocated by King George's armies. Indeed, the British conducted a deliberate campaign of atrocities against American soldiers and civilians. . . . Captured Americans were tortured, starved and cruelly maltreated aboard prison ships."[120] Kennedy went on to note:

> President Lincoln instituted the first formal code of conduct for the humane treatment of prisoners of war in 1863. Lincoln's order forbade any form of torture or cruelty, and it became the model for the 1929 Geneva Convention. Dwight Eisenhower made a point to guarantee exemplary treatment to German POWs in World War II, and Gen. Douglas McArthur ordered application of the Geneva Convention during the Korean War, even though the U.S. was not yet a signatory. In the Vietnam War, the United States extended the convention's protection to Viet Cong prisoners even though the law did not technically require it.[121]

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118 5 THE FOUNDERS' CONSTITUTION 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

119 Robert F. Kennedy Jr., *America's Anti-Torture Tradition*, L.A. TIMES, Dec. 17, 2005, at B21.

120 *Id.*

121 *Id.*

Despite the concern about extorting confessions, governmental authorities used some very aggressive tactics in trying to obtain confessions well into the twentieth century.

In 1929, for instance, the Correctional Association of New York

> researched the court records and found "strong grounds for suspecting that severe practices are employed to obtain information from those who come into the hands of the police." Among the abusive methods in use throughout the United States at that time were solitary confinement, whipping by rubber hose, forcing a suspect to look at a deceased victim in the morgue, placing a skeleton in a suspect's cell, and handcuffing the suspect to a chair for thirty-seven hours.[122]
>
> The Association lamented the fact that while "some States have passed statutes against [the third degree] there seem to have been practically no convictions under them." The Association also observed that "there is no practical redress for the individual . . . though the officers are civilly liable to the injured party for mistreating him, this remedy is in practice of no avail."[123]

At a very fundamental level, the concern over interrogation slipping into torture is a moral decision, not a pragmatic one.[124] American history and American values condemn torture of prisoners. It does not follow, however, that moral concerns would justify the same rules in a terror-related scenario that apply in common criminal law cases. In the terror context, when time is likely to be of the essence and many lives may hang in the balance, some form of aggressive interrogation, beyond what is acceptable when considering common criminals, may be justifiable, if not necessary. The threat is greater, the risk is higher, and the time element may be significantly different.[125]

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122 Ilan K. Reich, A CITIZEN CRUSADE FOR PRISON REFORM: THE HISTORY OF THE CORRECTIONAL ASSOCIATION OF NEW YORK 45 (1994) (quoting PRISON ASS'N OF N.Y., NINETY-NINTH ANNUAL REPORT 23 (1943)).

123 *Id.* at 46 (quoting PRISON ASS'N OF N.Y., ONE HUNDRED THIRD ANNUAL REPORT 40 (1947)) (alterations in original).

124 There are those who argue that the law should not impose moral values. Without delving into that argument in other contexts, it is certainly legitimate for a society to decide that authorities who are acting on behalf of the public should behave in a moral manner. *Cf.* Carlos A. Ball, *Autonomy, Justice, and Disability*, 47 UCLA L. REV. 599, 609–10 (2000) (discussing whether there should be a moral obligation placed on the civil government to help the disabled); Rychlak, *supra* note 50, at 94–97 (advocating for the pro-life community to vote into the Senate those with similar moral stances on abortion in order to change current abortion law and ultimately change the composition of the Supreme Court).

125 *See generally* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005); Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 GEO. MASON L. REV. 135 (2004).

At the same time, few, if any, citizens want to give interrogators full discretion to do whatever they wish.[126] Elimination of all rules and the threat of sanctions for the interrogators would open the possibility of widespread abuse. Waterboarding has already been publicly defended.[127] What about beatings, amputations, or inflicting pain on members of the suspect's family? As Richard John Neuhaus has stated:

> How do we address these questions of what in fact is happening in circumstances in which conscientious Christians seek moral guidance, and how can we do this without falling into the pits of relativism, proportionalism, consequentialism, and related errors? In the ticking bomb instance, does the duty to protect thousands of innocents override the duty not to torture?[128]

Therefore, it is incumbent on modern lawmakers to find a way to control interrogations and see that they do not turn into torture sessions while permitting interrogators to extract critical information.[129]

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126 Amnesty International's webpage states: "The America We Believe In Does Not Torture People." Amnesty International USA, The America We Believe In Leads the World on Human Rights, http://believe.amnestyusa.org/site/c.igLQIUOCKtF/b.2070843/k.BDE5/Home.htm (last visited Mar. 10, 2007). That view is certainly shared by many Americans who do not agree with other aspects of the Amnesty International agenda. Most religious groups also condemn torture. *See, e.g.,* Adelle M. Banks, *Religious and Civil-Rights Coalition Asks Bush to Condemn Use of Torture*, PRESBYTERIAN NEWS SERVICE, Nov. 10, 2005, http://www.pcusa.org/pcnews/2005/05609.htm.

127 *See* Demetri Sevastopulo, *Cheney Endorses Simulating Drowning,* MSNBC, Oct. 26, 2006, http://www.msnbc.msn.com/id/15433467/. *See also* Harrison, *supra* note 12, at 24 (stating that waterboarding "causes a brief, panic-inducing sensation of being about to drown but no pain or injury"). On September 20, 2006, television host Bill O'Reilly had Brian Ross of ABC News on his show. Deborah, *Bill O'Reilly Endorses Waterboarding As Safe and Reliable,* NEWS HOUNDS, Sept. 20, 2006, http://www.newshounds.us/2006/09/20/bill_oreilly_endorses_waterboarding_as_safe_and_reliable.php. Ross stated that "14 detainees with very important information about future terror plots broke down and talked after [being subject to] waterboarding." *Id.* He reported that "the toughest suspect broke down in [two and a half] minutes," but most detainees "only lasted for 30 seconds." *Id.* Ross "admitted that it probably could kill someone," but the main thing about waterboarding is that it makes the subject feel like he is drowning because it triggers "an uncontrollable gag reflex." *Id.*

128 Richard John Neuhaus, *The Public Square: Secularization Doesn't Just Happen*, FIRST THINGS, Mar. 2005, at 58, 62, *available at* http://www.firstthings.com/article.php3?id_article=164.

129 There are at least four different reasons why an interrogator might resort to torture: (1) for the illegal enjoyment of the person inflicting the torture; (2) to extract a confession of criminal activity; (3) to punish an enemy or wrongdoer; or (4) to obtain information so as to prevent greater harm (the "ticking bomb" scenario). *See* Harrison, *supra* note 12, at 26. The concerns that relate to criminal law rules primarily address the first three reasons. The torture scenario most often invoked when discussing terrorism, however, is the fourth reason. *See id.* at 26–27. That is why the typical criminal law analysis does not perfectly fit in the ticking bomb scenario. The moral equation is different. According to Father Brian Harrison, a professor at the Pontifical University of Puerto Rico, the Catholic Church has condemned the first three reasons for inflicting torture, but—perhaps tellingly—has not expressly condemned torture in the fourth situation. *Id.*

In light of these moral concerns, not to mention the international conventions, stripping all regulation from interrogation is simply not a viable alternative. If the controls were completely lifted, it is easy to imagine interrogators going too far. Therefore, some controls must apply in these situations.[130]

VI. APPROPRIATE CONTROLS ON TERROR-RELATED INTERROGATIONS

Recognizing that there is reason to place restrictions on interrogation, even in the terrorism scenario, the next question becomes whether *Miranda*-style protections should be given to the suspects. The answer here must be "no." *Miranda* is not a good way to regulate terror interrogations. As Justice O'Connor explained in a 1993 case, "Because *Miranda* 'sweeps more broadly than the Fifth Amendment itself,' it excludes some confessions even though the Constitution would not."[131] Perhaps that is why one Congressman said: "There's not a single member of this Congress that believes that Miranda warnings should be given to terrorists . . . ."[132]

Whatever the cost may be in the criminal context, terrorism shifts the balance of this equation. The risk of a single criminal going free is relatively small. Large terror-related organizations are a different matter. "[T]he harm any individual ordinary criminal can inflict, if wrongly freed, is limited. The potential harm an al Qaeda operative can inflict is potentially enormous."[133] Criminal laws have long been written so as to recognize the additional danger associated with joint or group activity,

130 *The Catechism of the Catholic Church* provides:

> *Torture* which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred is contrary to respect for the person and for human dignity. Except when performed for strictly therapeutic medical reasons, directly intended *amputations*, *mutilations*, and *sterilizations* performed on innocent persons are against the moral law.

CATECHISM OF THE CATHOLIC CHURCH ¶ 2297 (1994). The *Catechism* goes on to state:

> In times past, cruel practices were commonly used by legitimate governments to maintain law and order . . . . In recent times it has become evident that these cruel practices were neither necessary for public order, nor in conformity with the legitimate rights of the human person. On the contrary, these practices led to ones even more degrading. It is necessary to work for their abolition. We must pray for the victims and their tormentors.

Id. at ¶ 2298.

131 Withrow v. Williams, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part and dissenting in part) (quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

132 *Rep. Hunter Sides with Bush Administration on Military Tribunals*, FOXNEWS.COM, July 12, 2006, http://www.foxnews.com/story/0,2933,203126,00.html (quoting Rep. G.K. Butterfield).

133 YOO, *supra* note 6, at 201.

and the danger presented by international terror organizations must similarly be recognized by the law.

In a criminal investigation, if police questioning is prompted by an immediate concern for public safety, the Supreme Court has held that the officers may question the suspect without first providing *Miranda* warnings.[134] Moreover, the suspect's answers to these questions may be used not only to avert the immediate threat but also as evidence in a subsequent criminal prosecution against the suspect.[135] This does not mean, of course, that any and all tactics are legitimate when an officer is motivated by public safety concerns.[136] Limits still have to be set to protect suspects from overly aggressive interrogation. For today's purposes, however, the key is that *Miranda* is not the way to protect those suspects.

In the terrorist situation, it would seem that *every* interrogation—at least every one that is hypothesized when discussing the ticking bomb scenario—can be said to be prompted by a concern for the public safety. This does not mean that every tactic can be justified in the terror-related scenario. If aggressive interrogations take place, there will be mistakes in determining who is a legitimate suspect, and there will be times when techniques used to obtain information will not be justified. In those cases, governmental officials should face an inquiry and be able to defend their actions. Should they be unable to justify their actions, they would be subject to possible punishment.[137] If police are allowed to use otherwise impermissible interrogation tactics when lives are at stake, how far should they be permitted to go?[138]

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134 New York v. Quarles, 467 U.S. 649 (1984); *see also* Darmer, *supra* note 4, at 342–43.

135 *Quarles*, 467 U.S. at 659–60.

136 *Id.* at 656, 658 (stating that when officers ask questions, they need to be "*reasonably* prompted by a concern for the public safety") (emphasis added). A coerced, involuntary statement, for instance, would not be admissible under this *Miranda* exception. Oregon v. Elstad, 470 U.S. 298, 317 (1985).

137 Two issues that require further development include: (1) where responsibility should be attached, and (2) whether low-ranking officials who are ordered to carry out aggressive interrogations should be able to invoke the "Nuremberg defense" of superior orders. Henry T. King, Jr., *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT'L L. 335, 340 (2002); Frank Lawrence, Note, *The Nuremberg Principles: A Defense for Political Protesters,* 40 HASTINGS L.J. 397, 413 (1989) ("[I was only] following superior orders . . . .").

138 The answer to this question could have the long-term consequence of adversely impacting the treatment of U.S. citizens who are held in other nations. As such, this is a problem that calls for resolution. The rules of procedure and evidence for the International Criminal Court (ICC) provide for the protection of certain self-incriminating testimony. *See* Preparatory Comm'n for the Int'l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court* add. 1, pt. I, ch. 4 R. 74(3), U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000). Perhaps more importantly, the ICC may have jurisdiction over those who commit torture in certain circumstances. *See* Neil A. Lewis, *Military's Opposition to Harsh Interrogation is Outlined*, N.Y. TIMES, July 28, 2005, at A21; John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the In-*

After-the-fact judicial or quasi-judicial investigations give governmental authorities flexibility to deal with interrogation problems that are impossible to foresee but likely to develop. This approach strikes a balance between the two competing needs (information to combat terrorism and just treatment of all detainees) and succeeds where *Miranda* fails because it holds interrogators responsible if they "cross the line" but does not stop the flow of information. This approach is not perfect; it will not stop all overly-abusive tactics. The same, of course, can be said of *Miranda* and almost every other device ever used to protect against abusive interrogation.

Unlike *Miranda*, this approach requires that the analysis and evaluation of the interrogation occur after the interrogation has taken place.[139] In the terrorism/ticking bomb scenario, this approach is reasonable due to the immediate nature of the threat because the issues are complex, and various factors are likely to shift from one case to the next. It is not possible to develop in advance a one-size-fits-all template to determine what level of pressure can or should be applied to a given suspect and a particular threat.[140] With after-the-fact hearings, however, various principles and limitations designed to protect detainees from overly-abusive tactics (and to let government authorities know what is permissible) can and should be established. It can be assumed that they will evolve over the years.

CONCLUSION

Protection from forced self-incrimination is an important value in our criminal law system, and *Miranda* is one way to enforce that right. Due to the increased threat and time pressures, the analysis shifts in the terrorism/ticking bomb scenario. There are still reasons to provide some level of protection against forced self-incrimination to terrorist suspects, primarily to prevent interrogators from becoming overly abusive. The justifiable level of pressure to be applied in any given terror-related case, however, cannot be decided with certainty in advance. Too many factors have to be taken into consideration.[141] While there must be limi-

ternational Criminal Court, 79 NOTRE DAME L. REV. 55 (2003).

139 "Judges are good at focusing on what has happened in the past. Whether an attack might occur in the future, its magnitude, and how to stop it is beyond their usual expertise." YOO, *supra* note 6, at 201. When it comes to terrorism, the same might be said of legislators and regulators.

140 *See* Darmer, *supra* note 4, at 371 ("Beyond limiting the use of physical force to extract confessions, it is difficult to establish rules, in advance, on the permissible range of tactics when seeking confessions.").

141 The most extreme forms of torture (e.g. life-threatening, permanent injury, harm to third parties) might well be prohibited in advance. In other cases, numerous factors

tations, *Miranda* is not the appropriate way to enforce those limitations in the terrorism scenario. Rather, there must be after-the-fact judicial or quasi-judicial investigations that can look at all the facts and evaluate the actions of the interrogating authorities.

In the War on Terror, part of the battle is to thwart the enemy, part of it is to protect innocent citizens, and part of it is to maintain moral standards. The United States will have to make many decisions in future years, and those goals will sometimes compete with each other. We should remember that military and quasi-military actions are fundamentally different from criminal investigation. Accordingly, we cannot simply take criminal law doctrines and expect them to work in these new situations. At the same time, we have to maintain a basic level of morality in how we carry out governmental activities, and that may require the development of new standards and procedures. It may be difficult to do this, but it is necessary if we are to defeat terrorism without compromising our integrity.

must be considered, and that probably forecloses a hard-and-fast rule with broad application.