Interrogating Terrorists: From *Miranda* Warnings to "Enhanced Interrogation Techniques"

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"*I know that this program has saved lives. I know we've disrupted plots. I know this program alone is worth more than the FBI, the Central Intelligence Agency and the National Security Agency put together, have been able to tell us.*"

George Tenet, former CIA Director,
on the CIA's interrogation techniques[1]

"*I don't care what George Tenet says. I know what's right. I know what's morally right as far as America's behavior . . . . We've gotten a huge amount of misinformation as well as other information from these techniques.*"

Sen. John McCain (R-Ariz.)[2]

I. INTRODUCTION

The *Miranda* warnings are familiar to almost all Americans who have watched television or seen a movie at any time since the Supreme Court decided *Miranda v. Arizona*.[3] The rules have evolved over the years, and difficult issues of proof may arise, but litigants, attorneys, and judges fundamentally know how *Miranda* works. Suspects have the right to remain silent, the right to have an attorney present for questioning, and the right to have an attorney appointed to represent them if they cannot afford one.[4] Nevertheless, few areas of law provoke more consistent debate than interrogation and confessions, and *Miranda*'s exclusion of incriminating statements in some criminal cases has only added to the controversy.[5] Moreover, the war on terror has complicated the issues and raised the stakes.[6]

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1. *60 Minutes: At the Center of the Storm* (CBS television broadcast Apr. 29, 2007).
2. Katherine Shrader, *Tenet Memoir Draws Heat from Key Players*, ASSOCIATED PRESS NEWSWIRES, Apr. 30, 2007.
3. 384 U.S. 436 (1966).
4. 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.
5. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 291 (2d ed. 1992).
6. "[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, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/06/15/EDGKJ766AM1.DTL.

When discussing terrorism, the situation most often presented is the "ticking bomb" scenario. This is the hypothetical situation in which the authorities want to interrogate a suspect in custody regarding his knowledge about a bomb that has been set to explode or a planned terrorist attack.[7] Is this suspect entitled not to incriminate himself? What about the presence of an attorney or the right to remain silent?[8] In fact, are the interrogators permitted to force the suspect, even to the point of torture, to get an answer? We normally condemn forceful tactics, but with numerous lives on the line, "the issue of torture gets complicated and the easy pieties don't so easily apply."[9] Commentator Charles Krauthammer addressed the torture issue as follows:

> Question: If you have the slightest belief that hanging this man by his thumbs will get you the information to save a million people, are you permitted to do it?
>
> Now, on most issues regarding torture, I confess tentativeness and uncertainty. But on this issue, there can be no uncertainty: Not only is it permissible to hang this miscreant by his thumbs. It is a moral duty.[10]

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.[11] What rights are to be accorded the suspects in that situation?

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7. *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).

8. 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.

9. Charles Krauthammer, *The Truth About Torture*, WKLY. STANDARD, Dec. 5, 2005, at 21, 22, *available at* http://weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp.

10. *Id.*

11. Krauthammer addresses this point as follows:

> Sure, the (nuclear) scale is hypothetical, but in the age of the car-and suicide-bomber, terrorists are often captured who have just set a car bomb to go off or sent a suicide bomber out to a coffee shop, and you only have minutes to find out where the attack is to take place . . . .
>
> And even if the example I gave were entirely hypothetical, the conclusion—yes, in this case even torture is permissible—is telling because it establishes the principle: Torture is not always impermissible. However rare the cases, there are circumstances in which, by any rational moral calculus, torture not only would be permissible but would be required (to acquire life-

To adequately address this issue, we must resolve certain other questions, including: Do standard criminal procedure laws apply? Where are the suspects being held—in or outside of the United States? What is their citizenship status? Do they qualify as prisoners of war?[12] 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?[13] What about psychological pressure? What is the consequence of violating the rights of the detainee/prisoner? What international obligations apply?[14]

> saving information). And once you've established the principle, to paraphrase George Bernard Shaw, all that's left to haggle about is the price. In the case of torture, that means that the argument is not *whether* torture is ever permissible, but *when*—i.e., under what obviously stringent circumstances: how big, how imminent, how preventable the ticking time bomb.

Id.

12. Torture is illegal, regardless of whether or not a particular captive qualifies as a "prisoner of war" under the Geneva Conventions, but coercive interrogation methods are not necessarily "torture." The law leaves substantial room for the use of these tactics by both the military and the CIA. David B. Rivkin, Jr. & Lee A. Casey, *The McCain Amendment Is Flawed,* WALL ST. J., Dec. 10, 2005, at A11 (arguing that by equating stressful interrogations with torture critics have "wrongly painted the Bush administration's policies as illegal").

13. In the press and in academic discussions it is common to distinguish between "torture," in which physical assaults on the body of the victim result in excruciating pain, and the category of "torture lite" or "stress and duress" techniques, which include depriving subjects of food, sleep, light, or water, subjecting them to loud noises or bright lights, shackling them in painful positions, and depriving them of medical attention. Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187, 188 n.3 (2005). The leading international judicial decision relates to Britain's use of five stress methods against the IRA, including "wall standing," hooding, sleep deprivation, reduced rations, and constant loud noise. The court found that this was not torture, but did constitute cruel and inhuman treatment when used in combination. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 26–27 (1978).

The infamous Bybee Memo of August 1, 2002, defined physical torture as the infliction of "excruciating and agonizing physical . . . pain" that is "equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *available at* 2002 OLC LEXIS 19. This definition was repudiated in a memorandum of December 30, 2004. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen., Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm.

14. *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); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

Many of these questions go beyond the scope of this Article, but the rights of terrorist suspects and the potential applicability of *Miranda* is much more than a hypothetical question. Governmental sources, academic commentators, and the media have all recently devoted a great deal of attention to these subjects.[15]

An American citizen arrested within the United States would certainly have the right not to incriminate himself. A foreign national arrested outside of the U.S. would presumably not be protected.[16] Other scenarios present more difficult issues.[17] 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.[18] 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.

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15. *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); 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); Robert L. Bartley, *A "*Miranda*" Warning for Saddam?*, WALL ST. J., July 14, 2003, at A11, *available at* http://www.opinionjournal.com/columnists/rbartley/?id=110003743; Andrew C. McCarthy, *McCain &* Miranda*: "Cruel, Inhuman and Degrading" May Prove More Dangerous than Meets the Eye*, NATIONAL REVIEW ONLINE, Dec. 15, 2005, http://search.nationalreview.com/ (search using search term "Prove More Dangerous," follow "McCain & *Miranda*" hyperlink).

16. *But see* United States v. Bin Laden, 126 F. Supp. 2d 264, 270–71 (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, saying: "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."). As the United States continues to fight the war against terrorism 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.

17. The *Bin Laden* court said, "The Government seems to concede the general applicability of the Fourth Amendment to American citizens abroad . . . ." *Id.* at 270.

18. 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, as opposed to the United States. Godsey, *supra* note 15, at 1708.

II. THE LAW OF SELF-INCRIMINATION

The history of the privilege against self-incrimination in Great Britain extends back more than 400 years,[19] and scholars have long debated both its merits and its defects.[20] In the days of the Star Chamber, procedures such as the rack and other instruments of torture were often used to obtain confessions.[21] The practice of using harsh tactics to compel an accused to speak against himself gradually became such a problem that courts ultimately prohibited all parties, including criminal defendants, from testifying as witnesses at their trials.[22]

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19. *See* GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 42–43 (3d ed. 1963) (describing 1568 Court of Common Pleas' release of defendant imprisoned for not answering judge's questions).

20. *See, e.g.*, *id.* at 48–57 (summarizing criticism of privilege by Jeremy Bentham); 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 229–41 (photo. reprint 1978) (1827) (criticizing 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).

21. *See* WILLIAMS, *supra* note 19, at 38–40 (describing development of privilege over hundreds of years). Some historians date the beginning of the concept of a privilege to 1637, with the trial of John Lilburn, a Star Chamber case. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637); *see* Miranda v. Arizona, 384 U.S. 436, 459 (1966) (identifying *Lilburn* as a critical historical event in development of privilege). Parliament abolished the Star Chamber after this trial. *See Miranda,* 384 U.S. at 459 (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 n.27 (noting that some commentators find analogous principles in the Bible).

22. Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 485–90 (1939). *See* WILLIAMS, *supra* note 19, at 43 (describing procedures regarding defendant as witness in 1700s). As for torture creating a "problem," consider:

> Torture is not always to be trusted, nor is it always to be disbelieved: it is a delicate, dangerous and deceptive thing. For many persons have such strength of body and soul that they heed pain very little, so that there is no means of obtaining the truth from them; while others are so susceptible to pain that they will tell any lie rather than suffer it.

James Ross, *A History of Torture*, *in* TORTURE 3, 6 (Kenneth Roth & Minky Worden eds., 2005) (quoting THE DIGEST OF JUSTINIAN, bk. 48, ch. 18, § 1).

> Those wretched women, whose minds have already been disturbed by the delusions and arts of the devil and are now upset by frequent torture, . . . and constantly dragged out to undergo atrocious torment until they would gladly exchange at any moment this most bitter existence for death, are willing to confess whatever crimes are suggested to them rather than be thrust back into their hideous dungeon among recurring torture.

Id. at 11–12 (quoting 2 HENRY CHARLES LEA, MATERIALS TOWARD A HISTORY OF WITCHCRAFT 524–25 (Arthur C. Howland ed., Thomas Yoseloff 1957) (1939)).

A complete ban on all testimony from parties was eventually recognized as an obstacle in the pursuit of truth, and the prohibition was lifted.[23] Criminal defendants were permitted to testify, but they also had the right not to testify.[24] Judges, however, could comment on a defendant's failure to testify.[25]

Following English common law, early American courts permitted the introduction of confessions without restriction, even if law enforcement officials had abridged the rights of those being interrogated.[26] The key issue

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23. The House of Commons passed the Criminal Evidence Act of 1898. *See* WILLIAMS, *supra* note 19, 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 competency of witnesses).

24. *See* Criminal Evidence Act § 1(a) (stating that the charged person "shall be a competent witness," but "shall [only] be called . . . upon his own application").

25. *See* WILLIAMS, *supra* note 19, at 59–63. In addition, once a defendant elected to testify, the Act compelled him to answer incriminating questions. *Id.*

26. LAFAVE & ISRAEL, *supra* note 5, at 294. Of course, torture was prohibited by the Eighth Amendment to the Constitution. *See* Estelle v. Gamble, 429 U.S. 97, 102 (1976) ("[T]he primary concern of the drafters was to proscribe 'torture[s]' and other 'barbar[ous]' methods of punishment."); Gregg v. Georgia, 428 U.S. 153, 169 (1976) (tracing the ban on cruel and unusual punishment to the English Bill of Rights of 1689, which prohibited punishments "unauthorized by statute and beyond the jurisdiction of the sentencing court"). This, however, applies only to actions that constitute "punishment." *See* County of Sacramento v. Lewis, 523 U.S. 833, 852–53 (1998). *See generally* Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299 (1990).

The Lieber Code, drafted by German-American political philosopher Francis Lieber for Abraham Lincoln, was promulgated to the Union forces on April 24, 1863. It provides, inter alia:

> Article 16: Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy . . . .
>
> . . . .
>
> Article 56: A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.
>
> . . . .
>
> Article 76: Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

Francis Lieber, General Orders No. 100 (Apr. 24, 1863), *reprinted in* RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 48, 56, 59 (1983).

was whether the confession was *reliable*.[27] Too often, forcibly extracted confessions were given by the suspects solely to stop the interrogation.[28] This focus on reliability dominated American confession law well into the twentieth century.[29]

In the 1944 case *Ashcraft v. Tennessee*, the Supreme Court discussed interrogation methods known as the "third degree."[30] These techniques were used to obtain confessions without brutal force, but with things like powerful lights, persistent questioning over numerous hours, and deprivation of sleep.[31] The Court held that where the manner of interrogation was inherently coercive, the confession would be inadmissible regardless of reliability.[32] Moreover, if impermissible methods were used, a confession would be inadmissible regardless of the impact that those methods had or did not have on that particular defendant.[33]

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27. LAFAVE & ISRAEL, *supra* note 5, at 294. The history of this approach extends back to ancient Rome. "Torture had been common to the late Roman Empire. Its legitimacy was denied by Christendom, and it was slowly abolished . . . ." ROUSAS JOHN RUSHDOONY, THE INTENT OF THE LAW 120 (1999). *See also* Ross, *supra* note 22, at 6 ("Instead of questioning the method, the [Romans] surrounded it with a jurisprudence that was designed to give greater assurance to its reliability, a jurisprudence that is admirable in its scepticism and unsettling in its logic." (quoting EDWARD PETERS, TORTURE 35 (expanded ed., Univ. of Pa. Press 1996) (1985))).

28. Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it. . . . [Actually, however, t]hose under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are equally ready to make false charges against others, in the hope of being sooner released from torture.

Ross, *supra* note 22, at 5 (quoting ARISTOTLE, RHETORIC §§ 1376b–1377a (W. Rhys Roberts trans., 1954) (350 B.C.E.)). 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) ("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 (1998) (arguing that confessions are much more common).

29. *See* 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 8, at 218–19.

30. 322 U.S. 143, 150 n.5 (1944).

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

32. Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949) (stating 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).

33. 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,

Of course, virtually all confessions are "involuntary" to some extent.[34] 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 art."[35] 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."[36] Nevertheless, the voluntariness rule still exists, though it is often overshadowed by *Miranda*.[37]

In the 1950s, the Supreme Court established the so-called *McNabb-Mallory* rule.[38] Based on a federal statute[39] and the Federal Rules of Criminal Procedure,[40] 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

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165 (1986) ("[M]ental condition is surely relevant to an individual's susceptibility to police coercion . . . .").

34. "Although confession may be good for the soul, it is lousy for the defense. Thus, in a typical case, to obtain statements from unwilling suspects, officers themselves must employ some form of deception." Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 154 (1984) (footnote omitted). *See also* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 8–64 (2000) (discussing some of the deep-seated psychological and cultural reasons why suspects choose to speak to the police and confess); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1828–29 (1987) (discussing a suspect's "almost irresistible impulse to respond to . . . accusations"); Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243, 254–55 (2004) (listing reasons why suspects feel compelled to confess).

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

36. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2011–12 (1998).

37. In *Connelly*, 479 U.S. 157, a man heard voices that commanded him to do things. One of those things was to make a confession. *Id.* at 174–75 (Brennan, J., dissenting). Lower courts, based on testimony from psychologists, concluded that this was not voluntary and therefore was inadmissible. *Id.* at 162 (majority opinion). 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 166–67.

38. *See* McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

39. 18 U.S.C. § 595 (1940) (current version at FED. R. CRIM. P. 5).

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

prosecution. The rule was never constitutionally required, and it was eventually supplanted by *Miranda*.[41]

In the 1960s, the Warren Court dramatically reshaped the way society dealt with criminals and criminal suspects.[42] Prior to that time, protections afforded defendants in state criminal proceedings, where most criminal cases are tried, were often limited. The Bill of Rights applied only to the federal government, 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.[43] 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.[44] 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;[45] the prohibition against cruel and unusual punishment;[46] the right to assistance of counsel in felony cases;[47] the privilege against self-incrimination;[48] the right to confront opposing witnesses;[49] the right to a speedy trial;[50] the right to compel defense witnesses to appear at trial;[51] the right to a jury trial;[52] and protection against double jeopardy.[53] In 1972, the death penalty was declared

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41. The *Miranda* opinion briefly notes both the history of the "third degree" in America and the danger of *false* confessions. It described the modern interrogation process as "psychologically rather than physically oriented." Miranda v. Arizona, 384 U.S. 436, 447–48 (1966).

42. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004); BUREAU OF NATIONAL AFFAIRS, THE CRIMINAL LAW REVOLUTION 1960–1968 (1968); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995). For recent articles reflecting on the criminal justice decisions of the Warren Court, see Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 1 (2005).

43. *See* Palko v. Connecticut, 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

44. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

45. *Id.* at 655.

46. Robinson v. California, 370 U.S. 660, 666–67 (1962).

47. Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963).

48. Malloy v. Hogan, 378 U.S. 1, 8 (1964).

49. Pointer v. Texas, 380 U.S. 400, 407–08 (1965).

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

51. Washington v. Texas, 388 U.S. 14, 22 (1967).

52. Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

53. Benton v. Maryland, 395 U.S. 784, 795–96 (1969).

unconstitutional as it was then applied,[54] and in 1973, states were prohibited from outlawing abortions in the early stages of pregnancy.[55]

Regarding interrogations and confessions, the Supreme Court first adopted a rule based upon the Sixth Amendment. *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.[56] The following month, in *Escobedo v. Illinois*, the Court created the "focus" test, enforcing a right to counsel at the point when an investigation focuses on the accused with the purpose of eliciting a confession.[57] A year later, the Court issued the now-familiar *Miranda* rules.[58]

Miranda's demand that suspects be advised of their right to remain silent and their right to have an attorney present during questioning, combined with the exclusion of statements taken in violation of those rights, caused a shift in the landscape of criminal procedure.[59] The voluntariness rule remained in place, as did *Massiah*'s prohibition on interfering with a suspect's right to counsel.[60] *Miranda*, however, required

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54. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam). *See generally* Ronald J. Rychlak, *Defense Counsel and the Death Penalty: An Obligation to Oppose the Theory Behind the Punishment?*, 42 BRANDEIS L.J. 371 (2004).

55. Roe v. Wade, 410 U.S. 113, 164 (1973). *See* Ronald J. Rychlak, *Abortion, Thinking Americans, and Judicial Politics*, 14 U. FAC. FOR LIFE: LIFE & LEARNING CONF. PROC. 77 (2004), *available at* http://www.uffl.org/Vol14/rychlak-04.pdf.

56. 377 U.S. 201, 206 (1964).

57. 378 U.S. 478, 491–92 (1964).

58. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

Miranda v. Arizona, 384 U.S. 436, 467 (1966).

59. *See* Roxane J. Perruso, *And Then There Were Three: Colorado's New Death Penalty Sentencing Statute*, 68 U. COLO. L. REV. 189, 190 (1997) (explaining that within two years of *Furman*, twenty-nine states had enacted new death penalty statutes).

60. The *Massiah* test remains viable, but *Escobedo* does not. *See* Minnesota v. Murphy, 465 U.S. 420, 440 (1984); Beckwith v. United States, 425 U.S. 341, 347 (1976). Thus, the government can deliberately elicit information after a suspect has become the focus of the investigation, but prior to the start of formal proceedings. In *Maine v. Moulton*, 474 U.S. 159, 163–68 (1985), for instance, police secretly recorded meetings between the defendant and his codefendant, who was cooperating with the

that police inform suspects about their legal rights. The practical effect of *Miranda* was that suspects who had confessed to crimes were occasionally set free.[61] For that reason, it was a very controversial decision.[62]

III. SELF-INCRIMINATION IN THE TERRORISM CONTEXT

Even if some interrogators are able to use *Miranda* to help them obtain statements, the rules are certainly designed to help suspects invoke their right not to incriminate themselves.[63] If those rules are serving their intended purpose, they are making 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. The question is whether the same concerns that justify protection against self-incrimination in domestic criminal cases are applicable when it comes to the war on international terrorism. The two primary concerns are: false testimony elicited during interrogation, and the related issue of brutal

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police. The conversations related to crimes that had already been charged and other crimes where there were no charges. The Court held that conversations relating to pending charges had to be excluded, but conversations relating to other criminal activity did not have to be excluded. *Id.* at 180. Similarly, in *McNeil v. Wisconsin*, 501 U.S. 171, 175–76 (1991), the Court found statements were admissible where they related only to criminal activity not yet charged and were gained from a person in custody who had invoked his right to an attorney.

61. Within two years of the *Miranda* decision, Congress tried to change the legal landscape. Taking heed of Justice John Harlan's dissenting opinion that the "social costs of crime are too great to call the new [*Miranda*] rules anything but a hazardous experimentation," 384 U.S. at 517 (Harlan, J., dissenting), Congress enacted 18 U.S.C. § 3501, which said: "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 . . . ." Congress left no doubt that the purpose of § 3501 was to reverse the holding in *Miranda*. The statute provided that, when 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. 18 U.S.C. § 3501(b)(3) (1968). The absence of such warnings, however, would not preclude admissibility of an otherwise voluntary confession. *Id.* § 3501(b)(5). This section was ruled unconstitutional in *United States v. Dickerson*, 530 U.S. 428, 442–44 (2000).

62. The dynamics of this period of activity for the Supreme Court must be placed into context. The state criminal laws had been established by the political process. In other words, the situation as it was before these cases reflected the will of the majority of persons living in any given state. To much of the public, the Warren Court reforms meant that criminals were being set free by the courts, even when guilt was not in question. Since most of these issues were held to be required by the Constitution, however, state political action could not change the law. As to the death penalty, however, the Supreme Court's 1972 decision left open the possibility of applying it in a constitutional manner. *See* Furman v. Georgia, 408 U.S. 238, 310–11 (1972) (White, J., concurring). By 1974, twenty-nine states had acted to restore the death penalty. Perruso, *supra* note 59, at 190.

63. SIMON, *supra* note 35, at 197–98.

tactics being used by police authorities in order to elicit incriminating statements.[64]

A. Concern about False Confessions and Bad Information

If suspects are forced to speak, investigators might get false confessions or other bad information.[65] Consider the case of *Brown v. Mississippi*, in which the defendant's conviction was based solely on a confession induced by beatings.[66] He had been hanged twice by the local deputy and other men—the marks on neck were still visible at trial—then whipped.[67] 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 in every detail that the deputy suggested.[68] The defendant's story, in fact, changed several times to fit the facts as they were explained to him.[69] The confession was admitted at trial, and the jury convicted and sentenced him to death.[70] The U.S. Supreme Court held that this violated the

64. 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 and 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?

Letter from Pope St. Nicholas I to Boris, Bulgarian Prince (866), *reprinted in* Brian W. Harrison, *The Church and Torture*, THIS ROCK, Dec. 2006, at 23, 27.

65. *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); 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.

66. 297 U.S. 278 (1936).

67. *Id.* at 281.

68. *Id.* at 282.

69. *Id.* at 282.

70. *Id.* at 279.

Fourteenth Amendment.[71] In fact, it called the Mississippi Supreme Court decision upholding the conviction a denial of due process in and of itself.[72]

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 adequately serves neither the purpose of criminal justice, nor the nation's fight against terrorism.[73] Moreover, not only physical abuse elicits false confessions and bad information. Mental duress can also lead to false confessions.

The case of William N. Oatis is an interesting example of mental pressure leading to a false confession.[74] In 1951, Oatis, an American citizen, was taken into Czech custody on charges of espionage while working as bureau chief for the Associated Press in Prague.[75] He was innocent, but he signed a false confession after being interrogated for six days.[76] Oatis described how he felt after having been kept awake for over forty-two straight hours in an article for *Life* magazine:

> The room was whirling. I could not seem to make my eyes—or my brain—focus. I wanted time to think. I knew that this was a great and perhaps fatal step: if I signed, I would be confessing to something I had not done. I wanted to consider what I might be doing to myself by signing this document—and what I might be doing by refusing to sign it. But there was something else I wanted more. That was sleep. I had been awake 42 hours. Through that time, almost without letup, I had been questioned, browbeaten, and berated. I was limp with fatigue. My eyes kept falling shut, my mind kept blanking out. My future might lie in the balance, but the future must take care of itself. Tomorrow was another day. Tonight was what bore me down. I must end it somehow. There seemed only one way to do that, and that was to sign the confession. So I signed it. The 42 hours had finished me. I had gone to embassy people for help in my unofficial reporting, a procedure followed by journalists everywhere, but now I had confessed the opposite. I had signed a paper saying I went to the embassy to deliver information rather than to obtain it. I had not chosen to abandon the truth—the choice had been made for me . . . .[77]

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71. *Id.* at 287.
72. *Id.* at 285–86.
73. Nat Hentoff, *Prisons of Darkness*: *CIA Leads U.S. in 'Reaching for the Low Moral Ground' in the War Against Terrorism*, THE VILLAGE VOICE, Dec. 2, 2005, at 26, *available at* http://www.villagevoice.com/news/0549,hentoff,70638,6.html.
74. Rayner Pike, AP Reporter William Oatis Dies, Sept. 16, 1997, http://www.oatis.com/memorial/obit.html ("On the first day I admitted that I had done unofficial reporting, which I had; within three days I confessed that this was espionage, which—by any Western standard—it was not; and within seven days I confessed that I had spied for the U.S. government—which was a lie.").
75. *Id.*
76. *Id.*
77. Human Rights Watch, Descriptions of Techniques Allegedly Authorized by the CIA, http://hrw.org/english/docs/2005/11/21/usdom12071.htm [hereinafter Human Rights Watch, Descriptions] (last visited Sept. 13, 2007); Human Rights Watch, CIA

Obviously, false confessions are a concern for police or other intelligence-gathering authorities.[78] The right not to incriminate oneself helps protect against the danger of possible misinformation.[79]

False confessions obtained in criminal cases have often been driven by animus based on factors such as race, politics, the desire of police authorities to "close" a case, or other personal interests.[80] Such factors *could* impact a terror-related interrogation, but the risk is significantly lower, in part because investigators in one context would necessarily possess different goals than investigators in the other. In regular criminal investigations, the goal is to obtain a conviction of the suspect. Thus, the statement is valuable to the prosecution regardless of whether it is accurate.

Interrogators in the terrorism context, however, are seeking information, not trying to get a conviction. They seem to think that pressure—physical or nonphysical—is more beneficial than not, and they are in the best position to evaluate the risk of bad information from aggressive interrogation. Interrogators know the risks of false confessions, and yet, in every society, they continually return to forceful methods of interrogation.[81] Those outside of the terrorism investigation community are not close enough to the action to successfully prove that the risk of false confessions is sufficiently serious so as to justify providing terrorist suspects with the right not to incriminate themselves.[82] Accordingly, and without meaning to condone overly aggressive interrogation, much less torture, this "potentially

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Whitewashing Torture: Statements by Goss Contradict U.S. Law and Practice, http://hrw.org/english/docs/2005/11/21/usdom12069.htm (last visited Sept. 13, 2007).

78. *See* Leo & Ofshe, *supra* note 28, at 429.

79. *See also* Ross, *supra* note 22, at 5.

80. *See, e.g.*, Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 131–32 (2006) (exploring the impact of race on interrogation).

81. Levinson, *supra* note 65, at 2030. "The sad fact is that, for much of history, actual torture was a regular part of the judicial processes of virtually every human society—and not because it was ineffective. This debate should be framed in terms of policy and morality, not on false claims of futility." Rivkin & Casey, *supra* note 12, at A11. *See also infra* notes 86–88 and accompanying text (forceful techniques more necessary in terror-related cases).

82. *Compare* Cassell, *supra* note 28, at 527–29, *with* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557, 558 (1998) ("Not only is Cassell's thesis that '*Miranda* affirmatively harms the innocent' unsupported by any evidence, it also flies in the face of reason.").

bad information" argument is an insufficient justification for the right not to incriminate oneself, at least in a terrorism-related situation.[83] The argument certainly does not justify the *Miranda* rule being applied in such a context.

B. The "Slippery Slope" Argument

Another argument in support of the right not to incriminate oneself is that without such a right, police officers might be tempted to coerce suspects into making statements, perhaps sliding into overly aggressive interrogation or even torture.[84] The concern here is that "if torture is condoned in the extreme case of the known terrorist who has certainly planted the ticking time-bomb, security officers will come to believe that they hear bombs ticking everywhere, and will use torture against people merely suspected of posing a security threat."[85]

This may be a particularly serious threat in the terrorism context.[86] When it comes to routine criminal investigations, many authorities have concluded that harsh practices associated with "the third degree" are less effective in obtaining truthful statements than psychologically oriented

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83. *See, e.g.*, Michael Ignatieff, *Moral Prohibition at a Price*, *in* TORTURE, *supra* note 22, at 18, 25–26. *See also supra* note 81 (quoting Rivkin & Casey, *supra* note 12, at A11).

84. *See generally* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

85. Michael C. Dorf, *Renouncing Torture*, *in* THE TORTURE DEBATE IN AMERICA 247, 250 (Karen J. Greenberg ed., 2006) ("Only by prohibiting torture under all circumstances, such laws assume, can we prevent an extremely limited authorization, for torture in extreme circumstances, from becoming a license for routine torture."). *See also* Krauthammer, *supra* note 9.

86. Of course, the first question is to reach a consensus on the meaning of "torture." The practice lacks a clear definition in international agreements and in American law. *See* Kreimer, *supra* note 14, at 279–81 & n.9. 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 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 applied during interrogation, ranging from an uncomfortable chair and warm lights to extreme physical abuse, and perhaps even worse. Moreover, there are at least four different reasons why torture might be used: as punishment, for the enjoyment of the person inflicting the torture, to extract a confession of criminal activity, and to obtain information so as to prevent greater harm—the "ticking bomb" scenario. According to Father Brian Harrison, O.S., 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. Harrison, *supra* note 64, at 27. *See also* Krauthammer, *supra* note 9 (arguing along similar lines).

techniques designed to reduce the suspect's resistance in typical criminal investigation.[87] In terror-related situations, however, the evidence suggests that more civil interrogation tactics are not as successful.[88] Consider:

> As Posner and others have tartly pointed out, if torture and coercion were both as useless as critics pretend, why is there so much of it going on? While some abuse and outright torture can be attributed to the sadism of individuals, poor supervision, and so on, it must be the case that other acts of torture occur because interrogators believe, in good faith, that torture is the only way to extract information in a timely fashion. It must also be the case that if experienced interrogators come to this conclusion, they do so on the basis of their experience. The argument that torture and coercion do not work is contradicted by the dire frequency with which both practices occur.[89]

Indeed, the events of September 11, 2001, have caused serious scholars to debate the previously unthinkable prospect of legalized torture.[90]

The Supreme Court has defended the Fifth Amendment right to not incriminate oneself as a solution to the "cruel trilemma" of self-incrimination, perjury, or contempt that faces a defendant who is required to offer testimony in his or her own case.[91] At a fundamental level, this is a moral decision, rather than a pragmatic one.[92] It does not follow, however, that

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87. *See* Leo & Ofshe, *supra* note 28, 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.").

88. YOO, *supra* note 8, at 189.

89. Ignatieff, *supra* note 83, at 25–26.

90. *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) (suggesting the creation of a warrant for torture); Posner, *supra* note 86; 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; *Dershowitz: Torture Could Be Justified*, CNN.COM/LAW CENTER, Mar. 4, 2003, http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/ (Harvard Law Professor Alan Dershowitz discussing the possibility). Human Rights Watch put together a list of forms of torture that the CIA allegedly has authorized. Human Rights Watch, Descriptions, *supra* note 77.

91. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). In fact, it is not clear that the trilemma is as cruel as some would make it. As Justice Scalia has argued, "This 'trilemma' is wholly of the guilty suspect's own making, of course. An innocent person will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a 'lemma' . . .)." Brogan v. United States, 522 U.S. 398, 404 (1998) (quoting Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016 (1996)).

92. 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. *See generally* Rychlak, *supra* note 55.

moral concerns would justify the same rules in a terror-related scenario.[93]

Counterterrorism is different from regular law enforcement in ways that may make some form of aggressive interrogation justifiable, if not necessary. Normal law enforcement is "designed to punish and deter, rather than prevent, criminal conduct."[94] The goal of counterterrorism units, in contrast, is to "discover and pre-empt future suicide attacks before they take place."[95] At the same time, few, if any, citizens want to give interrogators full discretion to do whatever they wish.[96] Elimination of all rules and the threat of sanctions for the interrogators would open the possibility of widespread abuse.

> The Christian view of human nature and sin suggests that we are fallible creatures and thus not good at empire. We cannot be trusted with domination, becoming too easily corrupted by its power and too often succumbing to repression in defending it. Therefore, we should not simply be shocked at the evil we have seen in the horrible prison photos, but also sobered and saddened by that same potential in ourselves.[97]

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93. *See* National Council of Churches USA & Church World Service General Assembly, *A Statement on the Disavowal of Torture*, Nov. 2005, http://www.ncccusa.org/about/policies.html ("Torture, regardless of circumstance, humiliates and debases torturer and tortured alike."). 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 para. 2297, at 553 (Libreria Editrice Vaticana trans., 2d ed. 2000). 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. para. 2298, at 553.

94. David B. Rivkin, Jr. & Lee A. Casey, *Claims and Counterclaims*, WALL ST. J., Oct. 5, 2006, at A20.

95. *Id.*

96. Even when in extremis situations may occur, one would expect that, in those cases, governments would not seek to rationalize these actions or justify them, but, in following Henry David Thoreau, acknowledge such abhorrent individual practices when done to avoid a greater imminent and certain harm, and submit those who engage in them to the legal consequences for their violations.

M. Cherif Bassiouni, *Great Nations and Torture*, *in* THE TORTURE DEBATE IN AMERICA, *supra* note 85, at 256, 259.

97. Jim Wallis, *The Theology of Torture*, SOJOURNERS MAG., Aug. 2004, at 5, 5.

Waterboarding has already been publicly defended.[98] What about beatings, amputations, or inflicting pain on members of the suspect's family? Obviously, if the controls are completely lifted, it is easy to imagine interrogators going too far.[99] As one commentator has noted, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."[100] Therefore, the "slippery slope" argument for the right not to incriminate oneself *does* apply to the terrorism scenario. Some controls must be kept in place in these situations.

IV. CONTROLS ON TERROR-RELATED INTERROGATIONS

Even though there is *some* reason to place restrictions on interrogation, even in the terrorism scenario, *Miranda*-style protections are not

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98. On September 20, 2006, television host Bill O'Reilly had Brian Ross of ABC News on his show. Ross had just done research into aggressive interrogation. He found that fourteen detainees with very important information about future terror plots broke down and talked after being subjected to waterboarding. He reported that the toughest suspect broke down in two and a half minutes but that most only lasted for thirty seconds. Ross admitted that it probably could kill someone, but the key aspect of waterboarding is that it makes the subject feel like he is drowning, triggering an uncontrollable gag reflex. *See* Harrison, *supra* note 64, at 24. For a report critical of O'Reilly's take on this issue, see *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.

99. *See supra* note 85 and accompanying text; *see also* Krauthammer, *supra* note 9.

100. Ross, *supra* note 22, at 16 (quoting 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 442 n.1 (1883)). Consider also:

> Unlike a surgical procedure or a research methodology, torture is not easily susceptible to precision and restraint in application. Its internal dynamic makes it prone to ever wider use. Victims become inured to pain, inviting ever harsher and more imaginative measures, and no interrogator wants to "soften up" a subject just to have the next guy on the shift get the payoff when the prisoner cracks. The very commission of brutality engages the emotions, impelling the torturer to resolve ambivalence toward seeing the victim as ever more deserving of harsh treatment, as we see in the taunts of female guards toward prisoners who urinated on themselves from fear of guard dogs. Torture, like power, appears to be habit-forming. The rationale of torture in an age of terror—averting imminent and massive harm to civilians by torturing the right source—easily slides to cover ever more remote sources and more hypothetical harms. It is difficult to torture just a little.

Dinah Pokempner, *Command Responsibility for Torture*, *in* TORTURE, *supra* note 22, at 158, 167.

appropriate in such a context.[101] As one Congressman said, "There's not a single member of this Congress that believes that *Miranda* warnings should be given to terrorists."[102]

First, it is not even clear that *Miranda* has been successful in meeting its goal of protecting the right not to incriminate oneself in a general criminal context. For instance, we know that there are some officers who would lie, denying brutal or coercive conduct that resulted in a statement from the suspect. Those same officers are likely to testify falsely that they gave appropriate *Miranda* warnings.[103] Even more problematic, a suspect who made an incriminating statement can claim that *Miranda* warnings were not given, raising a difficult issue of fact. As Justice Douglas stated in a pre-*Miranda* case, the "trial on the issue of coercion is seldom helpful," with police officers "usually testify[ing] one way, the accused another."[104] *Miranda* does little to change this problem. It merely creates a fact question, and the prosecution has the burden of proof to show that the suspect understood his or her rights before waiving them.

Miranda is, essentially, an exclusionary rule. Statements taken in violation of *Miranda* 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.[105]

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101. The criminal justice system is fundamentally reactive. It can punish individual perpetrators, but it can prevent future crimes only through deterrence. Deterrence, of course, works well enough on the domestic level, in a society where most individuals are law-abiding to begin with, and others fear the consequences of a criminal conviction. It does not work at all where the bad actors, or at least a substantial number of them, are already willing to die in order to kill.

Lee A. Casey & David B. Rivkin, Jr., *How to Treat a Captured Terrorist: Getting to the Heart of an Important Question*, NAT'L REV., July 4, 2005, at 20, 20.

102. Anne Plummer Flaherty, *Tribunals for Detainees Backed*, DESERET MORNING NEWS (Salt Lake City), July 13, 2006, at A2 (quoting Rep. G.K. Butterfield (D-N.C.), a retired judge who served on North Carolina's Supreme Court).

103. Moreover:

[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.

Cassell, *supra* note 28, at 526–27.

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

105. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 657 (1984) (recognizing an exception for questioning prompted by concern for public safety); Harris v. New York, 401 U. S. 222, 225 (1971); Bowen v. State, 607 So. 2d 1159, 1162 (Miss. 1992) (holding

There is also a certain lack of logic in a rule that assumes that any statement taken prior to the receipt of warnings must be coerced, yet does not assume that waivers of the right to remain silent or to have an attorney present for questioning have similarly been coerced.[106] Some commentators even believe that the police have learned to work with 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.[107]

Miranda's protections also come with a cost in terms of lost convictions.[108] Scholars have attempted to obtain empirical evidence regarding confessions and the impact of *Miranda*, but difficulty in gathering and evaluating the evidence has led to inconclusive results.[109] Some commentators argue that *Miranda*'s costs, in terms of lost convictions, are too great to justify the benefits it supplies; they claim that "thousands of violent criminals

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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).

106. As pointed out by Justice White:

> [I]f the defendant may not answer . . . 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).

107. Consider the following passage:

> Yet more than two decades after the landmark *Escobedo* and *Miranda* decisions, the rest of the world remains strangely willing to place itself at risk. 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.

SIMON, *supra* note 35, at 199.

108. This, in and of itself, could be considered a moral violation of duty by the government. Consider:

> The murderer, as the man guilty of the most extreme form of physical coercion, must *without exception* be put to death. But, it must be noted, *coercion against evildoers is the required and inescapable duty of the civil authority*. God requires coercion in the suppression of lawlessness. Without godly coercion, the world is surrendered into the hands of ungodly coercion. No man wants a hose of water turned against his living room, but, in case of fire, that water is a necessity and a welcome help. Similarly, coercion is a God-ordained necessity to enable man to cope with outbreaks of lawlessness.

ROUSAS JOHN RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 292 (3d prtg. 1976).

109. LAFAVE & ISRAEL, *supra* note 5, at 291. *See* Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327, 332 (1997). As one British court noted, the right not to testify elicits "strong but unfocused" feelings. R v. Dir. of Serious Fraud Office, [1993] A.C. 1, 26–33 (H.L.) (appeal taken from Q.B.) (Lord Mustill).

escape justice each year as a direct result of *Miranda*."[110] 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.[111]

Others commentators argue that the cost of *Miranda* is minimal and the significant benefits include protection of the innocent and better control over the police.[112]

Whatever the cost may be in the criminal context, terrorism shifts the balance of the 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."[113] Criminal laws have long been written so as to recognize the additional danger associated with joint or group activity. Similarly, the extraordinary danger posed by international terror organizations must be recognized by the law.[114]

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.[115] 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. That does not mean, of course, that any and all tactics are legitimate when an officer is motivated by public safety concerns. Limits must still be set to protect suspects from overly aggressive interrogation. Note, though, that the United States Supreme

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110. United States v. Dickerson, 166 F.3d 667, 687 (4th Cir. 1999) (citing Paul G. Cassell & Richard Fowles, *Handcuffing The Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects On Law Enforcement*, 50 STAN. L. REV. 1055, (1998)), *rev'd*, 530 U.S. 428 (2000).

111. Cassell, *supra* note 28, at 531. "The 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. *Id.* at 525.

112. *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 20, at 348 (describing protection of innocent against wrongful conviction as justification for privilege).

113. YOO, *supra* note 8, at 201.

114. *See* Ambassador Francis X. Taylor, Coordinator for Counterterrorism, U.S. Department of State, Terrorist Threats Against America, Testimony to the Committee on International Relations (Sept. 25, 2001), *available at* http://www.state.gov/s/ct/rls/rm/ 2001/ 5215.htm (discussing the extraordinary danger posed by international terror organizations).

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

Court has concluded that *Miranda* is not the appropriate instrument to protect those suspects.[116]

In a terrorism situation, *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. That does not, however, mean that every investigation tactic can be justified in the terrorism scenario. If aggressive interrogations take place, innocent parties sometimes will be mistaken for legitimate suspects. Likewise, aggressive techniques used to obtain information will not always be justified. In those cases where aggressive techniques are used to obtain information, governmental officials should be subject to proceedings and possible punishment.[117]

Unlike *Miranda*, the approach being advanced here would require that the analysis and evaluation of the interrogation take place after the fact.[118] In a terrorism-related situation, 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. Therefore, a post hoc inquiry is reasonable to assess the response to the nature of the threat, the complexity of the issues involved, and the variety of factual scenarios from one case to the next. Various principles and limitations designed to protect detainees from overly abusive tactics, however, can and should be established.[119] It can be assumed that over time, courts

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116. *Id.*

117. Two issues that require further development include where responsibility should attach and whether low-ranking officials who are ordered to carry out aggressive interrogations should be able to invoke the "Nuremberg defense." *See generally* Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397 (1989).

> German government officials, industrialists, and military leaders, whom the Allies accused of committing international crimes, presented the "original" Nuremberg Defense. These defendants argued that they should not be held personally responsible for their actions because they were not top government officials, they had not formulated policy, they were following superior orders, and that international law did not apply to individuals.

Id. at 413.

118. "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 are beyond their usual expertise." YOO, *supra* note 8, at 201. When it comes to terrorism, the same might be said of legislators and regulators.

119. A thorough examination of potential approaches is beyond the scope of this Article. However, it is not difficult to imagine any number of possible approaches. For example, Israeli law allows authorities to delay a suspect's meeting with counsel for various increments of time, depending on the severity of the charges, the potential for future crime, and the severity of future crime. This approach, of course, brings its own

and administrators will develop guidelines, limitations, and practices designed to protect suspects and detainees.

V. CONCLUSION

There are several risks associated with aggressive interrogation in criminal cases. While the issues change in terrorism-related situations, there are still reasons to provide terror suspects some level of protection from abusive interrogation techniques. The justifiable level of pressure to be applied in any given case cannot be decided with certainty in advance, but interrogators should not be given free reign. That being said, *Miranda* is not the appropriate way to enforce those limitations in the terrorism scenario. Rather, after-the-fact judicial or quasi-judicial investigations should look at all the facts and evaluate the actions of the interrogating authorities in light of what they knew at the time.[120]

After-the-fact judicial or quasi-judicial investigations give government 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 used to protect against abusive interrogation.

In the war on terror, part of the battle is to thwart the enemy, and part of the battle is to maintain moral standards. These goals will sometimes compete with each other. It is therefore important to remember that military actions are fundamentally different from criminal investigations. We can not expect criminal law doctrines to work appropriately in every military situation. We must, however, maintain a basic level of morality in how we carry out government activities, including military operations. This

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potential for abuse, as noted by at least one author. Rinat Kitai, *A Custodial Suspect's Right to the Assistance of Counsel—The Ambivalence of Israeli Law Against the Background of American Law*, 19 BYU J. PUB. L. 205, 220–21, 233–34 (2004). Some authors have argued that further exceptions to *Miranda* should be established. *See* Darmer, *supra* note 15, at 351–53 (arguing that courts should carve out a "foreign interrogation" exception to *Miranda*, in the same manner that *Quarles* carved out a "public safety" exception). Some merely argue that *Miranda* be suspended in terrorism investigations and that subsequent information gathered be barred from any use in trial or tribunal. One is forced to wonder how that particular approach differs from *Miranda*'s normal function of excluding evidence obtained in violation of its requirements. William J. Stuntz, *Local Policing after the Terror*, 111 YALE L. J. 2137, 2186–94 (2002).

120. In this manner, the standard and the investigation would be similar to the one undertaken to assess effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

may be difficult, but it is necessary if we are to battle terrorism, maintain our integrity, and retain our national identity.