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Relearning Lessons of History: Miranda and Counterterrorism

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Umar Farouk Abdulmutallab's attempt to blow up Northwest Flight 253[1] and Umar Faisal Shahzad's attempt to blow up an SUV on New York City's 42nd Street[2] led many to question whether terrorism justifies denying *Miranda* protections to suspected terrorists beyond the public safety exception.[3] As the November

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There has been, over the years, an enormous amount of scholarly literature addressing *Miranda*, its effects, costs, and benefits. In addition, there was significant literature pre-*Miranda* that undoubtedly shaped the Court's thinking, perhaps most importantly that of Chief Justice Warren. My thinking on the *Miranda* issue—its historical basis, its application to terrorism, and its costs and benefits—has been shaped by the following combination of factors: my professional experience as prosecutor and judge in the Israel Defense Forces and the Judge Advocate General Corps; researching (including interviews with U.S. interrogators based in Iraq) for my book, *Constitutional Limits on Coercive Interrogation*; extended conversations and exchanges with Professor Lewis Katz (whose classroom discussions from 1984 regarding *Miranda* serve as the basis for how I teach *Miranda* today); interaction with law enforcement officials; my debate with my good friend and colleague Professor Paul Cassell, who has been the most forceful advocate for denying *Miranda* rights to suspected terrorists; and the extraordinarily rich and thoughtful pre- and post-*Miranda* scholarship from which I enormously benefitted.

Many thanks to Meredith McNett, Information Delivery Services Librarian at S.J. Quinney Law Library, for her invaluable assistance.

1. Richard Sisk et al., *Foiled Terror Plot Aboard Northwest Flight 253 Sparks Strict Scrutiny Rules for Air Passengers*, N.Y. DAILY NEWS (Dec. 26, 2009), http://www.nydailynews.com/news/national/2009/12/26/2009-12-26_foiled_terror_plot_aboard_northwest_flight_253_sparks_strict_security_rules_for_.html.

2. Al Baker & William K. Rashbaum, *Police Find Car Bomb in Times Square*, N.Y. TIMES, May 2, 2010, at A1, *available at* http://www.nytimes.com/2010/05/02/nyregion/02timessquare.html.

3. For public commentary and debate regarding *Miranda* and possible exceptions in the aftermath of terrorist attacks, see Richard M. Esenberg, *You Have the Right to Remain Silent*, MARQ. UNIV. L. SCH. FAC. BLOG (May 12, 2010), http://law.marquette.edu/facultyblog/2010/05/12/you-have-the-right-to-remain-silent/; Orin Kerr, *Legislating* Miranda *Rights for Terrorism Cases?*, VOLOKH CONSPIRACY (May 10, 2010, 2:56 AM), http://volokh.com/2010/05/10/legislating-miranda-rights-for-terrorism-cases; Brian Levin, *Exception to* Miranda *Takes Center Stage in Times Square Plot*, HUFFINGTON POST (May 4, 2010, 3:28 PM), http://www.huffingtonpost.com/brian-levin-jd/exception-to-miranda-take_b_563075.html; Rick Pildes, *Should Congress Codify the Public Safety Exception to* Miranda *for Terrorism Cases?*, BALKINIZATION (May 6, 2010), http://balkin.blogspot.com/2010/05/should-congress-codify-public-safety.html; Michael Stern, *A Final Word on Congress and* Miranda, POINT OF ORD. (May 8, 2010), http://www.d1040331.dotsterhost.com/applications/serendipity/index.php?/archives/

27, 2010 arrest of a naturalized U.S. citizen, Mohamed Osman Mohamud, on suspicion of using a weapon for purposes of causing mass destruction[4] made clear, the list of "triggering events" is constantly evolving.

The argument, in a nutshell, is that extending *Miranda* protections to a recently arrested suspected terrorist would significantly hamper law enforcement's ability to question the individual, thereby endangering the public. In other words, denying *Miranda* protections would both facilitate arrests of additional suspected terrorists and prevent further acts of terrorism.

In *Miranda v. Arizona*, the Court created the "*Miranda* warning."[5] In *New York v. Quarles*,[6] the Court created an exception to *Miranda* according to which public safety justifies an absence of the warning, and therefore statements given to police in context of public safety are admissible in court.

Those advocating "*Miranda* denial" claim that the public safety exception to *Miranda* set forth in *Quarles* is insufficient in the face of terrorism. In the immediate aftermath of Shahzad's terrorist attack, Attorney General Eric Holder inexplicably aided advocates of this claim when he stated on ABC's "This Week":

> The [*Miranda*] system we have in place has proven to be effective. . . . I think we also want to look and determine whether we have the necessary flexibility—whether we have

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222-A-Final-Word-on-Congress-and-Miranda.html; Michael Stern, *Congress, Miranda, and the "Public Safety" Exception*, POINT OF ORD. (May 17, 2010), http://www.d1040331.dotsterhost.com/applications/serendipity/index.php?/archives/219-Congress,-Miranda-and-the-Public-Safety-Exception.html; Dan E. Stigall, *The Public Safety Exception to* Miranda*: A Comparative Analysis*, COMP. L. BLOG (May 7, 2010), http://comparativelawblog.blogspot.com/2010/05/public-safety-exception-to-miranda.html.

4. *Somali-American Accused of Plotting to Bomb Oregon Tree-Lighting Event*, CNN.COM (Nov. 27, 2010, 9:27 PM), http://www.cnn.com/2010/CRIME/11/27/oregon.bomb.plot/index.html.

5. *Miranda* held that police must give criminal suspects in custody, before they are interrogated, a warning informing them of their rights. Miranda v. Arizona, 384 U.S. 436 (1966). Although this warning varies slightly by jurisdiction, the typical warning is:

> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense.

The Miranda Warning, U.S. CONST. ONLINE, http://www.usconstitution.net/miranda.html (last modified Jan. 8, 2010).

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

> a system that deals with situations that agents now confront. . . . We're now dealing with international terrorism. . . . I think we have to give serious consideration to at least modifying that public-safety exception [to the *Miranda* protections]. And that's one of the things that I think we're going to be reaching out to Congress, to come up with a proposal that is both constitutional, but that is also relevant to our times and the threats that we now face.[7]

Whether Attorney General Holder was merely pandering for political purposes or was articulating a new policy is unclear.

Whichever alternative—as my colleague Professor Paul Cassell correctly noted when we debated the subject of this Article—Attorney General Holder provided unexpected "ammunition" to those who believe that *Miranda* protections hamper effective counterterrorism.[8] Professor Cassell was spot-on in emphasizing Attorney General Holder's extraordinary comments. Attorney General Holder manifested a troubling combination of political weakness and fundamental ignorance regarding *Miranda* and interrogations.

Attorney General Holder's words are troubling because they reflect an administration incapable of articulating cohesive, consistent, and coherent homeland security and counterterrorism policies. The examples are disturbing and numerous. They range from the failure to close the detention center in Guantánamo Bay; the aggressive enforcement of an interrogation regime fundamentally distinct from that created by the Bush Administration;[9] the stunning inability to determine the appropriate judicial forum policy for post-9/11 detainees; and the reliance on court-ordered habeas corpus hearings to mask the continued, indefinite detention policy that systematically denies detainees

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7. Nico Pitney, *Eric Holder:* Miranda *Rights Should Be Modified for Terrorism Suspects*, HUFFINGTON POST (May 9, 2010, 9:28 AM), http://www.huffingtonpost.com/2010/05/09/eric-holder-miranda-right_n_569244.html; Charlie Savage, *Holder Backing Law to Restrict* Miranda *Rights*, N.Y. TIMES, May 10, 2010, at A1, *available at* http://www.nytimes.com/2010/05/10/us/politics/10holder.html. For a critical response to the Attorney General's comments, see Letter from Nat'l Ass'n of Criminal Def. Lawyers et al. to Attorney Gen. Eric Holder (May 17, 2010), *available at* http://www.opensocietypolicycenter.org/pub/doc_162/Letter%20to%20AG%20Holder%20re%20Miranda.pdf.

8. Paul Cassell, *Time to Codify a* Miranda *Exception for Terrorists?*, VOLOKH CONSPIRACY (Oct. 21, 2010, 10:27 AM), http://volokh.com/2010/10/21/time-to-codify-a-miranda-exception-for-terrorists/.

9. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html.

their day in court. Attorney General Holder's incomprehensible clumsiness reinforces a belief that, when push comes to shove, protecting individual rights—even for the Obama Administration—unfortunately takes a back seat.[10]

The rapidity with which Attorney General Holder was willing to minimize the rights of terrorists, or more accurately, of individuals merely *suspected* of involvement in terrorism, is deeply disturbing.[11] The emphasis on "suspect" is deliberate; the individual—whether interrogated in the immediate aftermath of arrest or in the station house—is merely an individual suspected of involvement in criminal activity and is deserving of protections.

The Obama Administration's apparent inability, or unwillingness, to clearly articulate the clear and present threat posing an incontrovertible danger to national security raises similar concerns. Attorney General Holder's extraordinary testimony before the House Judiciary Committee, in which he refused to articulate that radical Islam was a motivation for Umar Faisal Shahzad's attempt to blow up an SUV on New York City's 42nd Street, was jaw dropping.[12] It reflected either willful blindness or disturbing ignorance, either of which is troubling.

My deep objection to denying suspected terrorists *Miranda* protections is based on both of these concerns. My first concern is the ready willingness to minimize rights for a loosely defined

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10. *Id.*

11. The lack of media scrutiny regarding Attorney General Holder's position is equally disturbing. It is plausible to assume that the media would have been more vigilant if the pronouncement had been articulated by the Bush Administration's Attorney General, whose policies were justifiably criticized for their extraordinary violations of civil and political rights. Although outside the purview of this Article, the harsh glare of media attention to which Bush Administration policies were rightfully subjected has—unfortunately and disturbingly—been moderated. Media criticism of the Obama Administration reflects discouragement or disappointment—"the greater the expectation, the greater the disappointment"—rather than rigorous, thoughtful analysis of policies implemented and opportunities missed. Just as the media occasionally asks, "Where is Obama?" I suggest that the question, "Where is the media?" is similarly appropriate.

12. KeepAmericaSafeCom, *Eric Holder Refuses to Say "Radical Islam" Before the House Judiciary Committee*, YOUTUBE (May 13, 2010), http://www.youtube.com/watch?v=HOQt_mP6Pgg. Holder's testimony reflects Administration policy with respect to defining threats and terms. *Obama Bans Terms "Islam" and "Jihad" from U.S. Security Document*, HAARETZ.COM (Apr. 7, 2010), http://www.haaretz.com/news/obama-bans-terms-islam-and-jihad-from-u-s-security-document-1.909. I had a similarly disjointed and jarring experience in London when researching my book, *Freedom from Religion: Rights and National Security*, where in a series of meetings with senior British Home Office officials, I was repeatedly assured that "there is no extremism in Islam" and there is "no terrorism in Islam."

category of individuals, in the face of public scrutiny and criticism in the immediate aftermath of a terrorist attack. Second, I am concerned by the *simultaneous* unwillingness to recognize and define a threat meeting objective "clear and present" standards. The Supreme Court has already established a public safety exception to *Miranda*. Expanding the exception is fraught with danger, particularly when the proposal is raised in the immediate aftermath of an act of terrorism. My skepticism about such an exception draws strength from law enforcement officials[13] who have neither advocated nor requested such a measure, suggesting that the existing standard is sufficient for lawful and effective domestic counterterrorism.[14] Simply put, *Quarles*'s public safety exception is sufficient; expansion beyond that is both unwarranted and dangerous.

Unfortunately, American history is replete with examples of the high price innocent individuals have paid for executive branch excess, aided by an acquiescent Congress and docile Supreme Court.[15] This past highlights the extraordinary dangers inherent in an unwarranted expansion of executive power.[16] The past, both near and far alike, provides clear and direct guidance regarding the dangers of creating exceptions in the face of a threat, whether real or imagined. In weighing whether to expand the exception, and thereby to argue that *Quarles*[17] is insufficient, our most poignant guide should be the timeless words of the poet and philosopher George Santayana: "Those who cannot remember the past are condemned to repeat it."[18] In *Miranda*, the Supreme Court penned some of its most important words; *Quarles* articulates an exception to those words.

This Article argues that expanding that exception poses significant risks; any potential benefits do not outweigh the certain costs. Part I details the critically important history underpinning *Miranda* and the fundamental protections it enshrines for individuals before setting forth the foundations of the public safety exception in *Quarles*. Part II analyzes the application of *Miranda*–

13. The reference is to those actively engaged in active law enforcement.

14. *See generally* Fred Medick, *Exporting* Miranda*: Protecting the Right Against Self-Incrimination When U.S. Officers Perform Custodial Interrogations Abroad*, 44 HARV. C.R.-C.L. L. REV. 173 (2009).

15. *See* Korematsu v. United States, 323 U.S. 214 (1944).

16. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *Korematsu*, 323 U.S. 214; *Ex parte* Quirin, 317 U.S. 1 (1942); The Prize Cases, 67 U.S. (2 Black) 635 (1862).

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

18. *George Santayana: Quotes*, SANTAYANA EDITION, http://www.iupui.edu/~santedit/gsantayanaquotes.html (last visited Dec. 5, 2010).

Quarles to terrorism and counterterrorism to demonstrate the dangers of expanding any exceptions to *Miranda* as a response to terrorism. Finally, Part III draws together lessons from the past with a look to the future.

To history we turn.

I. THE WARREN COURT'S CRIMINAL PROCEDURE REVOLUTION

In a series of decisions—*Brown v. Board of Education*,[19] *Gideon v. Wainwright*,[20] *Griswold v. Connecticut*,[21] *Mapp v. Ohio*,[22] and *Miranda v. Arizona*[23]—the Warren Court[24] dramatically expanded civil rights by aggressively using the power of the federal judiciary in a criminal procedure revolution.[25] *Miranda*, the cornerstone of the Warren Court's criminal procedure revolution, has become the symbol for the expansion of civil rights that was, in many ways, the essence of the Warren Court. In keeping with this Article's narrow focus of analyzing the relationship between *Miranda* and terrorism, other significant decisions of the Warren Court's criminal procedure revolution will not be addressed.

A. Miranda*'s Historical Underpinnings*

Commentators have long suggested that a series of cases, in particular the continued extraordinary and unconscionable denial of criminal process rights for African Americans in the Deep

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19. 347 U.S. 483 (1954). The Court held that segregation of school children solely on the basis of race denies African American children equal protection of the law as guaranteed by the Fourteenth Amendment.

20. 372 U.S. 335 (1961). The Court held that under the Sixth Amendment an indigent criminal defendant is entitled to the right to counsel in a state criminal trial.

21. 381 U.S. 479 (1965). The Court held that a constitutional right to privacy exists in marital affairs.

22. 367 U.S. 643 (1961). The Court held that evidence obtained by search and seizure in violation of the Fourth Amendment is inadmissible and vitiates conviction.

23. 384 U.S. 436 (1966).

24. The "Warren Court" refers to the Supreme Court (1953–1969) when Earl Warren served as Chief Justice. *See The Law: The Legacy of the Warren Court*, TIME, July 4, 1969, *available at* http://www.time.com/time/magazine/article/0,9171,840195,00.html.

25. See Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627 (2006), and George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1 (2005), for thoughtful discussion regarding the Warren Court's criminal procedure revolution—which goes beyond the purview of this Article.

South, set the stage for the Court's holding in *Miranda*.[26] As Professor Thomas points out: "[F]rom 1957 to 1963, the Supreme Court reviewed ten state court cases that had upheld convictions based on voluntary confessions. The Court reversed eight of the ten cases, indicating that it was not satisfied with the way the states were applying the voluntariness test."[27]

In an effort to provide guidance to state courts, the Court in *Culombe v. Connecticut* articulated a voluntariness standard based on "philosophy, psychology and law."[28]

Accordingly, the Court's decision in *Miranda* was not out of the blue; after all, police misconduct in interrogations had been alleged in the U.S. for decades and has been a persistent reality for hundreds of years worldwide.[29] Nevertheless, it was not until the late 1800s that the Supreme Court issued its initial ruling regarding the inadmissibility of coerced interrogations. In *Bram v. United States*, the Court held:

> A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.[30]

Thirty years after *Bram*, the Wickersham Commission unflinchingly exposed the *institutionalized* practice of police brutality.[31] President Hoover appointed the Commission primarily

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26. *See* George C. Thomas III, Miranda*: The Crime, the Man, and the Law of Confessions*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 7, 16 (Richard A. Leo & George C. Thomas III eds., 1998) [hereinafter THE MIRANDA DEBATE] (citing Herbert L. Packer, *The Courts, the Police, and the Rest of Us*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 238, 240 (1966)). Packer stated, "What we have seen in the South is the perversion of the criminal process into an instrument of official oppression. . . . Powers of arrest and prosecution have been repeatedly and flagrantly abused in the interest of maintaining an illegal, not to say unconstitutional, social system." Packer, *supra*, at 240.

27. Thomas, *supra* note 26, at 17.

28. 367 U.S. 568, 603–04 (1961); *see also* Thomas, *supra* note 26, at 18.

29. The so-called "rack and screw" methods and other methods of torture have been used (misused and abused) throughout history. Due to the narrow constraints of this Article, the torture-based regime implemented by the Bush Administration in the aftermath of 9/11 will not be addressed.

30. Bram v. United States, 168 U.S. 532, 543 (1897) (quoting 3 WM. OLDNALL RUSSELL ET AL., A TREATISE ON CRIMES AND MISDEMEANORS 478 (6th ed. 1896)) (internal quotation marks omitted).

31. *See generally* UNITED STATES WICKERSHAM COMMISSION RECORDS, 1928–1931: FINDING AID (2003), *available at* http://www.comparativelaw.org/Wickersham.pdf.

for two reasons: the public's increasing worries regarding crime, in particular the Chicago gang wars, and efforts to resolve the debate over Prohibition.[32] Commission members were shocked to discover the degree to which suspects questioned in the police station were subjected to an interrogation method known as the "third degree,"[33] which the Commission defined as "the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions."[34]

The Commission members' discovery that police interrogations violated standards of decency and humanity is of particular importance to this Article. Simply put, state agents consistently violated the rights of those who most deserved protection—the truly vulnerable members of society. This was particularly true with respect to African Americans in the Deep South. Although analogy can create uncertainty, this dark era in American history offers powerful and relevant lessons in discussions regarding exceptions to the rights of vulnerable individuals. The Wickersham Commission directly suggests the extraordinary harm that can result from interrogations devoid of control.

Forty years after *Bram*, and in the aftermath of the Wickersham Commission, the Supreme Court revisited the brutal reality of interrogations conducted by law enforcement primarily, but not exclusively, in the Deep South.[35]

Because history provides important lessons for the present, a brief review of four critical pre-*Miranda* cases illustrates the dangers posed by unregulated excess. Although the Court was criticized for belatedly entering the fray, the reality of these holdings was unmistakable: the Court directly sought to protect the interrogatee by holding that confessions resulting from police brutality were inadmissible.

The cases below are undeniably horrific; their consistent reoccurrence was significantly influenced by state courts. Those who advocate expanding *Quarles* suggest that the existing public

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32. *See* UNIV. PUBL'NS OF AM., RECORDS OF THE WICKERSHAM COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, PART I (1997), *available at* http://www.lexisnexis.com/documents/academic/upa_cis/1965_WickershamComPt1.pdf.

33. See Paul G. Kauper, *Judicial Examination of the Accused: A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1930), *reprinted in* 73 MICH. L. REV. 39 (1974), for an important discussion of the Wickersham Commission and the "third degree."

34. NAT'L COMM'N ON LAW OBSERVANCES & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931).

35. See Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

safety exception does not satisfactorily respond to the contemporary threat terrorism poses.[36] They question whether *Quarles* provides law enforcement with sufficient flexibility in interrogating a suspected terrorist.[37] We shall turn our attention to that very question in due time, but to *truly* understand the significance of creating and implementing additional exceptions, context and history are critical even though the comparison is not prima facie clear.

In *Brown v. Mississippi*, the police arrested an African American man for allegedly murdering a white planter. A mob repeatedly whipped the suspect under the watchful gaze of local law enforcement and the local sheriff until the suspect's confession was in accordance with the specific language the sheriff desired.[38] In excluding the confession because of the brutality used, the Supreme Court applied a "totality of circumstances" test: "There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary . . . ."[39]

In *White v. Texas*, the defendant, an illiterate African American man, was convicted of rape and sentenced to death based on a written confession produced after a series of brutal beatings administered by local law enforcement.[40] The Supreme Court reversed the conviction, holding that "due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death."[41]

In *Ward v. Texas*, the defendant confessed after three days of cumulative mistreatment during which he was driven from county to county, placed in a jail 100 miles from his home, beaten, whipped, and burned by the officer to whom he finally confessed.[42] In overturning the confession, the Court held:

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36. Miranda & *Terror Suspects—Podcast*, FEDERALIST SOC'Y (Feb. 4, 2011), http://www.fed-soc.org/publications/pubid.2089/pub_detail.asp.

37. *Id.*

38. *Brown*, 297 U.S. at 280–82.

39. *Id.* at 283; *see also* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, *in* THE MIRANDA DEBATE, *supra* note 26, at 65, 71. According to Leo, "*Brown* set in motion a revolution in the constitutional jurisprudence of criminal procedure that culminated in the *Miranda* decision thirty years later. Although *Miranda* is the most famous confession case, it was *Brown* that exercised the greatest influence on coercive interrogation practices." Leo, *supra*, at 71.

40. *White*, 310 U.S. at 532–33 (citing Chambers v. Florida, 309 U.S. 227, 241 (1940); Canty v. Alabama, 309 U.S. 629 (1940)).

41. *Id.* at 553.

42. Ward v. Texas, 316 U.S. 547, 549–52 (1942).

> The effect of moving an ignorant negro by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously is evident from petitioner's statement to County Attorney Rolston that he would be glad to make any statement that Rolston desired. Disregarding petitioner's claims that he was whipped and burned, we must conclude that his confession was not free and voluntary but was the product of coercion and duress, that petitioner was no longer able freely to admit or to deny or to refuse to answer, and that he was willing to make any statement that the officers wanted him to make.[43]

Finally, the Supreme Court overturned the conviction in *Ashcraft v. Tennessee* because Ashcraft had been held in one room for approximately 36 consecutive hours, effectively cumulative mistreatment rather than physical mistreatment.[44] In light of the *Ashcraft* dissent's important questions about whether the majority opinion can be construed to suggest that any lengthy interrogation is inherently coercive, it is essential to focus on the actual coerciveness of the specific interrogation in determining whether a confession should be admissible.

Of the four cases discussed here, *Brown* is the most significant. It was the Court's initial, and clearest, articulation of the principle that confession evidence obtained through coercive physical interrogation violates federal constitutional due process and is therefore to be excluded in all state cases. In other words, confessions stemming from the unconscionable interrogation methods and explicit coercions imposed by states—particularly with respect to African Americans in the Deep South—would be excluded.

These four cases are included for a specific reason: to directly warn of the danger of state excess, legitimized by courts and legislatures alike. Protections are essential; minimizing them is fraught with danger particularly if not carefully delineated. From a historical analysis, however, arriving at *Miranda* was not a given. The Court traveled a certain distance before it *clearly* articulated rights to be extended to a detained suspect.

In creating the criminal procedure revolution, the Warren Court had both to reflect on the *Brown*, *Ashcraft*, *White*, and *Ward* precedents and to clearly state what rights to protect and how to protect them. Without clearly articulating rights, history would

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43. *Id.* at 555.

44. Ashcraft v. Tennessee, 322 U.S. 143 (1944). See Yale Kamisar, *Fred E. Inbau: "The Importance of Being Guilty,"* 68 J. CRIM. L. & CRIMINOLOGY 182 (1977), for an important discussion regarding *Ashcraft*.

continue to serve as a powerful reminder of the consequences of unconscionable wiggle room.

B. The Lead-Up to Miranda

The extraordinary wrongs to which African Americans were subjected to with mind-numbing consistency and routine is a deep stain forever seared into American history. Precisely because of the deep shame associated with the interrogation measures carefully—and painfully—described by the Court in *Brown*, *White*, *Ward*, and *Ashcraft*, Chief Justice Warren's words in *Miranda* carry not only judicial weight but also reflect extraordinary sensitivity and recognition of history.

The Warren Court has been criticized for writing a code for police departments, rather than deciding a constitutional question, particularly when only five justices comprised the *Miranda* majority. However, Chief Justice Warren articulated, history clearly shed light on the Court's rationale: "In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions."[45]

Precisely because the interaction between law enforcement and the detained suspect is enormously complex, the way in which protections are articulated and implemented is essential to establishing a rights-based paradigm. In *Escobedo v. Illinois*,[46] the case that preceded *Miranda*, the Court held that the Sixth Amendment right to counsel attached pre-indictment, thus extending *Gideon*,[47] which held that the right attached after indictment.

> [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the

45. Miranda v. Arizona, 384 U.S. 436, 446 n.5 (1966). The Court noted, "It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary investigation." *Id.* n.6.

46. 378 U.S. 478 (1964).

47. Gideon v. Wainwright, 372 U.S. 335 (1961).

> accused has been denied "The Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[48]

According to Professor Thomas, a narrow reading of *Escobedo* suggests that a suspect has the right to consult with counsel when the following conditions are met:

> (1) the investigation has begun to focus on a particular defendant . . . ; (2) the suspect is in police custody; (3) interrogation . . . is aimed at eliciting incriminating statements; (4) the suspect has requested and been denied an opportunity to secure advice from counsel; and (5) the police fail to warn the suspect effectively of his constitutional rights to remain silent.[49]

Therefore, the right to counsel created in *Escobedo* would only attach when the questioning was directed toward a specific suspect rather than a general questioning of a witness. Justice Goldberg thus left open the question of *when* the right to counsel attaches if the individual questioned is not a specific suspect. The distinction between specific suspect and general questioning is critical because the categories are fundamentally distinct. *Miranda* stepped into that breach by applying the Fifth Amendment privilege against self-incrimination in a context extending beyond the specific suspect paradigm articulated by the Court in *Escobedo*, building on its holding in *Malloy v. Hogan*[50] that the Fifth Amendment right against self-incrimination was applicable, through incorporation, in both state and federal courts.

Needless to say, expanding the right to counsel from specific suspect to general questioning and framing it in a Fifth Amendment rather than Sixth Amendment context is central to the intellectual, legal, and concrete underpinning of *Miranda*. In the words of Chief Justice Warren, writing for a five-to-four majority:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural

48. *Escobedo*, 378 U.S. at 490–91 (citation omitted).
49. Thomas, *supra* note 26, at 19.
50. 378 U.S. 1 (1964).

> safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[51]

C. Quarles *and the Public Safety Exception*

Eighteen years after *Miranda*, the Supreme Court articulated an exception to the fundamental rights enshrined in *Miranda* by setting forth the public safety exception in *Quarles*.[52] Because the facts of *Quarles* are essential to understanding the essence and limits of the public safety exception, they are presented in full here.

On September 11, 1980, at approximately 12:30 a.m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, New York when a young woman approached their car. She told them that she had just been raped by an African American male, approximately six feet tall, who was wearing a black jacket

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51. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (footnote omitted). Justices White, Harlan, and Stewart dissented, and Justice Clark dissented in part. *Id.* at 499 (Clark, J., dissenting in part); *id.* at 504 (Harlan, J., dissenting); *id.* at 526 (White, J., dissenting).

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

with the name "Big Ben" printed in yellow letters on the back. She told the officers that the man had entered an A&P supermarket located nearby and that the man was carrying a gun.

The officers drove the woman to the supermarket, and Officer Kraft entered the store while Officer Scarring radioed for assistance. Officer Kraft quickly spotted Quarles, who matched the description given by the woman, approaching a checkout counter. Apparently upon seeing the officer, Quarles turned and ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun. When Quarles turned the corner at the end of an aisle, Officer Kraft lost sight of him for several seconds, and upon regaining sight of Quarles, Officer Kraft ordered him to stop and put his hands over his head.

Although more than three other officers had arrived on the scene by that time, Officer Kraft was the first to reach Quarles. Officer Kraft frisked Quarles and discovered that he was wearing an empty shoulder holster. After handcuffing Quarles, Officer Kraft asked him where the gun was. Quarles nodded in the direction of some empty cartons and responded, "the gun is over there." Officer Kraft thereafter retrieved a loaded .38-caliber revolver from one of the cartons, formally placed Quarles under arrest, and read him his *Miranda* rights from a printed card. Quarles indicated that he would be willing to answer questions without an attorney present. Officer Kraft then asked Quarles if he owned the gun and, if so, where he had purchased it. Quarles answered that he did own it and that he had purchased it in Miami.[53]

Based on these facts, then-Justice Rehnquist, on behalf of a six-to-three majority, held that there is a public safety exception to *Miranda*, "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[54] Recognizing that the concealed gun posed a danger to public safety, a danger beyond concerns of constitutionally impermissible interrogation, the Court set forth the reasons for and parameters of the exception:

> In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which

53. *Id.* at 651–52.

54. *Id.* at 657. Justices Marshall, Brennan, and Stevens dissented. *Id.* at 674 (Marshall, J., dissenting).

> deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.
>
> . . . .
>
> We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.
>
> In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule.
>
> . . . .
>
> The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety.[55]

The importance of *Quarles* is the creation of a public safety exception to *Miranda*. The question going forward is whether the *Quarles* exception is sufficient to address the unique problems posed by counterterrorism operations.

II. *MIRANDA* AND COUNTERTERRORISM

In expanding *Escobedo* and providing greater protections to individuals subject to police interrogation—even those not deemed

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55. *Id.* at 657–59 (majority opinion) (footnote omitted).

specific suspects—Chief Justice Warren clearly looked back into the dark pages of interrogations in the U.S. The history that guided Chief Justice Warren must serve as an important reminder with respect to denying suspected terrorists *Miranda* protections.

Terrorism poses extraordinary dangers; of that, there is little doubt. The last four decades[56] have been marked by attack after attack against innocent people worldwide defined as "legitimate targets" by terrorists. Different nations have developed various counterterrorism strategies, ranging from aggressive measures,[57] to soft responses,[58] to largely a non-response,[59] to pay-off deals with terrorists.[60] The litany of attacks[61] is a telling demonstration of the never-ending scourge of terrorism. This Article defines "terrorism" as an attack by a group or individual in an effort to advance a cause—religious,[62] social, economic, or political—by killing,

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56. Although scholars debate which constitutes the initial terrorist attack of the contemporary age, the plane hijackings of the 1960s and, in particular, the P.L.O. attack in the Munich Olympic Games resulting in the deaths of 11 Israeli athletes are generally understood to be the initial acts of contemporary terrorism. See, in particular, the writings of Bruce Hoffman and Walter Laqueur.

57. *See* Allen Dershowitz, *Targeted Killing Is Working, so Why Is the Press Not Reporting It?*, HUFFINGTON POST (Jan. 3, 2008, 5:25 PM), http://www.huffingtonpost.com/alan-dershowitz/targeted-killing-is-worki_b_79616.html; *see also Russia Ends Operations in Chechnya*, N.Y. TIMES, Apr. 17, 2009, at A6, *available at* http://www.nytimes.com/2009/04/17/world/europe/17chechnya.html.

58. *See Operation Enduring Freedom: One Year of Accomplishments*, NAT'L ARCHIVES, http://georgewbush-whitehouse.archives.gov/infocus/defense/enduringfreedom.html (last visited Jan. 14, 2011).

59. *See Scores Die in Madrid Bomb Carnage*, BBC NEWS (Mar. 11, 2004, 13:46 GMT), http://news.bbc.co.uk/2/hi/3500452.stm (Spain's non-response in the aftermath of the March 2004 Madrid train bombing).

60. *See* Paul L. Montgomery, *European Community Gives Limited Support to Steps by the P.L.O.*, N.Y. TIMES, Nov. 22, 1988, at A6, *available at* http://www.nytimes.com/1988/11/22/world/european-community-gives-limited-support-to-steps-by-the-plo.html (Greece's "arrangement" with terrorist organizations, in particular—but not exclusively—with the P.L.O.).

61. *See Death by Terror*, GOOD.IS, http://awesome.good.is/transparency/web/1005/terror-in-america/flat.html (last visited Jan. 21, 2011); *see also Search Results*, GLOBAL TERRORISM DATABASE, http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties_type=f&casualties_max=101&start_yearonly=1970&end_yearonly=2008&dtp2=all&success=yes&ob=GTDID&od=desc&page=1&count=100#results-table (last visited Jan. 14, 2011). For an explanation of the Global Terrorism Database, see GARY LAFREE & LAURA DUGAN, INTRODUCING THE GLOBAL TERRORISM DATABASE (2007), *available at* http://www.ccjs.umd.edu/faculty/userfiles/23/FTPV_A_224594.pdf.

62. Elsewhere I argue that religious extremism is the single most important and powerful motivator for contemporary terrorism, much as secular terrorism was in the 1970s. *See* AMOS N. GUIORA, FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY (2009). Examples include the Red Brigade in Italy, Baader-Mainhoff in Germany, and the Weathermen in the U.S. *Id.*

harming, or intending to injure innocent civilians, or by intimidating the civilian population from conducting its daily life. In that regard, terrorist organizations are not bound by any sense of morality, they are not subject to legal obligations or restrictions, and they operate beyond any sense of restraint with two exceptions: tactical considerations as to when is the most effective time to attack and the nation-state's counterterrorism effectiveness. Conversely, the nation-state is subject to legal and moral restrictions with the understanding that limits on state power are the essence of the rule of law.[63]

Although the polity's natural response to a terrorist attack is to demand action by the nation-state, the essence of lawful operational counterterrorism is that the state, to quote the vernacular, "can't kill 'em all." Not even close; the opposite perhaps is the true reality of counterterrorism. Although this reality of operational counterterrorism that goes beyond criminal is frustrating for many, constitutional and international law raise legitimate questions regarding both its legitimacy and effectiveness.

In applying the *Miranda–Quarles* framework to terrorists, the question is what the Supreme Court intended in both cases; that is, what are the cases' respective core principles with respect to terrorism. Chief Justice Warren's words are extraordinarily clear and powerful. They reflect both his deep understanding of the American interrogation reality and the extraordinary—and unforgiveable—price paid by untold numbers of people subjected to methods ranging from the third degree to the unconscionable. Chief Justice Warren's reference to *Brown*, *White*, *Wade*, and *Ashcraft* is not just judicial craftsmanship; it is also a clarion call to state agents that the rule of law demands protection for suspects. The criminal procedure revolution does not limit law enforcement's ability to detain for either interrogation or "on the scene" crime prevention. The criminal procedure revolution does impose on law enforcement the obligation to inform the *suspect* of the right to representation by counsel during interrogation and the right to remain silent.

As *Miranda*'s language makes abundantly clear, creating—and protecting—both rights is essential. In Chief Justice Warren's words:

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63. For a fuller explication of the theory of self-imposed restraints, see Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002).

> The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. . . . In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation . . . . [The defendants] share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warning of constitutional rights.[64]

A. Problems of Definition

Written in 1966 regarding *suspected* criminals subject to the commonly understood criminal law paradigm, *Miranda*'s words hold particular weight—subject to *Quarles*—with respect to *suspected* terrorists particularly because the terrorist paradigm has not been defined. Nine years after 9/11, the American judiciary, two Presidents, and four Congresses have failed to consistently and coherently define the paradigm. Scholars and decisionmakers debate how to categorize terrorists:[65] as criminals in accordance with the criminal law paradigm, as soldiers as defined by the Geneva Conventions,[66] or as something else reflecting a hybrid of the criminal and prisoner-of-war paradigms. The discussion has included numerous terms including "enemy combatant," "enemy belligerent," "illegal belligerent," "unlawful combatant," and "non-state actor." The failure to uniformly and consistently categorize terrorists reflects policy, legal, and geo-political realities and considerations. For this precise reason, expanding the *Quarles* exception is to tread into dangerous waters that simply become murkier the deeper one wades. Although the definitional discussion is of the utmost importance, its state of fluidity must not justify creating exceptions that unnecessarily violate the rights of individuals merely suspected of involvement in terrorism, however defined.

If different agencies within the U.S. executive branch defined terrorism uniformly, those advocating for an expansion of *Quarles* might have a better argument, but such uniformity is sorely

64. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

65. *See* JONATHAN WHITE, TERRORISM AND HOMELAND SECURITY: AN INTRODUCTION (5th ed. 2006); *see also* BRUCE HOFFMAN, INSIDE TERRORISM (rev. ed. 2006); WALTER LAQUEUR, A HISTORY OF TERRORISM (2001).

66. *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMMITTEE RED CROSS, http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions (last updated Feb. 15, 2011).

lacking. For example, the key U.S. agencies employ the following definitions of terrorism:

FBI	Domestic terrorism refers to activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any state; appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.[67]
Department of Defense	The calculated use, or threatened use, of force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives.[68]
Department of State	The term "terrorism" means premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience. The term "international terrorist" means terrorism involving citizens or the territory of more than one country. The term "terrorist group" means any group practicing, or that has significant subgroups that practice, international terrorism.[69]

In the face of such definitional uncertainty, the essential question is: To whom are *Quarles* expansion advocates referring? While some proposals[70] recommend adopting the U.S. Code

67. 18 U.S.C. § 2331(5) (2006); *see also Terrorism 2000/2001*, FED. BUREAU INVESTIGATION, http://www2.fbi.gov/publications/terror/terror2000_2001.htm (last visited Dec. 5, 2010).

68. *What Is Terrorism?*, TERRORISM RES., http://www.terrorism-research.com (last visited Feb. 24, 2011).

69. The State Department definition is based on 22 U.S.C. § 2656f(d).

70. Professor Cassell, who argued before the Supreme Court in *Dickerson v. United States*, 530 U.S. 428 (2000), in which the Court held that *Miranda* was constitutionally based and that 18 U.S.C. § 3501 was unconstitutional, has been at the forefront of legal scholars who have raised significant concerns regarding *Miranda*. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996). For responses to Professor Schulhofer's criticism of Professor Cassell's argument regarding the social costs of *Miranda*, see Paul G. Cassell, Miranda*'s Social Costs: An Empirical Re-Assessment*, 90 NW. U. L. REV. 387 (1996), and Paul G. Cassell & Richard

definition of terrorism,[71] Attorney General Holder's use of the term was at best a catchall, without clear or careful delineation of the specific category to which he was referring. After all, Attorney General Holder's comments show that it is remarkably unclear how the Attorney General defines terrorism, much less a terrorist. The federal government's continued inability to uniformly define the term and the multiplicity of terms bandied about since 9/11 highlight the extraordinary danger of Attorney General Holder's recommendation. This is a marked and dramatic distinction from the clear, direct, and unequivocal language of Chief Justice Warren.

The fundamental danger is that this lack of definitional rigor and exactness means that any expansion of *Miranda–Quarles* would apply to an extraordinarily broad and vague group of "terrorists." Indeed, even if Congress, for example, were to legislate an exception to *Quarles*, the current reality of terrorism and counterterrorism in the U.S. is that there is no clarity regarding whether a just-detained individual is a terrorist to whom the new, expanded exception applies, or a criminal to whom it would not.

Exceptions are inherently problematic, and broad exceptions are particularly troubling. In this way, the suggested proposals profoundly fail the constitutional standard of "void for vagueness"[72] and are overbroad.[73] Denying *Miranda* protections to an individual arrested on suspicion of involvement in terrorism without carefully and narrowly articulating a clear standard for whether the just-detained individual is, indeed, a suspected terrorist[74] leaves a gaping hole.

Attempts to determine whether the exception applies to a specific individual would be through a criteria-less paradigm.

Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). For responses to Professor Cassell, see Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996), and John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998). For a recent debate between myself and Professor Cassell regarding *Miranda* rights for terror suspects, see Miranda *& Terror Suspects—Podcast*, *supra* note 36.

71. *See supra* note 67 and accompanying text (FBI definition, based on the U.S. Code).

72. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1143–51 (5th ed. 2005).

73. *See generally* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 87–88 (3d ed. 2002).

74. Professor Cassell's proposal is noteworthy in addressing this significant gap. *See supra* note 70.

Classifying an arrested suspect as a criminal suspect (entitled to *Miranda* protections subject to the public safety exception) or a terrorism suspect (subject to the proposed exception to the already created exception) is enormously difficult in real time.

The possibility of applying the exception—in the absence of criteria and definitions—poses irreversible danger to the very rights *Miranda* intended to protect. In this vein, it is important to recall, as Professor Thomas writes:

> The basic dream [of the Warren Court] was, I believe, a world in which state police, prosecutors, and judges treat suspects and defendants fairly. . . . Equality requires that suspects and defendants have the ability to make informed decisions and to act on those decisions. . . . Of second greatest importance [for the Warren Court], probably, was the requirement in *Miranda v. Arizona* that suspects be warned of the consequences of answering police questions, be informed of their right not to answer the questions, and be offered a lawyer to assist them in deciding whether to answer.[75]

To extend beyond the carefully crafted and deliberately narrow exception articulated by then-Justice Rehnquist, particularly when the outer *limits* of an additional exception are vague and amorphous, represents a dramatic break both with *Miranda* and *Quarles*. Not only does this break with *Miranda–Quarles* go far beyond what the Court cautiously articulated in *Quarles*, but it is essential to repeat that "boots on the ground" law enforcement has consistently *not* requested an additional exception in the face of complex terrorist threats.

B. Exceptions: Justifications and Dangers

Furthermore, Attorney General Holder failed to explain why the *Quarles* exception is insufficient to effectively protect America from terrorists, *however* defined. After all, as the Court held, the *just*-discarded pistol was admissible evidence even though Quarles had not been read his *Miranda* rights. This is the essence of the *Quarles* exception: "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege

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75. George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 174 (2005).

against self-incrimination."[76] Quite simply, I am unable to discern why the exception is insufficient for "boots on the ground" counterterrorism. What does *Quarles not* provide that is, according to Attorney General Holder, so essential to effective homeland security? Effective articulation of contemporary threats to the American public would greatly help in answering this question.

Balancing legitimate national security considerations and equally legitimate personal rights is essential to conducting lawful operational counterterrorism. Creating exceptions in response to a particular threat is tempting; however, it is complicated, fraught with danger, and must be subject to extraordinarily strict scrutiny. That does not suggest that exceptions are not legitimate; under certain circumstances, subject to oversight and review, exceptions are justified, if not essential. However, creating an exception paradigm requires determinations of need, alternatives, and costs.

I come to this issue—and deep concerns regarding exception models—based on my proposal that advocates the establishment of a national security court.[77] My proposal, an alternative to Article

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

77. *See Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 8–10 (2008) [hereinafter *Improving Detainee Policy*], *available at* http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da13bc6a1 (testimony of Professor Amos Guiora); BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); Amos N. Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617 (2009); Amos N. Guiora, *Military Commissions and National Security Courts After Guantánamo*, 103 NW. U. L. REV. COLLOQUY 199 (2008); Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805 (2007); Amos N. Guiora & John T. Parry, *Debate: Light at the End of the Pipeline? Choosing a Forum for Suspected Terrorists*, 156 U. PA. L. REV. PENNUMBRA 356 (2008); Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1 (2003); Glenn M. Sulmasy, *The Legal Landscape After* Hamdan*: The Creation of Homeland Security Courts*, 13 NEW ENG. INT'L & COMP. L. ANN. 1 (2006); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at 19; Charles D. Stimson, *Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War*, LEGAL MEMORANDUM (Heritage Found., Wash., D.C.), Jan. 23, 2009, *available at* http://s3.amazonaws.com/thf_media/2009/pdf/lm35.pdf; Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4; Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* (Series on Counterterrorism & Am. Statutory Law, Working Paper, 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf; Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a*

III courts, intends to facilitate adjudication of individual responsibility for suspected terrorists. The proposal seeks to resolve a constitutional and moral conundrum arising from the continued indefinite detention of thousands of post-9/11 detainees held in Guantánamo, Abu Ghraib, and Bagram.

Although detainees ideally would be brought before Article III courts, the need to protect classified intelligence information justifies minimizing the defendant's right to confront his accuser in those cases where criminal evidence is insufficient to proceed with prosecution. In a nutshell, intelligence information would be used to bolster the criminal evidence but would not be the sole basis for conviction. Although admittedly problematic, the proposal seeks to facilitate resolution of the indefinite detention paradigm.

However, for the reasons discussed below, expansion of the public safety exception articulated in *Quarles*[78] is both unwarranted and dangerous. To that end, I draw a sharp distinction between advocating an exception to existing Article III courts and opposing an expanded exception to *Miranda* protections. I am acutely aware of the deep—and largely justified—concern[79] with ad hoc solutions in response to a particular threat, whether direct or indirect.[80]

Legal architecture, necessity, utilitarianism, the existence of alternatives, and morality form the standard for measuring ad hoc exceptions. In that vein, the indefinite detention paradigm[81] imposed by successive American administrations on thousands of post-9/11 detainees manifests an acute wrong, largely resolvable only by creating an alternative judicial regime subject to the criteria above.

In large part, an *additional* exception to *Miranda* is unwarranted largely because a compelling argument has not been made that counterterrorism is facilitated by such a measure. Thus,

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National Security Court (Am. Enter. Inst., Working Paper No. 156, 2009), *available at* http://www.aei.org/paper/100038.

78. *Quarles*, 467 U.S. 649.

79. For criticism of proposed alternatives to Article III courts, see JAMES J. BENJAMIN, JR. & RICHARD B. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf, and Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505 (2008).

80. For an analysis of threats, see Amos N. Guiora, *Accountability and Effectiveness in Homeland Security* 5–8 (Univ. of Utah, Legal Studies Paper No. 08-02, 2008), *available at* http://ssrn.com/abstracts=1090328.

81. For a discussion regarding indefinite detention, see *Boumediene v. Bush*, 553 U.S. 723 (2008), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

the proposed exception fails on necessity and utilitarianism grounds in addition to legal principles and morality.

Those who advocate denying *Miranda* protections by expanding *Quarles* argue that *Miranda* protections (as established by the Warren Court) are relevant *only* when an individual is prosecuted. In essence, they argue that if an individual is detained (whether lawfully or not) and subsequently interrogated (without having been "Mirandized") but not prosecuted, then the confession would not be subject to admissibility standards and judicial scrutiny. Its exclusive usage with respect to the detainee, rather, would be outside the walls of the courthouse.

The notion, therefore, is that *Miranda* protections, even subject to *Quarles*'s public safety exception, would be irrelevant in this specific and narrow context because the information from the interrogation or confession would be used only for intelligence gathering and subsequent operational measures, rather than prosecution of the individual. That is, the harm emanating from an interrogation in which the suspect did not receive *Miranda* protections is limited to a specific class of individuals; for those not indicted, the fact they were not extended *Miranda* rights has no direct impact on their status, rights, or privileges because they were not brought before a court of law.

The argument, while arguably compelling and almost convincing, is predicated on a particularly narrow reading of *Miranda* and is devoid of sensitivity to and cognizance of operational realities. The overarching question must be principled, not practical: Is the public safety exception to *Miranda* established in *Quarles* sufficient with respect to terrorism? In other words, is there a need to create an *additional* exception with respect to terrorism and individuals suspected of involvement in terrorism? It is in addressing this question that the proposal fails on necessity and utilitarianism grounds.

Attraction notwithstanding, the argument posed above falls short because when the individual is *initially* interrogated, whether at the scene or at the station house, future prosecutorial intention is, at best, purely speculative. Therefore, expanding the public safety exception based on *possible* acts committed by the individual—and on the theory that he will not be prosecuted—poses an unwarranted danger in the context of rights protection.

After all, it is unclear whether detention and interrogation are intended to gather information about others or to prevent a future terrorist attack—suggesting the information serves a direct operational purpose—rather than facilitate prosecution of the detainee. That *very* uncertainty demands that *Miranda* protections not be eviscerated. Although perhaps tempting from the

perspective of short-term political considerations, the likely impact on individual rights is too significant to minimize. This impact is particularly acute when relevant prosecutorial decisionmaking is more uncertain than certain at the *very* moment *Miranda* rights must be extended, albeit subject to the public safety exception previously established by the Supreme Court.

III. LOOKING BACK—LOOKING FORWARD

The terrorism paradigm is, as I have previously suggested, distinct from both the traditional criminal law and war paradigms. Nonetheless, extraordinary care must be taken when recommending an exception to existing case law and legislation. The care and caution must take into consideration the practical and philosophical consequences and whether sufficient protections and safeguards are institutionalized when creating a rights-minimizing regime. This is particularly problematic when basic issues regarding terrorism have not been satisfactorily resolved and therefore the contours of the exception are dangerously vague. To expand upon *Quarles* is, in essence, to create a rights-minimization paradigm devoid of standards, criteria, and careful limits. This is fundamentally at odds with the Supreme Court's philosophical and jurisprudential goals for limits on state power (*Miranda*).

While the unconscionable treatment of African Americans in the jailhouses of the Deep South is a never ending stain on America, of equal shame is the acquiescence of the legal community to the horrors inflicted by law enforcement. It is important to recall: not only were African Americans subjected to horrific beatings and unrelenting brutality, either directly or indirectly, by the local constable, but state court after state court turned a willful blind eye on what was a constant reality. In other words, the latter constantly and consistently acquiesced regarding actions of the former. That same pattern—harsh state action followed by judicial acquiescence—largely typifies the American paradigm in the past decade. In the aftermath of 9/11, the Bush Administration created a torture-based interrogation regime[82] for individuals detained in Iraq and Afghanistan and interrogated in Guantánamo Bay, Abu Ghraib, Bagram, and other detention centers.[83] In clear violation of the United Nations Convention

82. *See* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, *available at* http://www.newsweek.com/2004/05/23/the-roots-of-torture.html.

83. In addition, some detainees were "turned over" to intelligence services of other nations with the tacit understanding that those detainees would be subject to interrogation measures not applied by the U.S. This process, known as

Against Torture,[84] the Geneva Conventions,[85] and the U.S. Constitution,[86] detainees were tortured by methods ranging from waterboarding;[87] to excessive physical beatings;[88] to the much-documented actions of Lynndie England, Charles Graner, and others at Abu Ghraib.[89] The Supreme Court—when presented the opportunity—fell far short of upholding the moral standards, not to mention legal limits, that are the essence of the Warren Court's criminal procedure revolution.

This troubling reality is directly on-point to my query; creating exceptions that are loosely defined and not rigorously upheld potentially creates a paradigm of excess. Interestingly, however—and the caveat here is of extreme importance—none of the violations occurred on American soil. That is, as aggressive as the Bush Administration was with respect to the interrogation of suspected, detained terrorists *outside* the U.S., similar methods were not imposed on individuals detained in the U.S. Rather, such individuals enjoyed full *Miranda* rights. This, then, is the most surprising aspect of Attorney General Holder's recommendation: interrogation measures subject to *Miranda–Quarles* limitations that satisfied the Bush Administration are insufficient for the Obama Administration.

Quarles created a specific public safety exception for on-the-scene arrests that does not extend beyond the moment of arrest. I do not suggest that those who seek to extend the public safety

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"rendition," violates the 1984 Convention Against Torture if there is reasonable cause to believe that the detainee will be subjected to measures that violate the Convention's definition of torture. *See generally* Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263 (2004).

84. The Convention was ratified by the U.S. Senate in October of 1990. Yoav Gery, Note, *The Torture Victim Protection Act: Raising Issues of Legitimacy*, 26 GEO. WASH. J. INT'L L. & ECON. 597, 598 n.13 (1993).

85. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see The Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 66.

86. Violating a Convention ratified by the Senate violates the Constitution. *See* U.S. CONST. art. VI, cl. 2.

87. For example, Khalid Sheikh Mohammed, an alleged (not convicted) 9/11 mastermind, was waterboarded over 150 times by U.S. interrogators. *See September 11 Mastermind Khalid Sheikh Mohammed "Waterboarded 183 Times,"* TIMES ONLINE (Apr. 20, 2009), http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6130165.ece.

88. *See Q&A: Iraq Prison Abuse Scandal*, BBC NEWS (Jan. 11, 2008), http://news.bbc.co.uk/2/hi/americas/3701941.stm.

89. *See Lynndie England Convicted in Abu Ghraib Trial*, USA TODAY (Sept. 26, 2005), http://www.usatoday.com/news/nation/2005-09-26-england_x.htm.

exception created in *Quarles*[90] advocate a return to the unconscionable interrogations discussed above. The discussion here is intended to unequivocally highlight the dangers of going down a murky road with a slippery slope around the proverbial corner. Terrorists are responsible for heinous acts against innocent civilians, but that does not justify denying their right to counsel in the interrogation setting. *Miranda* was based on the unconscionable excesses of the past; to deliberately create an exception beyond *Quarles* is fraught with danger.

Miranda did not, as some argue, deny law enforcement the right to interrogate the detainee or the opportunity to do so with counsel present. What it did was grant the suspect the right to waive the privilege of self-incrimination and the right to counsel. In that vein, it is essential to recall that in *Gideon*,[91] the right to counsel for an indigent defendant was simultaneously extended and limited to a criminal trial.[92] That is, although *Gideon* extended the privilege to indigent defendants in the courtroom, it did not extend that protection to where the individual is particularly vulnerable, the detention cell. That extension is the essence of *Miranda*.[93]

The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and

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

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

92. For a legendary and memorable analysis of *Gideon v. Wainwright*, see ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

93. *See* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From* Powell *to* Gideon, *from* Escobedo *to* . . . , *in* CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965). In affirming Professor Kamisar's assessment and description regarding the interrogation setting, I draw on my professional experiences as prosecutor, judge, and legal advisor with direct involvement in the interrogation process. The most powerful images are of the extraordinary tension and anxiety expressed, verbally and non-verbally, by suspects held for the sole purpose of eliciting information from them either to facilitate their trial or that of an associate. Similarly, the responsibility articulated by the interrogators with respect to their "mission" is equally powerful; in many ways, their ability to elicit correct and timely information from suspects is the key to successful operational counterterrorism. Without a doubt, the heart and soul of operational counterterrorism and of effective law enforcement in the traditional paradigm "unfolds" in the interrogation setting, which I have previously described as "fraught with the sweat of fear and anxiety." Furthermore, information that is either mis-information or dis-information significantly hampers effective operational counterterrorism/law enforcement and is a (perhaps "the") primary reason why professional interrogators uniformly dismiss the value of enhanced interrogation measures, subject to narrow, specific exceptions and circumstances.

enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors. In this gatehouse of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized subject to be sized up and subjected to interrogation tactics and techniques most appropriate for the occasion; he is game to be stalked and cornered.[94]

Coming to the conclusion in *Miranda* was not by chance; it was, as we have seen, an evolving process predicated on history, an increasing realization that rights were consistently violated, and a growing understanding that the Supreme Court was obligated to guarantee the rights of individuals in the interrogation paradigm. Although the Court in *Quarles* created an exception, it did so narrowly and specifically. Given the extraordinarily broad range of terrorism—however defined—denying *Miranda* rights to terrorism suspects in the interrogation paradigm is truly to turn the clock back.

94. *Id.*