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Torture

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TORTURE

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> "There have been, and are now, certain foreign nations . . . which convict individuals with testimony obtained by police organizations possessed of unrestrained power to seize persons . . . hold them in secret custody and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of this Republic, America will not have that kind of government."[1]

INTRODUCTION

The events of September 11, 2001 changed so many things and so many lives in the United States.[2] It also affected our discourse about interrogation and torture.[3] Within days of realizing that a tight-lipped, possible co-conspirator to the attacks in New York and

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1. Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

2. For a discussion of the various ways in which September 11, 2001 affected the psyche of Americans, see Karen Peterson, *The Family Is Enough*, USA TODAY, Dec. 27, 2001, at 1D (Americans are dealing with own emotional ground zero); Marco R. delle Cava, *Where Do We Go From Here?* USA TODAY, Dec. 17, 2001, at 1D (discussing change in six people's lives after Sept. 11); *see also* David Cole, *Lawyers Keep* Out, NATION, Apr. 21, 2003, at 4. ("September 11 changed everything."). That the events of September 11 would affect jurisprudence is not surprising. It would not be the first time that fundamental world events affected our nation's thinking about criminal procedure. Many believe that the Supreme Court's due process jurisprudence, and particularly its view of voluntary confessions, was heavily influenced by the experience in World War II and especially the Nazi war crimes in Nuremberg. *See* JOSHUA DRESSLER, & GEORGE THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES, 547-48 (1999).

3. As Alan Dershowitz noted, "the events of September 11 require us to imagine the unimaginable, and think the unthinkable." Scott Martinelle, *Terror Probe May Use Truth Serum*, THE RECORD, Nov. 8, 2001, at 20; *see also* Alan Dershowitz, *Rethink Everything*, JD JUNGLE, Feb/Mar. 2002, at 48, 52 ("the events of September 11 . . . should make all of us rethink even our most fundamental beliefs about the law . . . The events of September 11 have focused the minds of many on issues they never previously con-

Washington was in custody, and after detaining other potential suspects who were not forthcoming with information,[4] FBI agents floated in the press the idea of re-introducing torture or other unconventional methods of questioning.[5] After all, the nineteen hi-

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sidered . . . [including leading] some people to advocate such extreme measures as truth serum and even torture.").

Others have expressed a similar sentiment. "In this autumn of anger, even a liberal can find his thoughts turning to . . . torture." Jonathan Alter, *Time To Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45; Alexander Cockburn, *The Wide World of Torture*, NATION Nov. 26, 2001, Vol. 273 at 10 (calling torture "this week's hot topic."); *see also* Robert Weisberg, "The fact that we're even having this conversation [about torture] shows how much things have changed since Sept. 11" *quoted in* Vick Haddock, *The Unspeakable: To Get At The Truth, Is Torture or Coercion Ever Justified?* SAN. FRAN. CHRONICLE, Nov. 18, 2001, at D1.

A poll conducted after 9/11 suggested that one third of Americans favor the use of torture on terrorist suspects. Transcript, "Sixty Minutes" 34 BURRELL'S INFORMATION SERVICE PUBLISHING, at 7 (Jan. 20, 2002). The mere existence of such a poll suggests a major shift in thinking among the public.

Interestingly, pre-September 11 there was one person who was pondering the question of torture and terrorists: a German law professor wrote an article in anticipation of the possibility of terrorists with weapons of mass destruction. Professor Brugger posed the question: is torture ever justified? In concluding yes, Brugger acknowledged that he was, to his knowledge, the first German law professor in the last 50 years to advocate use of torture even in exceptional circumstances. Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661, 677 (2000). Other law professors were pondering similar issues with respect to Israeli law. *See* articles compiled in 23 ISR. L. REV. 1 (1989).

4. Haddock, *supra* note 3, at D1. Haddock discusses the four suspects — Zacarias Moussaoui, (who was detained in August, 2001 on immigration charges after he acted suspiciously at a flight school in Minnesota, and then held as a material witness), Mohammed Azmath and Ayub Ali Kan (who were traveling with fake passports when they were arrested on an Amtrak train with box cutters, hair dye and $5,000 cash), and Nabil Almarabh, a former Boston cab driver suspected of having links to bin Laden. "FBI agents are said to have offered the traditional inducements to them — reduced prison sentences, money, relocation to the United States and new IDs for themselves and their families — if they cooperate . . . But inducements haven't worked this time." *Id.*

Except for Moussaoiu, all of the others have been released without any charges being filed against them. Moussaoui was indicted on six criminal charges, including committing terrorist acts. Four of the charges carry a penalty of death. Dan Eggen & Brooke A. Masters, *U.S. Indicts Suspect in September 11 Attacks*, WASH. POST, Dec.12, 2001, at A1. The Government was apparently hoping that the threat of execution would make Moussaoui cooperate, a hope thus far unrealized. *Id.* Moussaoui pled guilty in July 2002, later withdrawing that plea. John Riley, *Change of Heart*, NEWSDAY, July 26, 2002, at A05. He is currently awaiting trial.

5. Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma For FBI,* WASHINGTON POST, Oct. 21, 2001, at A6 ("FBI and Justice Department investigators are increasingly frustrated by the silence of jailed suspected associates of Osama Bin Laden's al Qaeda's network, and some are beginning to . . . say that traditional civil liberties may

jackers belonged to a sophisticated organization, and any accomplices likely were trained to resist traditional interrogation techniques and "ploys" to garner information during interrogation.[6] Furthermore, there was real fear that the attacks on the World Trade Center and the Pentagon were just the beginning of a

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have to be cast aside if they are to extract information about the September 11 attacks and terrorist plans."). *See* Haddock, *supra* note 3 (frustration with failed interrogation of detainees led unnamed FBI agent to leak to Washington Post story about possible need for truth serum or extradition to country less squeamish about rough interrogation).

A few months later, such calls for innovative interrogation techniques were heard again when Richard Reid, the so called "shoe bomber" who tried to blow up an American Airlines jet from Paris to Miami by igniting a bomb in his shoe, was arrested. *See* Simon Crerar, *Giving the Lie to Truth Drugs*, TIMES NEWSPAPERS LTD., Jan. 6, 2002 ("Hardline opinion in America is calling for controversial truth drugs to be given to the suspected "shoe bomber," Richard Reid.").

Similar cries for additional interrogation techniques were heard when Abu Zabaydah, a top lieutenant to Osama bin Laden, was captured. Noting that al Qaeda members are trained to resist normal interrogation, use of truth serum or other "coercive" techniques were urged in order to find out about future possible attacks being planned by the group. *See* Ann Scott Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, CHRISTIAN SCIENCE MONITOR, Apr. 4, 2002, at 1. Ironically, Zubaydah has apparently been cooperating, for reasons unknown. Michael Kirkland, *Padillo Not Cooperating with U.S.*, UPI INTERNATIONAL, June 12, 2002. The quality of his information remains uncertain. *Id.*

Most recently, Pakistan captured Ramzi bin al-Shibh, a 30 year-old Yemeni who most believe was integrally involved in the September 11 attacks. Michael Elliott, *Reeling Them In*, TIME, Sept. 23, 2002, at 28. Bin al-Shibh too is cooperating with authorities. Johanna McGeary & Douglas Waller, *Why Can't We Find Bin Laden?* TIME, Nov. 24, 2002 at 28.

Despite such pressure, the military has consistently denied that it has any plans to use truth serum or other drugs during the interrogations of Taliban and al Qaeda prisoners at Guantanamo Bay. Stewart M. Powell, *Truth Serum Urged for Detainees*, MILWAUKEE JOURNAL SENTINEL, Apr. 28, 2002, at 16A. *But see* Yvonne Ridley, *Al Qaeda Terrorists Could be Used as CIA Guinea Pigs: Truth Drug Threat to Cuba Prisoners*, SUNDAY EXPRESS, Jan. 27, 2002, at 27 (claiming that CIA sources said that truth serum and other methods will be used if necessary at "Camp X-ray.").

6. An al Qaeda training manual in evidence at the embassy bombing trials lists 26 torture methods, including "placing drugs and narcotics in the brother's food to weaken his will power" and several methods of psychological torture. Frank J. Murray, *Using Truth Serum an Option in Probes*, WASH. TIMES, Nov. 8, 2001 at A1.

Persons committed to jihad and to undertaking suicide attacks might not be significantly coerced by threats of death. *See Wolf Blitzer Reports, Statement of Peter Bergen* (CNN television broadcast, April 1, 2002) (transcript). ("I think it's very unlikely that [Zubayday] will say anything . . . Because in past when al Qaeda members have been interrogated, they have tended to keep quiet unless they're facing very long prison terms.") (copy on file with author); *but see* Kirkland, *supra* note 5.

reign of terrorist activity in the United States. Given the potential for catastrophic destruction, what should be the limits when questioning individuals who might be knowledgeable about such future attacks?

As the United States took into custody hundreds of individuals in Afghanistan and detained hundreds more in Guantanamo Bay, Cuba[7] and elsewhere,[8] legal pundits and other experts began to

7. As of December, 2002, there are approximately 600 persons from 40 different nations detained in Guantanamo Bay. Henry Weinstein, *Prisoners May Face 'Legal Black Hole,'* L.A. TIMES, Dec. 1, 2002, at A1. For the first time, on October 28, 2002, the United States military authorities released four prisoners from Guantanamo Bay after deciding that they have no value for U.S. intelligence and are not a terrorist threat. *U.S. Releases 4 From Guantanamo Prison*, L.A TIMES, Oct. 29, 2002, at A11. There are several pending lawsuits challenging the constitutionality of the detentions in Cuba. *See infra* note 232.

8. On the one-year anniversary of September 11, it was reported that officials in 98 countries had detained more than 2700 al Qaeda or allied terrorist suspects. Amanda Bower, *More Arrests, New Threats in the Fight Against Terror*, TIME, September 9, 2002 at 16. As of the time this article was written, the precise number of citizens arrested or detained in the United States is unclear, since the government has been reticent to release information. It appears that over 1100 were arrested or detained on immigration or other charges shortly after September 11. Amy Goldstein, *A Deliberate Strategy of Disruption; Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror*, WASHINGTON POST, Nov 5, 2001, at A1. About half of those have been released. Neil Lewis & Don Van Natta, Jr, *A Nation Challenged: The Investigation: Ashcroft Offers Accounting of 641 Charged*, N.Y. TIMES, Nov. 28, 2001, at A1. Obviously, suspects continue to be arrested, albeit at a slower pace. In September 2002, for example, 5 U.S. citizens of Yemeni descent were arrested in upstate New York and charged, among other things, with having received training at an al Qaeda training camp in Afghanistan. Josh Meyer & Thomas Mulligan, *The Hunt for al Qaeda*, L.A. TIMES, September 15, 2002, at A1.

Potential terrorists with involvement in the September 11 attacks or with ties to al Qaeda are being held around the world. And some of these detainees are supposedly providing valuable information after being interrogated. What is not clear are the precise interrogation tactics used to obtain this valuable information. For example, on June 5, 2002, Indonesian authorities arrested Omar al-Faruq, a top bin Laden official in Southeast Asia, and turned him over to a U.S. held air base in Bagram, Afghanistan. According to secret CIA documents and intelligence reports obtained by Time Magazine, al-Faruq was not cooperative at first. After three months of "psychological interrogation tactics, including isolation and sleep deprivation, he finally broke down and told of several planned attacks to take place on or near the first anniversary of the September 11th attacks. *See* Romesh Ratnesar, *Confessions of an Al-Qaeda Terrorist*, TIME, Sept. 23, 2002, at 37.

These intelligence reports were at least partly responsible for the United States increasing the terror alert code to "orange" from "yellow" on September 10, 2002. Toni Locy & John Diamond, *Alert Follows al Qaeda Break*, USA TODAY, Sept. 11, 2002 at 3A. These attacks, of course, did not occur, and the alert status of the United States was

question whether torture was legal in the United States, and, if not, whether it should be.[9] Moreover, the specter of weapons of mass destruction being employed in the United States raised the ante, and led many to speculate whether torture would be justified to prevent mass casualties.[10] In this "ticking bomb" scenario, torture would be allowed if there were significant evidence that loss of life was imminent and the only way to obtain the necessary information to prevent such a tragedy would be through the use of extreme measures, including torture. Figuring most prominently in this debate was Harvard Law School professor Alan Dershowitz, who seemingly advocated the use of torture in certain limited circumstances,[11] a surprising stance for a civil libertarian.

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decreased again to yellow on September 24, 2002. *See* Josh Meyer, *US Downgrades Terror Alert Level from 'Orange' to 'Yellow'*, L.A. TIMES, Sept. 25, 2002, at 14. It is unknown, of course, whether al-Faruq was lying, mistaken, or whether any attacks were simply prevented or delayed by law enforcement efforts.

9. *See, e.g.*, CNN Transcripts, *Target Terrorism: Forcing Suspects to Talk*, October 25, 2001, *available at* http://www.cnn.com/TRANSCRIPTS/0110/25/cf.oohtml; CNN.com Transcripts, CNN the Point with Greta Van Susteren, *Tracking the Terrorists*, October 26, 2001, *available at* http://www.cnn.com/TRANSCRIPTS/0110/26/tpt.00html; MSNBC Transcripts, *Alan Keyes Is Making Sense*, February 4, 2002, *available at* http:/www.msnbc.com/news/70024.asp (all on file with author); *see also Use of Truth Serum Urged*, CHI. TRIBUNE, Apr. 26, 2002, at 2 (William Webster, a former director of the CIA and FBI urged the Pentagon to administer truth serum drugs — but not use torture — in questioning defiant Taliban and al Qaeda prisoners).

Torture-related issues have also been thrust into the forefront of popular culture. Two recent television shows introduced, albeit briefly, the topic of torture. *See, e.g., 24 Hours: "Day One,"* (Fox television broadcast, 2002) (showing man tortured in South Korea by South Koreans; American waiting in next room to get the information, which was that a nuclear device had been planted in Los Angeles and was scheduled to explode that day*); Law and Order: Criminal Intent: "The Pilgrim,"*(NBC television broadcast, 2002) (detective suggests using truth serum on captured would-be suicide bomber to reveal where his partner was; ultimately, "persuasive" psychological interrogation tactics by main star, a New York detective, and traditional police investigative techniques lead police to capture second bomber in time); *CSI Miami: "A Horrible Mind,"* (CBS television broadcast, 2002) (professor who lectured on and indulged in torture is found tortured; culprit turns out to be student). Torture also has featured prominently in a new James Bond film, DIE ANOTHER DAY (MGM, 2002). In that film James Bond, a British secret agent, is captured in North Korea, and tortured over an 18-month period before being released. Although not totally clear, Bond apparently never revealed any secrets during his interrogations. The torture scenes, though shown in brief clips and out of focus, were nonetheless chilling to watch.

10. *See supra* notes 2, 3, and 5, and accompanying text.

11. Alan M. Dershowitz, *Can There Ever Be More Torturous Road to Justice?* THE HAMILTON SPECTATOR, Jan. 23, 2002 at A11 ("I have no doubt that if an actual ticking bomb

According to post September 11th discourse about torture, the interest of investigators has shifted from obtaining viable evidence for prosecution to obtaining credible information for preventing future acts of terrorism.[12] Numerous experts have suggested that "coercive" techniques of interrogation that would normally not be considered should be pursued in the war on terrorism.[13] This shift is significant because American law arguably allows government officials greater latitude to use coercive tactics, including torture, in questioning suspects so long as the purpose of the investigation is to deter or detect the next terrorist attack, rather than obtain evidence for a criminal trial.[14]

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were to arise, our law enforcement authorities would torture. The real debate is whether such torture should take place outside of our legal system or within it. The answer to this seems clear: If we are to have torture, it should be authorized by the law."). In his recently published book, Dershowitz argues for a torture warrant, where judges weigh the competing claims and decide whether a suspect should be tortured. ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002).

12. *See, e.g.*, comments of Professor Dershowitz, suggesting the use of torture warrants, and allowing the fruits of such interrogation only for investigative purposes and not to convict the detainee, *quoted in* Alter, *supra* note 3; *see also* Haddock, *supra* note 3 ("Most legal experts say that if investigators use truth serum or other coercive methods, the goal becomes prevention, not prosecution.").

13. *See Use of Truth Serum Urged*, CHI. TRIBUNE, Apr. 26, 2002 (William Webster, former director of the CIA and the FBI, and a former judge urged the Pentagon to administer truth serum to Taliban and al Qaeda prisoners if necessary, so long as the information is used for the protection of the country and not to prosecute). Jed Babbin, former deputy undersecretary of defense, and an attorney, agreed with Webster. *See* Ann Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, CHRISTIAN SCIENCE MONITOR, Apr. 4, 2002.

Drawing a distinction between evidence obtained for public safety purposes and for prosecution purposes is not a new phenomenon. In 1985, no less a civil libertarian than Justice Thurgood Marshall wrote in a dissent: " the public's safety can be perfectly well protected without abridging the Fifth Amendment . . . If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights . . . If trickery is necessary to protect the public, then the police may trick a suspect into confession . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial." New York. v. Quarles, 467 U.S. 649 (1984).

14. Typical are the comments made by Jeffrey Toobin: " I think we're beginning to see sort of the beginnings of two legal systems that are at work here . . . The Justice Department is really changing its orientation in some ways toward preventing crime. They don't care as much about prosecutions anymore. They want to prevent terrorism and they're going to do whatever it takes. And that may include sodium pentathol or even harsher measures, and they just don't care about whether it's used in court." *CNN.Com, Blitzer Report: Interrogating al Qaeda*, CNN Transcripts, *available at* Wysiwyg//

Thus, the time is ripe for a more academic analysis of whether the United States should ever engage in torture during interrogations of suspected terrorists. What are the current constitutional restraints on interrogation, and do they permit coercive tactics in any circumstance? Should some leeway for "truth serum" or even more drastic measures be permitted? Moreover, even if torture could be constitutionally and philosophically justified, would such measures be effective? This article attempts to provide answers to these questions, or at least suggest areas for future, scholarly consideration.

In Section I, I provide a brief working definition of torture. In Section II, I examine the constitutional restraints on interrogation tactics and question whether the law varies if the evidence obtained is introduced at trial. I conclude that the due process clause and the privilege against self-incrimination place significant restraints on the use of torture in order to obtain evidence to be used against the suspect in a criminal trial. Whether torture undertaken solely to obtain information to prevent an imminent terrorist attack violates the Constitution, however, is not as clear. Indeed, last term in *Chavez v. Martinez,* the Supreme Court addressed whether the due process clause and the privilege against self-incrimination protect a suspect during interrogation without regard to the admissibility of any incriminating evidence.[15] The decision, however, generated six separate opinions with no clear majority, and thus the case provides little guidance. I also conclude that international law is not a significant legal barrier to the use of torture in the United States even though treaties to which the United States is a signatory condemn torture without exception.

In Section III, I consider the moral and philosophical arguments for and against torture. I also consider the practical effectiveness of allowing the government limited ability to use extraordinary means of interrogation in extremely narrow circumstances. These arguments are important because the consideration of whether torture violates a person's substantive due process rights

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15. Chavez v. Martinez, 583 U.S. 760 (2003).

turns in part on the state's compelling need to engage in such activity.

In Section IV, I conclude that official state sanctioning of torture is never justified. Given the minimal likelihood of success from torture, the existence of alternative investigative techniques, the harm to society when torture is utilized, and most importantly, the danger that the government will resort to torture in ever increasing circumstances, the United States should categorically reject the use of torture as an interrogation tactic.

I. Defining Torture

When discussed in the media torture is rarely defined.[16] Rather, a wide variety of practices are almost casually referred to as "torture."[17] Moreover, no decision in American case law provides

16. After reviewing transcripts of news shows which discussed torture, I found it very interesting that no one during any of the shows offered any definition of torture. It was treated as though everyone had the same definition in mind. But clearly we don't. Torture is one of those words that even in everyday parlance have a variety of meanings. It is, on the one hand, acknowledged as one of the most egregious behavior undertaken by people. Yet, on the other hand, we use the term to refer to a variety of clearly less abusive behavior. For example, I've often heard a person say to another: "you're torturing me," when that other person won't stop making them laugh. Kids lament that their parents are "torturing" them when they ground them, or make them meet curfew. Parents complain that a baby who wakes all night long is "torturing them." Taking a particularly boring class is often referred to as "torture" by many students.

17. *See* Edward Peters, Torture 1-2 (1985) (discussing definition of torture over time, and concluding: "From the seventeenth century on, the purely legal definition of torture was slowly displaced by a moral definition; from the nineteenth century the moral definition of torture has been supplanted largely by a sentimental definition, until 'torture' may finally mean whatever one wishes it to mean. . ..")

In an interesting "60 Minutes" episode on torture, Mike Wallace was discussing with a retired FBI agent the "torture" by Philippine authorities of a prisoner in the Philippines; the information obtained from the man was used to convict him in the United States. Wallace remarks that [the Philippine authorities] tortured him. You know it . . . The ex-FBI agent merely said: "they did use certain techniques in-in eliciting information. That is correct." Neither put on the table any definition of torture — it was as though they were speaking in code. *See 60 Minutes Transcripts, supra* note 3.

Judge Richard Posner recently wrote that certain practices often called torture — truth serum, sleep deprivation, bright lights — are more aptly called coercion, not torture, but does not define the difference. Richard Posner, *The Best Offense*, New Republic, Sept. 2, 2002 (book review); *see also*, Michael Moore, *Torture and the Balance of Evils*, 23 Isr. L. Rev. 280 (1989), where Professor Moore writes that "there is world of difference morally between the *slight tortures* of sleep deprivation and the *severe tortures* of

an all-encompassing definition of torture; at best the courts make passing reference to police behavior as "torture" or like a "rack and screw."[18] It's as though we assume we all have the same working definition or conception of torture in mind. Do we?

Most people would agree that torture involves physical abuse.[19] The quintessential picture of torture in the United States involves a

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physical mutilation." *Id.* at 334 (emphasis supplied). Professor Moore does not explain why sleep deprivation should even be defined as torture, albeit "slight."

18. For example, in *Brown v. Mississippi*, 297 U.S. 278 (1936), the Supreme Court mentions the word "torture" three times without defining it. There, several black defendants were subjected to severe beatings until they confessed to a murder; there was no evidence against them except the confession. One suspect was hanged by a rope from a tree and whipped until he confessed. The Supreme Court noted that he suffered intense pain and agony. The other defendants were beaten and whipped until they confessed. Once, the Supreme Court quoted the trial judge stating that the defendants had been given some time to "recuperate somewhat from the tortures to which they had been subjected." *Id.* at 282. The second time, the Court implied that the suspects were compelled by torture to confess. *Id.* at 285. Finally, the Court noted, in an oft-cited statement: "[b]ecause a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." The Court concluded: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of these confessions thus obtained as a basis for conviction and sentence was a clear denial of due process." *Id.* at 286. Subsequent Court decisions have referred to the coercion in *Brown* as "torture." *See* Colorado v. Connolly, 479 U.S. 157, 164 (1986) (in *Brown*, police officer extracted confessions through "brutal torture."); *cf.* Haynes v. Washington, 373 U.S. 503 (1963) (J. Clarke, dissenting) (calling police behavior "physical torture").

The Court has not limited its depiction of torture to physical beatings alone. *See* Rochin v. California, 342 U.S. 165, 172 (1952). In *Rochin,* the suspect was not beaten, but was restrained, forced to open his mouth while a stomach tube was placed down his throat and into his stomach. An emetic was then administered, which forced vomiting (and produced capsules of morphine used to convicted the defendant). The Court said this conduct by police of opening the petitioner's mouth and forcibly extracting the contents of his stomach are methods too closely analogous to the "rack and screw" (a euphemism for torture) and hence violated due process.

For further discussion of *Brown* and *Rochin, see infra* notes 50-56 and 118-120 respectively, and accompanying text.

19. *See, e.g.*, 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc a/39/51 (1984) (defines torture as, inter alia, the intentional infliction or threatened infliction of severe physical pain or suffering).

One writer called this form of torture "smacky-face" — the use of whips, pipes, chairs or other "low-tech" items to beat a person; this was described as the most common form of torture. Christopher Hutsul, *The Temptation to Use Torture*, TORONTO STAR, March 9, 2003, at F03; *see also* Stuart Taylor, *Should We Hit Him?* LEGAL TIMES, March 10, 2003, at 52 (calling breaking bones, burning skin, ripping out fingernails "real, unam-

suspect being whipped and/or beaten to secure a confession.[20] More "exotic" physical abuse may include applying electrodes to various parts of the body, wrapping a wet towel around a person's face until they choke and vomit,[21] or inserting sterilized needles under a suspect's fingernails.[22] In Israel, in a case widely viewed as prohibiting "torture" in that country,[23] the Israeli Supreme Court, rather than defining torture more generally, focused its analysis on several specific methods of interrogation, most involving physical discomfort or pain.[24]

But the limitations to a definition that focuses solely on physical abuse or imposing physical pain appear immediately. How much physical abuse constitutes torture? It can't be that the imposition of *any* physical discomfort satisfies the definition. Prison, after all, involves much physical discomfort and even a certain degree

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biguous torture" techniques as opposed to threats to cause pain, deprivation of sleep and food).

20. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936). The Court reversed the convictions on due process grounds: "It would be difficult to conceive of methods more revolting to the sense of justice that those taken to procure the confessions of these petitioners." *Id.* at 286; *see infra* notes 49-54 and accompanying text; *see also* Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 721 (1992) (Supreme Court in *Brown* reversed two convictions that were extorted by "brutal torture."); Rochin v. California, 342 U.S. 165 (1952).

21. This was one of the techniques used by the French to expose a network of Algerian terrorists in the 1950's. *See 60 Minutes Transcript, supra* note 3, at 6-7. The "wet towel until you choke" technique was apparently what broke Abdul Hakim Murad, captured in the Philippines for blowing up a passenger plane. *Id.* at 5.

22. *See* ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (Yale Univ. Press 2002); and comments by Judge Posner, *supra* note 17. Saddam Hussein's preferred torture methods allegedly include eye gouging, acid baths, and use of electrodes. *See Wolf Blitzer Reports*, (CNN television broadcast, December 2 (2002) (transcript).

23. *Israeli Supreme Court Bans Interrogation Abuse of Palestinians*, available *at* www.cnn.com/World/meast/9909/06/Israel.torture (last visited Jan. 28, 2004) ("the Israeli Supreme Court on Monday banned the use of torture in interrogations."

24. Public Comm. Against Torture in Israel v. The State of Israel, H.C. 5100/94 (1999). The Supreme Court of Israel discussed and condemned shaking, waiting in the "shabach" position or the frog crouch, excessive tightening of handcuffs, and intentional sleep deprivation. *See also* Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978), where the English High Court held that protracted standing against the wall on tip toes, covering of the suspect's head throughout most of the detention, exposing the suspect to loud noise for prolonged period of time, and deprivation of sleep, food and drink did not constitute torture, but were prohibited because they treated the suspect in an "inhuman and degrading" manner.

of pain. Requiring someone to sit still and be questioned might be physically uncomfortable and even painful to some. But such is the price of routine interrogations; it certainly would not be considered torture under any reasonable definition of that term.[25] Indeed, the case law is replete with confessions that are deemed admissible despite the existence of some physical abuse during the interrogation process.[26]

Defining torture based on the degree of pain is also fruitless. The amount of physical abuse that causes "significant" pain cannot be measured objectively, and would provide little guidance to interrogators.[27]

Moreover, physical pain may not be a necessary condition to turn an interrogation into torture. What about non-physical, psychological techniques employed during an interrogation or imprisonment in order to gain information or cooperation? For example, keeping a strong light on in a jail cell, playing loud music 24 hours a day,[28] or constantly awakening a person during the night, may not be physically painful, but are considered by many to constitute "psychological torture."[29] Assuming that some psychological tactics

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25. *See, e.g., Regulations Concerning the Convention Against Torture,* 64 Fed. Reg. 8478, 8490 (1999) (hereinafter *Federal Regulations*).

26. *See* cases compiled in Catherine Hancock, *Due Process before Miranda*, 70 TUL. L. REV. 2195, 2203 n.17 (1996).

27. For example, the Convention against Torture (CAT), and the United States regulations implementing that treaty, declares that torture is the infliction of *severe* pain or suffering, and is an *extreme* form of cruel and inhuman treatment as opposed to *lesser* forms of cruel or inhuman treatment. It is never explained how one draws the line between extreme and lesser forms of cruelty. *See Federal Regulations, supra* note 25, at 8490. For further discussion of the CAT see *supra* note 182.

Defining torture is further complicated by the various ways in which physical abuse can be used. That is, one might have one definition of torture when the government uses physical cruelty against political dissidents to stifle dissent, and another when physical abuse is used during interrogation to achieve a desirable end. In the former, the severity of abuse required to satisfy a definition of torture might be lower than in the latter.

28. This is allegedly what happened to Zaccarias Moussaoui, who was arrested in August 2001 and currently faces charges as a co-conspirator in the September 11 bombings. *See supra* note 4; "*Lindh, Mouussaoui under Tight Restrictions*, CNN.com, April 21, 2002, *available at* www.cnn.com4/21/lindh.moussaoui.ap/index.htm. (Moussaoui had bright lights on for 24 hours a day; government later agreed to turn lights off at night) (copy on file with author).

29. Jonathon Alter, for example, discussed subjecting the detainees to "psychological torture," like tapes of dying rabbits or high decibel rap, suggesting that the military

might be considered torture — how do we draw the line? What definition tells us that methods like depriving a suspect of sleep or causing him "unbearable anxiety"[30] may not be acceptable, but that other psychological ploys, like lying,[31] or playing good-cop, bad-

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has done this in Panama and elsewhere. Alter, *supra* note 3. Others find such techniques "relatively benign." Ann Tyson, *U.S. Task: Get Inside Head of Captured bin Laden Aide*, CHRISTIAN SCIENCE MONITOR, Apr. 4, 2002*; see also* Cooper v. Dupnik, 963 F.2d 1220, 1248 (9th Cir. 1992) (referring to police behavior of persistent questioning, where suspect was "hammered, forced, pressured, emotionally worn down, stressed and infused with a sense of helplessness and fear, all to extract a confession" as sophisticated, psychological torture") *Compare Cooper with* U.S. v. Thierman, 678 F.2d 1331 (9th Cir. 1983); U.S. v. Rutledge, 900 F.2d 1127 (7th Cir. 1990).

Interestingly, the dictionary definition of torture is limited to physical pain and does not include psychological abuse. *See* RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY, (2d Ed 1997) ("The act of inflicting excruciating pain, as punishment or revenge, as a means of getting a confession or information, or for sheer cruelty.").

30. A CIA manual apparently used before 1985 advised against physical torture as counterproductive during interrogation. "Instead, it discussed using intense fear, deep exhaustion, solitary confinement, unbearable anxiety, and other forms of psychological duress against a suspect as ways of destroying his capacity to resist his interrogation." Tim Weiner, *CIA Taught, Then Dropped, Mental Torture in Latin America*, N.Y. TIMES, Jan. 29, 1997 at A1.

31. Oregon v. Mathiason, 429 U.S. 492 (1977) (confession obtained after suspect falsely told that his fingerprints had been discovered at the scene of the crime); Michigan v. Mosley, 423 U.S. 96 (1975) (confession obtained after suspect falsely told that another suspect had fingered him as the gunman); Frazier v. Cupp, 394 U.S. 731 (1969) (misrepresentation of accomplice's statements does not render confession involuntary); *see generally* Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 429 (1996); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 581-82 (1979); Note, 40 STAN L. REV. 1593 (1988); *but see* State v. Cayward, 552 So.2d 971 (Fla. App. 1989) (upholding the suppression of a confession made after police manufactured false documents and scientific evidence showing semen stains on victim's underwear came from the defendant).

It is not clear why a lie does not rise to the level of torture — why isn't it as "evil" as keeping a suspect blindfolded and naked, or subjecting a suspect to loud music all the time? *Cf.* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 30 (1978) (discussing the "evil nature of lying"). Once it is determined that the infliction of physical pain is not a necessary condition for the finding of torture, how do you draw the line? Lying can be as coercive and destructive of the human personality as, say, loud music. Yet, as mentioned, suspects being lied to by police officers is standard interrogation procedure.

cop,[32] are not only constitutional but are also, for the most part, accepted by the international community?[33]

And what about non-physical ploys, like threatening to castrate a person or threatening to kill a prisoner's family members, even when there is no intent to carry out such threats? No physical harm actually occurs, yet many would believe these threats to constitute a form of torture.[34]

And finally, how does "truth serum" fit into a definition of torture?[35] Many definitions of torture include the use of truth serum, and many people speak of torture and truth serum in the same breath.[36] Why? It cannot be the minute pain of the injection. Af-

32. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court described the tactic of good cop/bad cop: "In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision." *Id.* at 452.

33. *But see* Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH J. INT'L L 423, 428-29 (2001) ("English courts have declared that misrepresentation of available evidence and other types of deceit are not permissible.").

34. In one case, the Supreme Court equated torture with threats of physical harm that amounted to coercion. In a case where the petitioner was, among other things, threatened with potential mob violence, the Court excluded the resulting confession: "That petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for 'there is torture of mind as well as body; the will is as much affected by fear as by force." Payne v. Arkansas, 356 U.S. 560, 567 (1958); *see also* Harris v. South Carolina, 338 U.S. 68 (1949) (threats to family of suspect).

Jordan, for example, made the most notorious terrorist of the 1980's, Abu Nidal talk by threatening his family. Jonathon Alter referred to this technique as torture: "some torture clearly works." Alter, *supra* note 3. What makes this torture instead of an effective interrogation tactic?

35. Truth serum is a term commonly given to various medical compounds, such as scopolamine, sodium amytal, or sodium pentothal, that lower inhibition by affecting neurotransmitters in the brain, thus, making a suspect more talkative. Scott Martelle, *Terror Probe May Use Truth Serum*, THE RECORD, Nov. 8, 2001 at a20. The "low tech explanation is that barbiturates, which includes sodium pentothal — help channels in the neurotransmitters stay open longer, and in the ensuring flow of gamma-amniobutyric acid, or GABA, personal inhibitions fall away." *Id.*

36. *See* Akshaye Mukal, *The Legal Questions Raised over Truth Serum Use*, ECONOMIC TIMES, July 25, 2002 (human rights community have decried us of truth serum in India as "tantamount to torture."); *A Shot at Justice: Truth Drug for Godra Accused*, INDIAN EXPRESS, June 23, 2002 (truth serum banned under international law, United Nations

ter all, rape suspects routinely undergo blood tests for DNA or for AIDS without any allegation that the suspect is being tortured.[37] The Supreme Court has sanctioned blood tests for drug testing without any discussion as to whether this might constitute torture.[38]

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called it torture because it was physical abuse to extract information). A "60 Minutes" episode on torture included a mention of truth serum (essentially dismissing it as ineffective), but mere inclusion of the topic on a show titled "torture" indicates that some connection between the two was implicitly made. *See 60 Minutes Transcript, supra* note 3; *see also Wolf Blitzer Transcripts, supra* note 14 (critics of using sodium pentothal argue that it would amount to a form of torture."); *see also* Kenneth Roth: *Human Rights Watch* (calling use of truth serum "a notch" from torture; later in same show calls it "psychological terrorism"); *CNN, The Point with Greta van Susteren*, *Tracking the Terrorists*, CNN Transcripts, October 26, 2001, *available at* http//www.cnn.com/transcripts/0110/26/tpt.00html (copy on file with author).

The Convention against Torture includes truth serum as prohibited torture, and the Regulations adopted by the United States to implement the Convention seemingly agree. *See Federal Regulations, supra* note 25 at 8490 (torture includes the administration or application or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality).

37. *See e.g.*, People v. Thomas, 139 Misc. 2d 1072, (1988) (court has inherent discretionary power to order the defendant to submit to a blood test because the rape victim has a right to know whether she may have been exposed to the AIDS virus); Doe v. Connell, 583 N.Y.S.2d 7070 (App. Div. 1992) (nonconsensual extraction of defendant's blood for HIV testing is allowable pursuant to substantial governmental interest in curbing the transmission of AIDS).

38. *See, e.g.*, Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); *see also* Schmerber v. California, 384 U.S. 757 (1966) (government may use blood sample against defendant obtained by medical personnel while defendant was unconscious). There was no discussion of torture, or potential substantive due process violations in *Skinner*; rather the case focused on the Fourth Amendment's prohibition against unreasonable searches and seizures. There potentially may be a Fourth Amendment violation with the use of truth serum injections. The Supreme Court has held in the context of bloods tests for drug testing that both the physical invasion of the skin, and the analyzing of that blood sample for private information, constitutes a search under the Fourth Amendment. *See Skinner,* 489 U.S. at 617. The Fourth Amendment does not prohibit such a search, however; it merely requires that it be reasonable. Thus, at worst, the use of truth serum might require that the officers obtain a search warrant based upon probable cause to believe the individual has relevant information. It is very possible, however, that the Court would not even require a warrant, and would simply demand that the search be "reasonable." In cases of special government need beyond the normal requirements of law enforcement, the Court has held that a warrant requirement and even the requirement of individualized suspicion may be dispensed with. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000). The pin prick involved in delivering the "truth serum" is likely to be viewed as a minimal intrusion involving virtually no risk, trauma or pain, and, given the special government need to fight terrorism, might be justified without probable cause or a warrant. *Cf Skinner*, 489 U.S. at 619; *see also* Government of Virgin Islands v. Roberts, 756 F. Supp. 198 (Dist. Ct. V.I. 1991) (removal of blood reasonable under Fourth Amendment).

Such minimal level of discomfort surely cannot be differentiated from other types of discomfort that occur all the time — from wearing handcuffs, to being hungry before dinner is served, to being slightly chilled or too warm. Yet no one suggests that such physical discomfort would violate the Geneva Convention and other protocols against "torture."[39]

Perhaps the operative factor is that "truth serum" is an affront to human dignity because it overcomes a person's will. Yet, overcoming a person's will, by itself, is not sufficient for a finding of torture. Surely, there are numerous behaviors that can be said to overcome a person's will, including lying and trickery, which are not viewed as torture. Why then, is the use of truth serum, which by all accounts acts similarly to alcohol, considered torture as opposed to cruel and inhumane behavior?

The point I am trying to make is that the boundaries of the concept of torture are surprisingly blurry. Some commentators define torture incredibly broadly to include the infliction of virtually any level of physical or emotional pain. For example, Amnesty International and others speak of torture when describing sexual abuse of women prisoners,[40] police abuse of suspects by physical brutality, overcrowded cells, the use of implements such as stun guns,[41] and the application of the death penalty.[42] Thus, they accuse the United States of either failing to prevent or, more significantly, of promoting torture.[43] The problem with such a definition is that it knows no real limits; if virtually anything can constitute torture, the concept loses some of its ability to shock and disgust. Moreover, universal condemnation may evaporate when the definition is so all encompassing. For example, the United States likely

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39. *See supra* note 26 and accompanying text.

40. Amnesty International, *"Not Part of My Sentence": Violations of the Human Rights of Women in Custody: Overview* (Mar. 1999), *available at* http//www.amnestyusa.org/rightsforall/women/overview.html 2/21/02 ("Sexual abuse of women inmates is torture, plain and simple" said Dr. Schultz, executive director of Amnesty International USA)

41. *See* Associated Press, *US Police Too Brutal, Says Report by Amnesty,* DETROIT FREE PRESS, May 10, 2000 (in its report, Amnesty International cited the use of pepper spray and electric shock devices as punishments that constitute torture).

42. Coalition against Torture and Racial Discrimination, *Torture in the United States,* (Morton Sklar, ed. Oct. 1998 at 6).

43. *Id.*

would not be willing to embrace a definition of torture that includes overcrowded jail cells and the death penalty.[44]

Moreover, to condemn everything equally as torture may lead to the unintended result of creating a sliding scale of torture — a "rating" of torture methods. For example, one commentator suggested that "medium" or "moderate" torture might be acceptable to prevent future terrorist attacks.[45] What exactly is that, and how do we set limits? Is moderate torture a "moderate" amount of physical beating? Some shaking but not "extreme" shaking?

The inability to precisely define torture presents some difficulties for this paper. Rather than attempt an all-encompassing definition, I will try whenever possible to deal with specific interrogation tactics, and only use the word "torture" as a generic term when a more precise delineation is not necessary to the discussion. In those cases, the reader should simply bear in mind the type of abuse that most people would agree constitutes torture.

II. The Law of Interrogation and Torture: What Limits Currently Exist?

Police interrogations of suspects are generally constrained by two constitutional principles. First, when questioning a suspect, the government cannot violate the Fifth and Fourteenth Amendments' requirement for due process of law. The due process clause provides that "no state shall deprive any person of life, liberty or property without due process of law."[46] Second, the Fifth Amendment's privilege against compelled self-incrimination cannot be in-

44. In fact, when the United States passed regulations implementing the Convention against Torture, it specifically modified the definition of torture so that it does not include the death penalty applied consistently with the Fifth, Eighth and Fourteenth Amendments. *See Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8482 (Feb. 19, 1999).

45. *See* comments made by Yonah Alexander: "One has to use whatever resources one has to obtain information, even if you have to forego some civil liberties. In other words, some sort of moderate torture, if you will, or some physical force that is needed in order to save lives." *CNN the Point with Greta Van Susteren: Tracking the Terrorists*, October 26, 2001, *available at* http//www.cnn/transcripts/0110/26/tpt.00,html (copy on file with author); *see also, Alter supra* note 3 (Israeli law leaves room for "moderate" physical pressure in ticking bomb cases.)

46. U.S. Const. Amend. XIV., § 1 (Fifth Amendment guarantees due process in federal proceedings, and Fourteenth Amendment does same with regard to the states).

fringed:[47] "[n]o Person . . . shall be compelled in any criminal case to be a witness against himself."[48] In addition, some restriction on interrogation tactics may also be imposed by international law. Each of these possible constraints is discussed below. It should be noted that the discussion that follows is descriptive and predictive; it is not a normative assessment of whether the Constitution should be interpreted to prohibit torture. In other words, the focus of this section is entirely on whether torture violates the due process clause and the privilege against self-incrimination under current law and not what these rights *should* mean.

A. Due Process Constraints on Interrogation

Two lines of precedent support the contention that torture of suspected terrorists should not be allowed. The Supreme Court has held that coerced confessions are not admissible in court, whether the confession is obtained by physical brutality, psychological pressure that overbears the will of the accused, or drugs. There is also some case law indicating that the Due Process Clause is violated by improper interrogation techniques, regardless of whether any information obtained is ever admitted in court. As to both lines of cases, however, an argument can be made that there is no prohibition against torture of suspected terrorists when necessary to protect against an imminent threat to public safety. These arguments are discussed below.

1. Due Process Concerns When the Product of Interrogation is to be Used at Trial

Case law places substantial limits on the means government officials may use to interrogate suspects when the resulting evidence

47. Due process was the most common constitutional claim raised to exclude confessions between 1930's and the 1960's. In 1964, the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966) brought the Fifth Amendment's right against compelled self-incrimination into the forefront of confessions in the 1960's, *see infra* notes 144-146, but both remain important doctrines today. *See* Catherine Hancock, *Due Process before Miranda*, TUL. L. REV. 2195, 2198 (1996) ("Despite the avalanche of Miranda law since 1966, Due Process doctrine remains a significant source of rights for confession cases."); JAMES ACKER AND DAVID BRODY, CRIMINAL PROCEDURE: A CONTEMPORARY PERSPECTIVE 251 (1999) (same).

48. U.S. CONST. AMEND. V; *see supra* note 46 and accompanying text. (the Fourteenth Amendment applies this provision to the states).

is to be used in court. First, admission in a court of law of any statement obtained after severe physical abuse or threats of abuse constitutes a *per se* constitutional violation. In 1936, for the first time, the Supreme Court rejected a state court's admission of a confession because the police interrogation methods violated the due process clause.[49] In *Brown v. Mississippi*, a capital murder conviction was based solely on the confessions of several African American youths, obtained after savage beatings by white officers.[50] Specifically, one of the defendants was hung on a rope from a limb of a tree; when he continued to protest his innocence, he was let down, tied to a tree and whipped. In the words of the state court judge, the defendant suffered "intense pain and agony."[51] The defendant was later severely whipped by a police deputy, and told that the whipping would continue until he signed a confession written by the deputy. Not surprisingly, he signed the confession. The other defendants suffered a similar fate — they were stripped and whipped with a leather strap with buckles on it until they confessed.[52]

The Supreme Court unanimously reversed the convictions in *Brown*. The Court noted that a state might regulate its own criminal process unless doing so "offends some principle to justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[53] Referring to the police behavior as "compulsion by torture to extort a confession,"[54] the Court found that "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as

49. For an interesting discussion of some cases prior to 1936, see generally 2 John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 833 (2d ed. 1923).

50. Brown v. Mississippi, 297 U.S. 278 (1936). Seeds of the voluntariness doctrine relied on in *Brown* had were rooted in English common law developed in the 1600's. *See* Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. J. L.Q 59, 94 (1988). For a discussion of the importance of the *Brown* case, particularly its racial aspects, *see* Michael Louis Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

51. *Brown*, 297 U.S. at 281.

52. *Id.* at 282.

53. *Id.* at 285 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105; Rogers v. Peck, 199 U.S. 425, 434).

54. *Id.*

the basis for conviction and sentence was a clear denial of due process."[55]

Since *Brown,* the Supreme Court has invalidated numerous confessions elicited in violation of a suspect's due process rights.[56] But the contours of due process have never been adequately defined. In part, the confusion occurs because the ultimate objective of a due process analysis is often obfuscated.[57] Is it the *reliability* of the confession that is of predominant concern? Is the due process test primarily designed to protect against the admission of untrustworthy evidence?[58] During the early 1900's, most courts seemed to focus on the reliability of a confession in assessing a potential due process violation. If reliability of confessions is the ultimate concern, courts might be inclined to admit a confession so long as it is consistent with the overwhelming weight of the evidence, even if the police tactics were suspect.[59] Moreover, due process might not be violated by an interrogation whose fruits were never intended to be and were not admitted at trial since there would be no real reliability issue in such a case.

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55. *Id.* at 286.

56. Since *Brown,* the Supreme Court has considered approximately 35 confession cases on due process grounds alone. *See* CHARLES WHITEBREAD AND CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 401 (4th ed. 2000).

57. As Professor Lawrence Herman writes: "A careful reading of the Court's more than forty involuntary confession cases discloses not one but five different objectives. . ..The objectives are: (1) to deter the police from engaging in conduct that may produce an unreliable confession; (2) to deter the police from engaging in conduct so offensive to the minimum standards of a civilized society that it shocks the conscience of the Court; (3) to deter the police from engaging in less than shocking misconduct; (4) to deter the police from using the techniques of an inquisitorial system and to encourage them to use the techniques of an accusatorial system; and (5) to deter the police from overbearing the suspect's will. . . .[e]ach of the objectives is problematic in one or more ways, and the very number of them obfuscates rather than clarifies" Lawrence Herman, *The Supreme Court, The Attorney General, and The Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 749-50, 754-55 (1987) (*reprinted in* Dressler and Thomas, *supra* note 2, at 571).

58. *See* Yale Kamisar, *What is an Involuntary Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (suggesting that at least at the beginning, the due process test was designed to protect against unreliable confessions).

59. *Cf.* Manson v. Brathwaite, 432 U.S. 98, 113-14 (due process reliability analysis in eyewitness identification cases).

By the 1950's, due process analysis came to focus on the *voluntariness* of a confession, without regard to its reliability.[60] Reliability of the evidence at trial was irrelevant or at most secondary. Instead, courts considered the methods used to obtain a confession and the effect of such tactics on a suspect's free will.[61] In other words, due process reflected a concern for both "the propriety of particular police conduct as well as its probable effect on the suspect's ability to resist."[62] Thus, interrogation tactics "repellent to civilized standards of decency, or which, under the circumstances, were thought to apply a degree of pressure to an individual which unfairly impaired his capacity to make a rational choice, violates due process."[63]

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60. *Brown*, for example, seemed to rely on both justifications. The Court emphasized the unreliability of the confessions, and scolded the lower court since the confessions were the only evidence against the defendants. But the Court was clearly revolted by the behavior of the police and the use of methods that offend "principles of justice so rooted in the tradition and conscience of people as to be ranked as fundamental." *Brown,* 297 U.S. at 285.

61. The shift in thinking can be reflected in the following Supreme Court cases during an approximately ten year time period: Spano v. N.Y., 360 U.S. 315, 320 (1959) ("[T]he abhorrence of society to the use of involuntary confessions does not turn *alone* on their inherent trustworthiness.") (emphasis supplied); Rochin v. California, 342 U.S. 165, 190-91 (1952) ("Use of involuntary verbal confessions is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the due process clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency"); Rogers v. Richmond, 365 U.S. 534 (1961) (question is whether the state overbore the will of the suspect, without "*any regard*" to truth or falsity of the statement) (emphasis supplied); Haynes v. Washington, 373 U.S. 503, 518 (1963) (quoting Rogers, 365 U.S. at 541) ("Indeed, in many of the cases in which the command of the due process clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement."); *see also* Welsh S. White, *What is an Involuntary Confession Now?,* 50 RUT. L. REV. 2001, 2002 (1998) (suggesting that by the 1960's due process cases came to focus on the voluntariness of the confession).

62. White, *supra* note 61, at 2010.

63. Paul Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966). In Columbe v. Connecticut, Justice Frankfurter provided an oft-cited description of the voluntariness test:

> "The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three phased process. First, there is the business of finding the crude historical facts, the external 'phenome-

The application of due process to the torture debate is hampered in part by uncertainty as to the ultimate objective of the due process clause. If reliability of a confession is the key, a suspect whose confession is never intended to be offered into evidence may not have a viable due process claim. Moreover, a suspect who fails to confess, but who claims to have been tortured, may not have a due process claim. And, of course, the reliability standard does not aid a torture victim whose confession turns out to be extremely "reliable."[64]

On the other hand, concerns about ensuring acceptable police behavior and maintaining standards of decency and civility raise their own difficulties for the courts. Every case is fact specific and depends on normative judgments relating to the legitimacy of particular police practices — a question the courts have not addressed in the context of a terrorist suspect who might hold the key to an imminent attack on civilians.

Finally, determining that a suspect's will has been overcome has also proven elusive.[65] Drawing such a conclusion is difficult be-

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nological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, psychological fact. Third, there is the application to the psychological fact of standards for judgment informed by the largely legal conceptions ordinarily characterized as rules of law but which, also, comprehend both inductive form and anticipation of factual circumstances." 367 U.S. 568, 603 (1961).

64. Of course, torture tactics, as will be discussed in Section III, often raise reliability questions. But there are undoubtedly circumstances where police interrogation techniques that may constitute torture lead to verifiable and accurate incriminating statements. *See infra* note 214 and accompanying text.

65. This would include not only the precise behavior of the police (for example, how many hours was the suspect sleep deprived?) but also the individual characteristics of the suspect. *See* Crooker v. California, 357 U.S. 433 (1958) (pointing out that suspect was well educated); Galego v. Colorado, 370 U.S. 49 (1962) (youth of suspect factor in free will); Arizona v. Fulminante, 499 U.S. 279 (1991) (discussing suspects psychological problems).

Of course, this begs the question of whether the real factual circumstances surrounding the interrogation can ever be accurately assessed. Until all interrogations are videotaped, it is often a swearing match between the suspect's claims and the police. Although the imposition of Miranda rights has brought some confessions somewhat "out of the closet," *see* WILLIAM A. GELLER, VIDEOTAPING INTERROGATION & CONFESSIONS, IN THE MIRANDA DEBATE: LAW, JUSTICE AND POLICY 303 (Richard A. Leo & George C. Thomas eds., 1998) (in 1990, about a third of all police departments serving more than 50,000 people were videotaping), they often still take place in secret, controlled settings

cause it relies in part on normative questions that the courts have never addressed. As Professor Welsh White notes: "assessing whether a police practice unduly impairs a suspect's freedom of choice depends on the normative judgment of how much mental freedom should be afforded the suspect . . . as well as an empirical assessment of how much freedom of choice he had at the time he confessed. "[66] Professor White concludes that the Supreme Court has never addressed these normative questions,[67] much less established a methodology for proving that a particular police practice has overcome the will of the suspect. Often, therefore, the court merely makes a conclusion as to the voluntariness of a confession, without any detailed analysis of the underlying normative issues.

Nonetheless, despite the widely acknowledged ambiguities and difficulties inherent in a due process analysis, certain basic precepts can safely be stated. First, admission in a court of law of any statement obtained after severe physical abuse, or threats of such abuse, would constitute a *per se* constitutional violation.[68] This is the clear lesson from *Brown*: evidence obtained after police engage in severe physical abuse will be excluded under the due process clause. In such a case, distrust of the confession's reliability, abhorrence of the state's behavior, and concern about the individual's will being overcome, all coalesce to require that the evidence be suppressed.

Second, confessions obtained by any coercive method that the court believes overcomes the will of the accused will not be admissible.[69] For example, in *Mincey v. Arizona,*[70] the Supreme Court found that a confession elicited from a patient who had just been

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by police. This secrecy is likely magnified manifold when the police interrogate terrorist suspects.

66. White, *supra* note 61, at 2010.

67. *Id.*

68. Brown, 297 U.S. at 278; Stein v. New York, 346 U.S. 156, 182 (1953) (Jackson J.) (overruled-in-part by, Jackson v. Denno, 378 U.S. 368 (1964) ("physical violence or threat of it . . .invalidates confessions. . .and is universally condemned by law. . ..[Thus] there is no need to weigh or measure its effects on the will of the individual victim."); Rochin, 342 U.S. at 172 (struggle to forcibly open suspect's mouth and forcibly extract stomach contents analogous to rack and screw for constitutional purposes and the content is not admissible); Beecher v. Alabama, 389 U.S. 35 (1967) (evidence inadmissible when police officer held gun to head of suspect to obtain confession).

69. *See* Colorado v. Connolly, 479 U.S. 157 (1987) (to establish a due process violation, need both an act of police coercion and proof that the police overbore the will of the suspect).

shot, was in severe pain, could not speak, and frequently asked for an attorney, to be involuntary. As the Court noted:

> It is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will' than Mincey's. He had been seriously wounded . . . had arrived at the hospital 'depressed almost to the point of coma'. . . . He complained . . . that the pain in his leg was unbearable . . . He was evidently confused and unable to think clearly about either the events of the afternoon or the circumstances of his interrogation [and, lying on his back on a hospital bed he was] 'at the complete mercy' of [his interrogator].[71]

The undisputed evidence, according to the Court, made clear that Mincey did not want to answer the questions, but "weakened by pain and shock, isolated from family, friends and legal counsel, and barely conscious, his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."[72]

Similarly, a confession induced by scientific methods that medically or otherwise override the will of the accused will be inadmissible. For example, the use of "truth serum" would almost certainly render a confession inadmissible in a court of law because an accused's self-determination and free will would be violated in the most basic sense. In *Townsend v. Sain*,[73] the Supreme Court suppressed a confession so induced. In that case, Townsend, a nineteen-year-old heroin addict, was arrested in connection with a robbery and murder. Upon his arrest, he was questioned and denied having committed any crimes. A day or so later, during further questioning, Townsend complained of stomach pains and was suffering from severe withdrawal symptoms. A doctor arrived, and,

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70. 437 U.S. 385 (1978); *cf.* Leyra v. Denno, 347 U.S. 556 (1954) (government psychiatrist's questioning of sleep deprived suspect which used almost hypnosis-like methods to elicit confession renders resulting confession involuntary).

71. *Mincey*, 437 U.S. 398.

72. *Id.* at 401-02. The Court held that the confession must be suppressed under the due process clause even though there was ample evidence aside from the confession to support the conviction. *Id* at 385. *But see* discussion of Chavez v. Martinez, *infra* notes 96-111.

73. 372 U.S. 293 (1963).

in the presence of the police, administered a dose of Phenobarbital and hyoscine to alleviate the withdrawal symptoms. Hyoscine is the same as scopolamine — the drug often called "truth serum."[74] Shortly after the doctor left, the police obtained a full confession. In remanding the case for a hearing on the admissibility of the confession, the majority noted the standard for a voluntary confession under the due process clause:

> If an individual's will was overborne or his confession not 'the product of a rational intellect and a free will," his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure . . . . It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a "truth serum.[75]

Indeed, although the Court split on the question of whether the defendant should receive a new evidentiary hearing, all nine members of the Supreme Court agreed, "a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial."[76]

Third, due process would require the exclusion of confessions induced by what most people would refer to as more "subtle" forms of torture (if torture at all) — psychological tactics to obtain confessions.[77] For example, the Court has condemned such tactics as lengthy incommunicado detentions,[78] sleep deprivation,[79] and in-

74. *Id.* at 298.

75. *Id.* at 307-08.

76. *Id.* at 326. Justices Stewart, Clark, Harlan and White dissented from the grant of a *de novo* evidentiary hearing, but stated at the outset, "as to the underlying issue of constitutional law, I completely agree that a confession induced by the administration of drugs is constitutionally inadmissible in a criminal trial." *But cf.* United States v. George, 987 F.2d 1428 (9th Cir. 1993) (defendant voluntarily waived his Miranda rights even when in hospital, on medication, and in pain); United States v. Martin, 781 F.2d 671, 673-74 (9th Cir. 1988) (statement voluntary even though defendant had been given Demerol, a strong pain killer).

77. Of course, some of these techniques would not even rise to the level of most person's conception of torture, but the evidence would still be inadmissible under the due process clause as involuntary.

78. Haynes v. Washington, 373 U.S. 503, 534 (1963) ("We cannot blind ourselves to what experience unmistakably teaches: That even apart from the express threat . . .

voluntary nakedness.[80] Additionally, in *Chambers v. Florida*,[81] the Court overturned the admission of a confession procured during protracted questioning over seven days, while the prisoner was isolated from his family and denied assistance of counsel. Such circumstances were "calculated to break the strongest nerves and the stoutest resistance."[82]

The Supreme Court has consistently condemned, as violating notions of due process, the admission of evidence obtained as a result of interrogation methods that could be described as torture.[83] Although the case law seems to overwhelmingly reject such tactics, it does not address the core issues raised by the current dialogue on torture. Most commentators do not advocate the use of torture in order to obtain evidence for prosecuting a suspect — and for good reason. The above discussion demonstrates that the due process clause would preclude the admission of such evidence. The key question raised by the debate over the use of torture is narrow: what is the role of due process in limiting police behavior when the

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the secret and incommunicado detention and interrogation are devises adapted and used to extort confessions from suspects."); *see also* Aschcroft v. Tennessee, 322 U.S. 143 (1944) (36 hours of consecutive questioning denounced); Reck v Pate, 367 U.S. 433 (1961) (defendant — 19 year-old with subnormal intelligence — held incommunicado for nearly four days, subjected to relentless and incessant interrogation, and food deprived: circumstances "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom").

79. Greenwald v. Wisconsin, 390 U.S. 519 (1968) (condemned 18 hour interrogation during which time suspect deprived of sleep and food); Ashcroft, 322 U.S. 143 (defendant questioned for 36 hours, without sleep or rest).

80. Malinski v. New York, 324 U.S. 401, 405 (1945) ("If the confession had been the product of persistent questioning while Malinsky stood stripped and naked we would have a clear case [of an involuntary confession.] But it was not."). The confession in Malinksi was ultimately found involuntary for a number of other reasons.

81. 309 U.S. 227, 238-39 (1940).

82. *Id.* at 238-39. The Court was also concerned that the "third degree" had historically been used against the most disadvantaged in society — the poorest, least educated, and least influential. *Id.* at 238 n.11; *accord*, Ward v. Texas, 316 U.S. 547, 555 (1942).

83. The fact that the tortured suspect may not be a United States citizen is irrelevant for constitutional purposes. The guarantees of the Fifth and Fourteenth Amendments still apply. As the Court noted in Matthews v. Diaz, "there are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment protects every one of them from deprivation of life, liberty or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." 426 U.S. 67, 77 (1976).

information is never intended to be used — and is not introduced — in a criminal trial? In other words, is there a due process violation if the police act inappropriately or even horrifically, but the resulting confession is never used against the suspect in a court of law?

2. Due Process Concerns When the Product of the Interrogation is Not to be Used at Trial

There is certainly language in Supreme Court jurisprudence supporting the position that there is no due process violation where a statement obtained by torture is not used against a suspect. In virtually all involuntary confession cases brought under the due process clause, it seems to be the *use* of a coerced confession in the criminal trial that constitutes the Constitutional violation. For example, in *Leyra v. Denno*,[84] the Court noted, "use in a state criminal trial of a defendant's confession obtained by coercion — whether physical or mental — is forbidden by the Fourteenth Amendment."[85] Similarly, in *Lisenba v. California*,[86] the Court noted, "petitioner does not and cannot ask redress in this proceeding for any disregard of due process prior to the trial. The gravaman of his complaint is the unfairness of the *use* of his confession and what occurred in [its] procurement is relevant only as it bears on that issue."[87] Finally, in *Mincey v. Arizona*,[88] the Court held that "any criminal trial use of a defendant's involuntary statement is a denial of due process of law, even though there is ample evidence aside from the confession to support the conviction."[89]

It is true that virtually all voluntariness cases have arisen in the context of a criminal defendant asking the courts to apply the exclusionary rule — to hold that coerced confessions are inadmissible in court because admission of such evidence violates the due process clause. And it is true that most court opinions have, without fail, linked the violation of due process to a confession's admission at trial. But is such linkage mere happenstance — made simply

84. 347 U.S. 556 (1954).
85. *Id.* at 558.
86. 314 U.S. 219 (1941).
87. *Id.* at 235 (emphasis supplied).
88. 437 U.S. 385 (1978).
89. *Id.*

because that is the context in which claims have thus far been made? Or, is this linkage not one borne of the procedural posture of a case, but rather based on a substantive finding that the due process clause is violated when and only when, an involuntary confession is introduced in a court of law?

This point — that torture is permissible under the due process clause only if used in extreme situations, only to obtain information for investigative purposes, and not to acquire evidence for prosecution — is one made repeatedly by commentator's post-September 11.[90] Thus, the legal question: does coercive questioning *by itself* violate the due process clause of the Fourteenth and Fifth Amendments? While the Supreme Court has consistently found that any use, in a criminal trial, of a defendant's involuntary statement is a denial of due process, should the same conclusion inure when the objective of the state is not to obtain evidence but to save lives?[91] The courts of appeals have considered this question with conflicting results. The Ninth Circuit appears to be the main proponent of the position that a due process violation occurs at the moment coercive questioning overcomes the will of the suspect, regardless of whether the evidence is ever used at trial. For example, in *Cooper v. Dupnik*,[92] officers in the Tucson Police Department utilized interrogation techniques purposely calculated to wear the suspect down, without any intention of using the evidence in court. Cooper, suspected of being a serial rapist, despite strong evidence that he was innocent, was held incommunicado for almost 24 hours and questioned without counsel, despite his repeated requests for an attorney.[93] After being released from custody, Cooper filed a civil rights action against the officers, alleging a violation of his Fourteenth

90. *See supra* notes 12-13.

91. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978). With one exception, every Supreme Court decision up to now has involved the question of the admissibility of evidence in a criminal trial. *See* Brief for Petitioner Ben Chavez, Chavez v. Martinez, No. 01-1444, at 25 (2002) (*hereinafter*, Brief for Petitioner). The one exception concerned the admissibility of evidence in a civil trial; the Court permitted the introduction of an involuntary confession there. *Id* at 25 (*citing* U.S. ex rel Bilokumsky v. Tod, 263 U.S. 149 (1923)).

92. 963 F.2d 1220 (9th Cir. 1992) (en banc).

93. *Id.*

and Fifth Amendment rights.[94] The Court of Appeals sustained Cooper's Fourteenth Amendment claim:

> Can the coercing by police of a statement from a suspect in custody ripen into a full-blown Constitutional violation only if and when the statement is tendered and used against the declarant? We think not. . . . The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself.[95]

Almost a decade later, the Ninth Circuit revisited this issue, and, relying heavily on *Cooper,* again found that abusive police questioning violates the Fifth and Fourteenth Amendments. It was this case — *Chavez v. Martinez*[96] — which the Supreme Court considered last term.

The facts of *Martinez* are, as one scholar put it, quite "tragic."[97] There, two Oxnard police officers stopped Oliverio Martinez, a farm worker, while riding his bicycle near suspected narcotics activity. Martinez complied with a request to get off his bike, but started running after the police discovered a knife during a pat down search. He was tackled, and, during the scuffle, one officer called out that Martinez was trying to grab his gun. A second officer then fired several shots at Martinez, hitting him once in the eye and blinding him, once in the spine, and three times in the legs, leaving him paralyzed.[98]

Ben Chavez, a patrol supervisor, accompanied Martinez to the hospital. In the ambulance and at the hospital, Chavez demanded information about the shooting. He apparently was concerned that

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94. *Id.*

95. *Id.* at 1244-45. The Ninth Circuit's holding, however, has not met with widespread approval. Numerous other courts of appeals have taken exception with its holding, although most of those cases focus on the privilege against self-incrimination rather than due process. *See* Wiley v. Doory, 14 F.3d 993, 996 (4th Cir. 1994) (disagreeing with Fifth Amendment holding in Cooper); Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc) (same); Giuffre v. Bissell, 31 F.3d 1241, 1256 (3d Cir. 1994) (same); United States v. Palomo, 80 F.3d 138, 142 (5th Cir. 1996) (no Fifth Amendment claim where statement not used against him).

96. 583 U.S. 760 (2003).

97. Erwin Chemerinsky, *The Supreme Court Undermines Fifth Amendment Privilege Against Self-Incrimination*, DAILY JOURNAL, July 2003.

98. Martinez v. Chavez, 270 F.3d 852, 854 (2001).

Martinez would not survive and wanted to obtain his version of the police shooting. Martinez apparently feared that he would not get medical treatment if he did not respond. During the period of questioning, which was spread over a 45 minutes, Martinez admitted that he fought with the police, that he had taken the gun and pointed it at an officer, and that he had used heroin and had been drinking.

Martinez survived and no criminal charges were filed, so his statements to Chavez were never used against him in any criminal proceeding.[99] Rather, Martinez filed a civil rights complaint under federal law,[100] alleging that the officers had violated his constitutional rights by, among other things, subjecting him to a coercive interrogation while he was receiving medical treatment.[101]

Chavez and the other defendants argued that because they could not reasonably have known that their conduct violated

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99. There was no criminal proceeding ever instituted against him. He had been in the vicinity of a narcotics stakeout — a classic case of wrong place, wrong time.

100. 42 U.S.C. § 1983. State officials performing discretionary functions may be sued when they act under color of state law, and deprive a person of their constitutional rights. *See generally* Parratt v. Taylor, 451 U.S. 527 (1981). In order to allow ample room for mistaken judgment, the law allows those sued to assert a qualified immunity defense. *See* Hunter v. Bryant, 502 U.S. 224, 229 (1991) (law gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law). To determine if a government official is entitled to qualified immunity, the following analysis is used: First, taking the facts most favorable to the plaintiff, do the facts show that the action complained of constituted a violation of his or her constitutional rights? If so, is the right clearly established, so that it would be clear to the reasonable officer that the conduct was unlawful? Saucier v. Katz, 533 U.S. 194 (2001); *see also* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wilson v. Layne, 526 U.S. 603 (1999).

In Bivens v. Six Unknown Names Agents, the Supreme Court created an implied private cause of action for damages against *federal* officials when (1) the government official acts under "color of authority" and (2) the official deprived the individual of his constitutional rights. 403 U.S. 388 (1971); *see also* Barr v. Matteo, 60 U.S. 564, 575 (1959). After showing these two elements, the plaintiff has sustained his burden of persuasion, but the government officials may still have a qualified immunity claim. *See* Butz v. Economou, 438 U.S. 478 (1978).

101. Martinez relied heavily on Mincey v. Arizona, 437 U.S. 384 (1978). *Compare Mincey with* Companeria v. Reid, 891 F.2d 1014 (9th Cir. 1989).

Martinez also claimed that the police violated his constitutional rights when they stopped him without probable cause and when that they used excessive force, both in violation of his Fourth Amendment rights. The District Court denied summary judgment on these claims, and thus they were not a part of the appeal. Martinez, 270 F.3d at 855 n.1.

"clearly established" constitutional rights, they were protected from liability under the civil rights laws by qualified immunity. Indeed, they argued that because Martinez's statements were never introduced in a criminal trial, no constitutional violation had occurred.

The Ninth Circuit rejected the officers' claims, finding that Martinez's constitutional rights had been violated. "The Fifth [and Fourteenth] Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity . . . [E]ven though Martinez's statements were not used against him in a criminal proceeding, Chavez's coercive questioning violated Martinez's [constitutional] rights."[102] In other words, "the due process violation caused by coercive behavior of law enforcement officers in pursuit of a confession is complete with the coercive behavior itself . . . . The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution."[103]

Support for such a position rests, in part, from a belief that a contrary holding would lead to a nonsensical result. If the admission of a coerced confession at trial were the only measure of a constitutional violation, a guilty party who is unlawfully interrogated and as a result, confesses, has been denied his constitutional rights and thus, has a civil action against his interrogators. But an innocent person who has nothing to confess, and is subjected to the exact same — or even worse — coercive interrogation will have suffered no violation and will have no civil remedy. Such a result would run counter to any notion of fairness. As the Ninth Circuit concluded, "Our law has many subtleties and turnings, but such a counter-intuitive result cannot be, and is not, the law."[104]

Finding that Martinez's constitutional rights were established at the time of the violation, the Ninth Circuit held that Martinez's complaint stated a viable civil rights claim. The officers and the city defendants appealed, and the Supreme Court granted certiorari.[105]

In *Chavez*, the Supreme Court held, for the first time, that a victim of police brutality could bring a cause of action under the

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102. *Martinez*, 270 F.3d at 857.

103. *Id.* at 857, *quoting Cooper,* 963 F.2d at 1244-45.

104. *Cooper*, 963 F.2d at 1237.

105. The Supreme Court granted certiorari in June 2002. *See* 2002 U.S. Lexis 4044 (June 3, 2002).

due process clause even though there was no criminal trial. The decision of the Court, however, was badly splintered. Justices Thomas, Rehnquist and Scalia found that police brutality could constitute a substantive due process violation, but held that Martinez's case did not rise to the level of such a violation.[106] Souter and Breyer found that brutality that "shocks the conscience" violates substantive due process, but they did not decide whether the behavior here was sufficiently shocking. Instead, they suggested a remand to determine if such a violation occurred on the record. Not only did Justices Kennedy, Stevens and Ginsberg agree that physical brutality by the government can constitute a substantive due process violation, but also they believed that the record in Martinez's case adequately supported a finding of such a constitutional violation. Nevertheless, they agreed to remand the case in order to assemble a majority on this issue. Thus, the opinion of the Court was delivered by Justice Souter who wrote that "[w]hether Martinez may pursue a claim of liability for a substantive due process violation is. . . an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him."[107] No further guidance for determining the scope or application of the due process clause was provided by the Court.

Despite the cryptic nature of the opinion, the decision in *Chavez* clearly recognized that in interrogation contexts, there are two relevant due process "clauses" contained in the Fourteenth Amendment. First, there is the concern for "procedural" due process — a concern that the suspect receives a fair trial.[108] As previously discussed, this appears to be the initial focus of the due process clause — the prohibition against coerced confessions was very much grounded in a concern about reliability, and hence, a concern about the right to a fair trial. Even when the focus shifted away from reliability, the due process clause remained grounded in the notion that a coerced confession cannot be used to convict a defen-

106. Chavez v. Martinez, 583 U.S. 760 (2003).

107. *Id.* at 4392.

108. *See* Chambers v. Florida, 309 U.S. 227, 237 (1940) ("[T]he due process provision of the Fourteenth Amendment — just like as that in the Fifth — has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority.").

dant: "[the due process clause] prevent[s] fundamental unfairness in the use of evidence, whether true or false."[109] In sum, to the extent the Fourteenth Amendment focuses on procedural fairness, an attempt to introduce the evidence against a suspect at trial is obviously required.

Second, the Court in *Chavez* affirmed that there is a "substantive" due process right to be free of coercive interrogation tactics regardless of how any procured statements are used. Indeed, eight justices affirmed that a person has a right to be free from coercive interrogation tactics whether or not any procured statements are used against him.[110] In other words, independent from its concern with a fair trial due process is concerned with placing appropriate limits on police behavior and with respecting an individual's dignity and autonomy. As even the Brief for the Petitioner in *Martinez* conceded, "substantive due process jurisprudence is broad enough to condemn certain police questioning outright . . ."[111]

The question, obviously, is how to define the substantive right. The Court made little attempt to do so in *Chavez v. Martinez*, instead choosing to remand the case for further determination. Thus, the Ninth Circuit presumably will need to develop standards for assessing the nature of due process in this context.

Defining substantive due process is not easy. The amorphous nature of substantive due process has bedeviled the judiciary — and scholars — throughout the century.[112] Two formulations of substantive due process that have developed over time, however, seem most relevant in the area of police interrogations. First, the due process clause protects against behavior that "shocks the conscience," or that contravenes our conceptions of a democratic, de-

109. Lisenba v. California, 314 U.S. 219, 236 (1941); *see also* Malinski v. New York, 324 U.S. 401, 404 (1945).

110. Justice O'Connor never weighed in on this issue.

111. Brief of Petitioner, *supra* note 91, at 28 (substantive due process violated by police questioning this is intentional, brutal and unjustified by legitimate state interest); *see also* Brief of Amicus Curiae of the Criminal Justice Foundation in Support of Petitioner, Chavez v. Martinez, No. 01-1444, at 28 2003 U.S. LEXIS 4274 (2002) ("Force, the threat of force, or the deprivation of food, water or sleep during interrogation violates substantive due process.").

112. *See* Flores, 507 U.S. at 301; *see also* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002).

cent society.[113] Second, due process protects those rights deeply rooted in the nation's history and tradition.[114]

To hold that the due process clause prohibits police behavior that "shocks the conscience" in many ways merely restates the question. How do we determine what behavior is so shocking? Some would say that any police coercion that overbears the will of the suspect is unconscionable; others would require extreme police brutality. My point is not to conclusively enter this field — that would be an article in itself. Rather, my point is simply this: however the substantive due process right is defined, much of what we think of as "torture" would clearly constitute behavior that "shocks the conscience."

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113. *See* Deshawn E v. Safir, 156 F.3d 340, 348 (2d Cir. 1998) (under Section 1983, the "challenged conduct must be the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the state.").

The shock the conscience approach was used since the early 1900's to determine whether a contract should be enforced, or whether to accept a sale of property. *See* Eric Muller, *Constitutional Conscience,* at 5-6 (2002) (Unpublished manuscript). The test was first used in a criminal context in Rochin v. California, 342 U.S. 165, 172 (1952). *See infra* notes 118-122 and accompanying text; *see also* Hurtado v. California, 110 U.S. 516 (1884), where the defendant in a murder case claimed that the due process clause of the Fourteenth Amendment required that all criminal cases be initiated by a grand jury indictment. Court rejected that notion, but held that due process protects those "fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." *Id.* at 534-35.

The "shock the conscience" approach has been subjected to much criticism. For example, Professor Benner argues that the shock the conscience standard is "unable to provide a theoretical framework capable of generating neutral principles that transcend the result in the immediate case at hand." Thus, the approach "ransoms due process to the personal values of five members of the Court." Laurence Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine Historical Perspective*, 67 WASH. U. L.Q. 59, 131 (1989); *see also*, Rochin, 342 U.S. at 175 (Black, J., concurring) (criticizing court's doctrine as unprincipled, bounded by nothing except a judge's personal notion of civilized decencies"); County of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring)(calling shock the conscience test "the cellophane of subjectivity").

114. Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) ("[A]ppropriate limits on substantive due process come . . . from careful respect for the teachings of history' [and] solid recognition of the basic values that underlie our society.")(citations omitted); *accord*, Washington v. Glucksberg, 523 U.S. 702 (1987); Michael H. v. Gerald D, 491 U.S. 110 (1989); *see also* Rebecca Brown, *Traditional Insight*, 103 YALE L. J. 177, 201 (1993) (discussing use of history and tradition); Wolf, *supra* note 112 ("history and tradition are often consulted in order to assess whether a purported right is fundamental").

Indeed, in many ways, the "shock the conscience" test may be at the core of defining torture and distinguishing it from other behaviors. For example, a police officer striking a suspect might be illegal, or at least offensive, but few would feel it constitutes "torture." Why? Such conduct can be characterized as the deliberate imposition of physical pain to elicit information. Yet, because the behavior is not likely to be deemed "so egregious, so outrageous that it fairly [can] be said to shock the contemporary conscience,"[115] it would neither violate the due process clause nor constitute torture.

Sustained, brutal beating, however, that crosses over some threshold of brutality — that begins to *shock* us with its brutality and degradation for humanness — goes beyond mere abuse. It may deserve condemnation as a method of torture rather than merely offensive behavior.[116] *Rochin v. California* is instructive in this regard, as it provides an example of police conduct that crosses the brutality threshold.[117]

In *Rochin*, several deputy sheriffs, having information that Antonio Rochin was in possession of narcotics, forced themselves into his bedroom. After an officer pointed to two pills on his nightstand and asked him to whom they belonged, Rochin swallowed the capsules. An officer squeezed Rochin's throat and forced his fingers down his mouth, but to no avail.[118]The officers then took Rochin to the hospital where, at the direction of the police, the doctors strapped him to a gurney, and forced a tube into his mouth and down his throat. After an emetic solution was administered down the tube, Rochin vomited into a bucket. The capsules were

115. County of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998).

116. The Seventh Circuit made this point in Wilkins v. May, 872 F.2d 190 (7th Cir. 1989). There, the suspect sought damages from the FBI agents who, he claimed, held a pistol at his temple during his interrogation. In remanding for consideration under the due process clause, the court noted: "this is not to suggest that the federal courts should monitor the details of police interrogation and to award damages whenever the police cross the line that separates coercive from non-coercive interrogation. The relevant liberty is not freedom from unlawful interrogation but freedom from severe body or mental harm . . . We do not specify a particular threshold . . . But it is a high threshold, and to cross it [plaintiffs] must show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience." *Id.* at 195.

117. 342 U.S. 165 (1952).

118. *See* People v. Rochin, 225 P.2d 1 (Cal. Dist. Ct. App) (1950); *Rochin*, 342 U.S. at 166.

retrieved from the bucket, and were found to be morphine. Rochin was convicted of unlawful possession of morphine based on the admission of the pills against him at trial.[119]

The Supreme Court reversed Rochin's conviction, holding the retrieval of the morphine tablets and their use at trial, shocked the conscience and hence violated Rochin's due process rights under the Fourteenth Amendment. "The proceedings by which the conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically . . . .They are methods too close to the rack and the screw to permit of constitutional differentiation."[120]

In addition to the "shock the conscience" test, substantive rights are also defined as those "deeply rooted in this Nation's history and tradition."[121] In *Washington v. Glucksberg*,[122] the Supreme Court, expressing a general reluctance to expand the concept of

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119. *Rochin,* 342 U.S. at 166-67.

120. *Id.* at 172; *see also* Irvine v. California, 347 U.S. 128, 133 (1954) (Court makes clear that what was so troubling in *Rochin* was the physical brutality there); Muller, *supra* note 113, at 27.

121. Washington v. Glucksberg, 521 U.S. 702 (1997).

122. *See id.* Like the "shock the conscience" test, the use of history and tradition has also been widely criticized as subjective and malleable. *See generally* LAURENCE TRIBE & MICHAEL DORF, ON READING THE CONSTITUTION 106 (1991); Wolf, *supra* note 112. Many argue that history and tradition can be molded to support almost any conclusion depending on the historical period looked at and the level of specificity with which the tradition is framed. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n. 6 (1989 (discussing the level of specificity issue); *see also*, Laurence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); David Crump, *How do Courts Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J. L. & PUB. POL'Y 795 (1996). For example, one could make the argument that there is a long tradition of using torture and coercion throughout Anglo-American history. *See* H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1140 (1989) (discussing Anglo-American history of torture from the 13th Century); Andrea Montavon-McKillip, *CAT among Pigeons: The Convention against Torture, A Precarious Intersection Among International Human Rights Law and U.S. Immigration Law,* 44 ARIZ L. REV. 247, 248 (2002) (despite early condemnation of torture, it was revenant after World War Two; torture was again used by European colonialists, British anti-terrorist forces in Northern Ireland, the Greek military, Latin American military dictatorships, African dictators, communist regimes, and United States police departments, to name a few.").

Others applaud the use of history and tradition in defining substantive due process rights. Professor Muller, for example, praises it as a "palatable way of converting the shocks the conscience test from free-form philosophy to constitutional principle." Muller, *supra* note 113, at 67.

substantive due process, held that it would only protect under the due process clause "those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Does torture violate any fundamental rights that are deeply rooted in this nation's history?

The right to be free from extreme physical brutality during police questioning seems so rooted. There clearly is a liberty interest in bodily integrity that would protect against physical abuse during interrogation.[123] Indeed, there is a long history of condemnation of physical torture and the freedom from such abuse seems implicit in the concept of ordered liberty. Thus, most would agree with the Seventh Circuit's conclusion that the substantive due process right under the Fourteenth Amendment includes "freedom from severe bodily or mental harm inflicted in the course of an interrogation."[124] Or, as Justice Kennedy wrote in *Chavez,* "it seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty . . . . The Constitution does not countenance the official imposition of severe pain or pressure for purposes of interrogation . . ."[125]

So, my point is simply this: there seems significant agreement that, whatever the precise scope of the due process clause, it *does* limit certain police behavior regardless of any desire or attempt to admit evidence in a criminal trial. Even those who would attempt to define the scope of the due process clause narrowly concede that extreme acts of physical or mental abuse would likely cross the line into unconstitutional behavior.[126]

Nonetheless, this does not mean that all forms of coercive questioning of terrorists will violate due process. First, what might

123. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990); *see also* Washington v. Harper, 494 U.S. 210 (1990).

124. Wilkins v. May, 877 F.2d 190, 195 (7th Cir. 1989); *see also*, Palko v. Connecticut, 302 U.S. 319 (1937) (overruled on other grounds by Benton v. Maryland, 395 U.S. 784 (1969) (due process must at least give "protection against torture, physical or mental.")).

125. *Chavez,* 583 U.S. 760 (Kennedy, J., dissenting).

126. *See supra* note 111.

constitute a substantive due process violation likely will be strictly construed because courts have been reluctant to add new substantive rights.[127] Most courts have found that the infliction of minimal physical abuse does not constitute a substantive due process violation. For example, the Court of Appeals for the Eighth Circuit found no due process violation when officers threatened to knock out a suspect's teeth if he remained silent.[128] The court concluded that the officers' conduct, while not to be condoned, did not "rise to the level of a brutal and wanton act of cruelty."[129]

Likewise, psychological ploys such as keeping the lights on, continuous interrogations, and sleep deprivation would often not rise to the level of shocking the conscience, or be contrary to a right long protected by history and tradition, and therefore, are not likely to constitute a substantive due process violation.[130] Even though confessions elicited by these tactics have been excluded from trial as "involuntary," this does not necessarily mean that there was a substantive due process violation. As Professor Susan Klein recognized, "the standard for finding a confession to be involuntary is much lower than the 'shock the conscience' substantive due process standard."[131]

Finally, it is likely that the use of truth serum in extreme circumstances would not violate substantive due process rights. In other words, while any statements derived from the administration of truth serum could not be introduced at trial — that would violate *procedural* due process concerns — the procurement of such statements would not otherwise violate due process. The courts

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127. The Supreme Court itself has expressed an unwillingness to recognize new substantive rights, and has indicated that it will construe existing rights narrowly. As the Court said in Washington v. Glucksberg, "we have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this un-chartered area are scarce and open ended." 521 U.S. 702, 720 (1997)*; accord,* Collins v. Harkin Heights, 503 U.S. 115, 125 (1992).

128. Hopson v. Fredericksen, 961 F.2d 1374, 1379 n.3 (8th Cir. 1992).

129. *Id.*; *accord* Robertson v. Plano, 70 F.3d 21 (5th Cir. 1995).

130. *See* Richard Posner, *supra* note 17 (truth serum, bright lights and sleep deprivation more aptly described as coercion rather than torture).

131. Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide,* 143 U. PA. L. REV. 417, 471 (1994). As Professor Klein argued, if all involuntary confessions violated substantive due process, it would provide insufficient guidelines to the police, who might cease all custodial interrogation rather than risk civil liability. *Id.* at 472.

would not likely find that the injection of "truth serum," which is minimally invasive, involves almost no pain or deleterious side effects, and simply lowers inhibitions, constitutes severe bodily intrusion or shocks the conscience. This conclusion is bolstered by the Supreme Court's decision in *Breuthaupt v. Abrams*.[132] There, an emergency room doctor, at the behest of the police, drew blood in order to determine the blood alcohol content of an unconscious driver who had caused an accident, killing three people. The driver argued that this invasion violated his due process rights under *Rochin*. The Court disagreed, noting that there was "nothing brutal or offensive in the taking of a sample of blood when done . . . under the protective eye of a physician."[133]

Thus, there are methods of interrogation that may be associated with the word "torture" that might not raise substantive due process concerns. But what if a prisoner is impervious to other physical or psychological tactics, and the only method left to attempt to obtain information is to use electrodes attached to the genitals. At a threshold level, this infliction of significant physical pain and suffering would clearly raise concerns under due process. Does this mean that such a tactic is constitutionally impermissible?

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132. 352 U.S. 432 (1957).

133. *Id.* at 435; *see also* People v. Melton, 44 Cal. 3d 713, *cert. denied*, 488 U.S. 934 (1988) (calling a blood test a "minimal intrusion.").

There potentially may be a Fourth Amendment violation with the use of truth serum injections. The Supreme Court has held in the context of blood tests for drug testing that both the physical invasion of the skin, and the analyzing of that blood sample which might yield private information, constitute a search under the Fourth Amendment. *See* Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). The Fourth Amendment, however, does not prohibit such a search; it merely requires that it be reasonable. Thus, at worst, the use of truth serum might require that the officers obtain a search warrant based upon probable cause to believe the individual has relevant information. It is very possible, however, that the Court would not even require a warrant, and would simply demand that the search be reasonable. In cases of special government need beyond the normal requirements of law enforcement, the Court has held that a warrant and even any individualized suspicion may be dispensed with. *See* City of Indianapolis v. Edmond, 531 U.S. 32 (2000); *see also Skinner*, 489 U.S. at 619-20 (discussing doctrine of special needs).

The pin-prick involved in delivering the "truth serum" is likely to be viewed as a minimal intrusion involving virtually no risk, trauma or pain, and thus could be justified without probable cause or a warrant in the face of special government need beyond the normal requirements of law enforcement.

The answer must be no. The conclusion that a constitutional right has been violated does not end with a finding that the police behavior shocks the conscience. Rather, the analysis only begins there. The Fourteenth Amendment's guarantee that the government will not deprive any person of due process of law, like virtually all constitutional provisions, is not absolute. The government may deprive a person of life, liberty or property if the government has a sufficiently valid justification for doing so.[134]

Therefore, methods of interrogation that normally would not be tolerated in a free society nonetheless might be constitutionally permissible if there is a compelling government interest that outweighs an individual's rights.[135] Or, to look at the issue from a slightly different perspective — a conclusion that certain behavior should not be tolerated in a free society can not be made simply by considering the government's behavior in isolation — the entire context must be evaluated. For example, a situation in which bamboo shoots are forced under a petty theft's fingernails to find the location of stolen videos may be deemed intolerable. However, such action may be deemed acceptable when dealing with a terrorist who admits to planting a weapon of mass destruction in a largely populated city and refuses to say where. In other words, police behavior that may be condemned as indecent and abhorrent to civilized society in one circumstance may be reluctantly embraced as a necessary evil in another.[136] Due process does not exist in a vac-

134. "If a right is deemed fundamental [under the due process clause], the Government must present a compelling interest to justify an infringement. Alternatively, if a right is not fundamental, only a legitimate purpose is required for the law to be sustained." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 700 (2d ed. 2001); *cf.* New York v. Quarles, 467 U.S. 649 (1984) (recognizing exception to Miranda because of countervailing public safety need); McNally v. Butts, 195 F.3d 1039, 1042 n. 4 (9th Cir. 1999) (suggesting different result if there were exigent circumstances such as a ticking bomb that had to be located).

135. As will be discussed more fully below, whether the government has a compelling interest in obtaining the information must also include consideration of the societal costs of utilizing coercion. *See Cooper,* 963 F.2d at 1250 (the government interest must also include societal interest in freedom from coercion and in fairness in police procedure).

136. *Cf.* Haynes v. Washington 373 U.S. 503, 519 (1963) ("The procedures here are no less constitutionally impermissible and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods (of interrogation) utilized were in any way essential to the detection and solution of the crime or to the protection of the public.")

uum, and requires consideration of any compelling government interest as well as any alternative means to secure those interests.

Thus far, the Supreme Court has not undertaken such a balancing approach in evaluating the due process rights of an interrogated suspect.[137] In the only known case of this sort, a Florida State court obliquely considered the question of whether the use of extreme force is acceptable when a suspect has information vital to someone's life. In that case, the police encountered a kidnapper, Jean Leon, during a prearranged meeting to collect ransom.[138] Forced to take Leon into custody, the police demanded that he tell them where the victim was being held.[139] Leon refused to reveal the information. The police officers, fearing that the victim's life was in imminent danger because Leon could not return to his associate with the ransom, proceeded to threaten and physically abuse Leon by twisting his arm behind his back and choking him until he revealed where the victim was being held. The police then went to the location, rescued the victim and arrested the confederate. Several hours after his arrest, at a different location than the earlier "interrogation," different police officers questioned Leon after informing him of his right to remain silent, and he provided a full confession. It is that confession that Leon was seeking to suppress — the state was not seeking to admit the initial information regarding the location of the kidnap victim.[140]

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137. It has in the area of "Miranda" violations under the Fifth Amendment, where the Supreme Court adopted a "public safety" exception. *See infra* note 148 and accompanying text.

138. Leon v. State, 410 So. 2d 201 (Fl. Ct. App. 1982), *aff'd* Leon v. Wainwright, 734 F2d 770 (11th Cir. 1984). The Court of Appeals similarly found it important to mention that the "violence was not inflicted to obtain a confession or provide other evidence to establish appellant's guilt. Instead, it was motivated by the immediate necessity to find the victim and save his life." *Id.* at 773 n.5; *see also supra* notes 12-13 and accompanying text.

139. The kidnapper was actually meeting with the brother of the person kidnapped to claim the ransom, the police were watching nearby. When the kidnapper drew a gun on the brother, the police were forced to intervene and arrest the kidnapper. Leon, 410 So. 2d. at 202.

140. The issue in this case was the admissibility of the later, station house confession and whether it was tainted by the admittedly coerced confession. The court held that that second confession was admissible because of the intervening events. Such intervening events included the time between the interrogations, the different locations and different officers at the station house than in the field. Most significant, the court found that the coerciveness of the earlier acts of violence would not carry over to the

Although the court was not directly concerned with whether the police officer's behavior in eliciting the first "confession" was constitutional or not, the court did comment on the officer's actions, intimating that the physical abuse of Leon did not violate standards of decency. The court noted, "the force and threats asserted upon Leon in the parking lot were *understandably* motivated by the immediate necessity to find the victim and save his life. Unlike the situation in every authority cited by the defendant . . . the violence was not inflicted in order to secure a confession or provide other evidence to establish the defendant's guilt."[141] In a footnote, however, the court backtracked, noting that since it really was irrelevant to the resolution of the case, "we do not attempt to resolve the moral and philosophical problem of whether the force used on Leon in the emergency, life-threatening situation presented to the arresting officers, was "justified" or proper."[142] It is interesting that the court viewed this question as a moral and philosophical one, rather than a legal issue.

The bottom line appears to be that no court, thus far, has engaged in a substantive due process analysis in which the justification for the state's behavior was considered in assessing the voluntariness of a confession. Such an analysis, however, is essential to determining whether torture violates the due process clause. Assessing whether police conduct exceeds the bounds of acceptable behavior, or whether an action shocks the conscience, requires consideration of justifications for such action. The context in which some have suggested that torture is appropriate — the ticking bomb scenario — in which police use torture to obtain information to save thousands, perhaps millions of lives, demands scrutiny of government interests.

The nature of government interests figures into the constitutional analysis in two distinct ways. First, the government's purported justification for torturing will invariably factor into the consideration of whether the police conduct shocks the conscience. Police abuse intended simply to injure without any other justifica-

later confession because the police officers acted that way in the field in order to find the victim; once the victim was saved, the suspect would realize that there was no reason for him to fear abuse. *Id.* at 202-03.

141. *Id.* at 203 (emphasis supplied).

142. *Id.* at 203, n.3.

tion is the "sort of official action most likely to rise to the conscience-shocking level."[143] Even despicable police behavior, however, might not shock the conscience if essential for saving tens of thousands of lives, or, even if shocking, might nonetheless be found constitutional based on such a compelling government interest.[144]

Second, in considering any possibly compelling government interest for engaging in torture, it is not only the possibility of saving lives if a terrorist attack were thwarted that must be evaluated. The government interest must also include institutional concerns against using torture, as well as considerations of the effectiveness of the tactic.[145] These concerns are addressed in Section III.

B. The Right Against Self-Incrimination, Miranda Rights and Limits on Torture

Until the 1960's, the law regarding confessions was governed almost exclusively by the doctrine of voluntariness under the due process clause.[146] But the Court was concerned that the Fourteenth Amendment's amorphous standards could not adequately protect criminal suspects from police coercion. Central to this concern was the fact that interrogation was still a practice conducted almost entirely under police control, with a suspect not only isolated from external sources of support, but also subject to a wide variety of tactics designed to "persuade, trick or cajole"[147] a confession.

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143. County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998). Thus, physical abuse undertaken for sadistic purposes may violate substantive due process; the exact same behavior when done to obtain the location of a "dirty" bomb may not.

144. *See* Youngberg v. Romeo, 457 U.S. 307, 320 (1982) (must balance individual liberty interest against government's interest in determining whether there is a substantive due process violation).

145. *See Cooper,* 963 F.3d at 1250 (conception of common good cannot only include possibility of catching criminal; it must also include the importance of fairness in police procedures and the common good in freedom from coercion).

146. In 1897, the Supreme Court in *Bram v. United States* held that an involuntary confession elicited pre-trial is inadmissible under the Fifth Amendment's privilege against self-incrimination. But after *Bram*, the Court basically ignored the self-incrimination clause as a basis for finding confession inadmissible and focused instead on the due process clause.

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

In order to better protect against involuntary confessions, the Court shifted its focus from the Fourteenth Amendment's due process protections to the Fifth Amendment's privilege against self-incrimination.[148] The Fifth Amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against him-

148. One of the most significant developments under the Fifth Amendment was the holding in Miranda v. Arizona, 384 U.S. 436 (1966). Finding that police dominated, custodial interrogations were presumptively coercive, and hence, potentially violative of the right against self-incrimination, the Court took a proactive approach to protecting a suspect's Fifth Amendment rights. A suspect in custody subjected to interrogation must be afforded certain rights, and must be told of these rights. Specifically, these Miranda rights require that the police warn a suspect that he has the right to remain silent, and the right to have an attorney present during questioning. Any waiver of these rights must be made knowingly, intelligently and voluntarily. *See generally* Marcy Strauss, *Reinterrogation*, HASTINGS CONST. L.Q. 359 (1995).

It is entirely possible that the police may violate a suspect's Miranda rights during questioning of a terrorist. However, the Supreme Court has explicitly recognized a public safety exception to Miranda in New York v. Quarles, 467 U.S. 649 (1984). There, a young woman approached two officers, and told them that she had just been raped. She described the offender, and told the police that he was armed, and that he had just entered a nearby grocery store. The officers went to the store, found the suspect and frisked him. They found an empty shoulder holster, but no gun. Without reading him his rights, one police officer asked him where the gun was and Quarles told him "the gun is over there." *Id.* at 651-52. The police retrieved a loaded .38 caliber revolver from the place Quarles indicated.

At trial, the court suppressed the statement "the gun is over there" and the gun itself as fruit of a Miranda violation; the court of appeals affirmed. *Id.* at 653. The Supreme Court reversed, finding that there was a "public safety exception to the requirement that Miranda warning be given before a suspect's answers may be admitted. Miranda need not be applied "with all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656.

Given the context in which torture is suggested, it is clear that a public safety exception to Miranda would justify dispensing with the Miranda rights. There is a complication, however: Quarles was based in significant part on the assumption that a Miranda violation did not constitute a constitutional violation. That is, a statement may be elicited in violation of Miranda, but otherwise not be coerced, and thus it does not violate the Fifth Amendment. The Supreme Court has recently rejected the notion that a Miranda violation is not a constitutional violation. *See* Dickerson v. United States, 530 U.S. 428 (2000). The Supreme Court has not decided the implications of this holding for the public safety exception. *But see* United States v. Patane, 304 F.3d 1013(10th Cir. 2002) (decision in Dickerson establishes that Miranda is a constitutional rule, and hence, physical evidence obtained by police as a result of a statement obtained in violation of Miranda must be suppressed).

In any event, whether the argument is that there was a Miranda violation, or an independent Fifth Amendment violation during the interrogation process, the ultimate question remains the same: Does the Fifth Amendment (and Miranda) apply when the information sought to be obtained is never used to incriminate the suspect?

self."[149] Although read literally, the language of the Fifth Amendment suggests that the privilege only protects a suspect from being forced to testify against himself in a criminal trial, the Supreme Court has long provided a much broader interpretation of the Amendment.[150] Although how broadly the Amendment sweeps is a matter of significant dispute,[151] no one doubts that the Fifth Amendment applies to exclude, from a criminal trial, coerced statements elicited during police interrogation. Thus, it is established that any confession coerced out of a suspect would be inadmissible at a criminal trial.[152]

As with the due process analysis, those who advocate the limited use of torture would not challenge the inadmissibility of coerced testimony at trial because of the right against compelled self-incrimination. The issue, then, is whether the Fifth Amendment prohibits coercive interrogation tactics in the first place. More succinctly — does the Fifth Amendment bar coercive questioning — or only the admission of the fruits of such questioning in a criminal trial against the accused?

The Supreme Court addressed this precise question in *Chavez v. Martinez*. The Court's decision, however, provides little resolution. First, there is some disagreement as to the actual holding in *Chavez*. Justice Thomas, announcing the judgment of the Court, found that the Fifth Amendment privilege is a fundamental trial right:

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149. U.S. CONST. AMEND V. The Fifth Amendment applies the privilege against self-incrimination to the federal government; the Fourteenth Amendment ensures that the states honor the privilege as part of due process. In this section of the paper, the Fifth Amendment will be used generically to refer to both constitutional provisions.

150. *See* Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Bram v. United States, 168 U.S. 532 (1897).

151. The precise scope of the Amendment has been subject to much debate; as one legal scholar wrote, "[d]espite the facial clarity of this language, the amendment . . . [has] always been shrouded in controversy." Marvin Schiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 197 (1979); *see also* Akhil Reed Amar and Renee B. Lettow, *Fifth Amendment First Principles: The Self Incrimination Clause*, 93 MICH. L. REV 857, 857 (1995); Marcy Strauss, *Silence*, 35 LOY. L. REV. 101, 152 (2001).

152. *See infra* note 161. The Ninth Circuit, however, appears to be in the minority of those courts of appeals that have considered this issue. *See, e.g.*, Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc); United States v. Paloma, 80 F.3d 138, 142 (5th Cir. 1996); Wiley v. Doory, 14 F.3d 993, 996 (4th Cir. 1994); Giuffre v. Bissell, 31 F.3d 1241, 1256 (3d Cir. 1994).

> Although our cases have permitted the Fifth Amendment's self-incrimination privilege to be asserted in non-criminal cases — that does not alter our conclusion that a violation of the constitutional *right* against self-incrimination occurs only if one has been compelled to be a witness against himself in a criminal case.[153]

Coercive police questioning does not meet this standard. As Justice Thomas concluded:

> In our view, the criminal case at the very least requires the initiation of legal proceedings . . . . We need not decide today the precise moment when a "criminal case" commences, it is enough to say that police questioning does not constitute a "case" any more than a private investigator's pre-complaint activities constitute a civil case.[154]

For Justice Thomas, the only appropriate remedy for police misconduct, including torture, lies, if at all, under the due process clause:

> Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.[155]

Justice Thomas was joined, in this part of the opinion, by Chief Justice Rehnquist and Justices O'Connor and Scalia. Numerous commentators, and even Justice Kennedy, refer to these views as being the majority holding of the decision even though, in actuality, the opinion of the court was only a plurality.[156] For example, Justice Kennedy states: "In my view the Self-Incrimination Clause is applicable at the time and place police use compulsion to extract a

153. *Chavez,* 583 U.S. at 768-69.

154. *Id.* at 767.

155. *Id.* at 770.

156. *See, e.g.,* Gerald Plessner, *Miranda Law Eroded in California Case*, DAILY NEWS, June 4, 2003, at N19 (calling Thomas' decision a majority decision).

statement from a suspect. The Clause forbids that conduct. A *majority* of the Court has now concluded otherwise. . .."[157]

This inconsistency stems from the fact that Justices Souter and Breyer concurred in the *judgment* — i.e., finding that Martinez had no claim under 42 U.S.C. S. 1983 — not in Justice Thomas' *opinion*. Justices Souter and Breyer appeared to recognize the existence of a right against compelled self-incrimination outside of a criminal trial because they listed several examples of when such a right might be asserted separate from trial. Their concern, however, was with recognizing a civil damage remedy to enforce that right:

> The most obvious drawback inherent in Martinez's purely Fifth Amendment claim to damages is its risk of global application in every instance of interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles . . . If obtaining Martinez' statement is to be treated as a stand alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self incriminating statements or whenever the government so much as threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor *Miranda*? *Martinez* offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.[158]

While there were 6 votes to deny Martinez's claim, there was no definitive determination of the scope of the Fifth Amendment outside the trial context. Indeed, if Justice Souter's opinion is read as recognizing some Fifth Amendment right outside of the criminal trial, even though there is no damage remedy, then there are five justices who might find that the privilege against self-incrimination could be violated by torture. Professor Chemerinsky argues that the real majority holding in *Martinez* is simply that "there is not a civil cause of action for questioning in violation of *Miranda v. Arizona,*" rather than a broad statement on the reach of the privilege against self-incrimination.[159]

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157. *Chavez*, 538 U.S. at 768.

158. 538 U.S. 764.

159. Chemerinsky, *supra* note 97, at 43.

Because *Chavez v. Martinez* failed to resolve the application of the Fifth Amendment to police questioning when no statement is utilized at a criminal prosecution, both sides of the debate merit consideration. Those who argue that the privilege against self-incrimination prohibits coercive police behavior, argue that the Fifth Amendment's policies require an expansive view of the right. As one scholar noted, the Amendment was "adopted in response to a long history of oppression of the individual by the state and . . . [is] an important shield, protecting individuals against abuses of state authority."[160] It is viewed as "one of the great landmarks in man's struggle to make himself civilized."[161] From the earliest times, the Court has recognized a lengthy list of critical values the Amendment is to serve — values that extend far beyond the introduction of evidence in a criminal case. For example, the Supreme Court in *Murphy v. Waterfront Commission of New York Harbor* set forth the following policies furthered by the privilege:

> The privilege against self incrimination reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good case is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load . . . our respect for the inviolability of the human personality and the right of each individual to a private enclave where he may lead a private life; . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes a shelter to the guilty, is often a protection to the innocent.[162]

160. Mary Shein, *The Privilege Against Self Incrimination Under Seige: Asherman v. Meachum*, 59 BROOK. L. REV. 503, 505 (1993).

161. E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955).

162. Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52 (1964) (citations omitted).

These values, and the protections afforded by the Fifth Amendment, are not implicated only by the use of evidence at trial. More specifically, the inviolability of the human personality, and the right of each person to a "private enclave," are jeopardized by coercive police interrogation tactics, even if any information obtained is never used against the suspect in a criminal trial.

Moreover, advocates for a broad view of the right against self-incrimination argue that the Fifth Amendment should apply outside the trial setting, and indeed, that the Supreme Court has so held.[163] In *United States v. Hubbell*,[164] the Supreme Court found that the Fifth Amendment was violated outside of a trial setting when it affirmed the dismissal of an indictment on the ground that the government used an immunized act of producing documents to obtain the indictment.[165] The Court recognized that the phrase "in any criminal case" in the Fifth Amendment

> might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence.[166]

Under this broad view of the right against self-incrimination, the use of torture against terrorists, even in the ticking bomb scenario and even when the information is not used for prosecutorial purposes, would certainly violate the Fifth Amendment. It is hard to imagine what could be more destructive of human dignity, or the inviolability of the human personality, than the coercive tactics used in torture. Furthermore in analyzing the Fifth Amendment, courts do not engage in balancing because there is no room to balance any compelling government interest against the act of compulsion.

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163. For an excellent defense of this position, *see* Brief of Amici Curiae ACLU and California Attorneys for Criminal Justice in Support of Respondent Martinez, submitted in Chavez v. Martinez, No. 01-1444 (2002).

164. 530 U.S. 27 (2000).

165. *Id.* at 41.

166. *Id.* at 37.

On the other hand, some, like the plurality in *Martinez*, suggest a Fifth Amendment violation occurs only when a suspect is incriminated at trial. Proponents of this limited view of the Fifth Amendment make three basic arguments. First, the reach of the Fifth Amendment is not co-extensive with the myriad of purposes often asserted in support of the clause. Second, the language of prior Supreme Court decisions requires a reading of the Fifth Amendment limiting it to an exclusionary rule. And third, the doctrine of immunity supports a narrow view of the right against self-incrimination.

First, some argue that the broad policy justifications for the right against self-incrimination cannot expand the scope of the privilege. Indeed, the litany of broadly defined policy justifications in *Murphy* has been discredited.[167] As the Supreme Court recently held:

> we think there would be sound reasons to stop short of resting an expansion of the . . . [Fifth Amendment's] scope on the highly general statements of policy expressed in . . . .*Murphy*. While its list does indeed catalog aspirations furthered by the Clause, its discussion does not even purport to weigh the host of competing policy concerns that would be raised in a legitimate reconsideration of the Clause's scope.[168]

Second, Supreme Court precedent has consistently implied that the right against self-incrimination is a trial right. As the Court recently recognized, "at [the heart of the Fifth Amendment] lies the principle that the courts of a government from which a witness may reasonably fear prosecution may not in fairness compel the witness to furnish testimonial evidence that may be used to prove his guilt."[169] Indeed, in dicta, the Supreme Court has already explicitly embraced this limited reading of the Fifth Amendment. In *United States v. Verdugo-Urquidez*,[170] the Court noted, "[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct

167. *See, e.g.*, Balsys v. United States, 524 U.S. 666, 687-88 (1999).
168. *Id.* at 691.
169. *Id.* at 683.
170. 494 U.S. 259 (1990).

by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*"[171]

Finally, proponents of this limited reading of the Fifth Amendment point to immunity cases in support of their position. If the government offers witness immunity so that the threat of incrimination is removed, then the government can compel that witness to testify.[172] In *Kastigar v. United States*,[173] the Supreme Court held that a witness who was compelled to testify before a grand jury under a grant of use immunity could not invoke the privilege against self-incrimination. As the Court concluded, use immunity is sufficient to compel testimony over a claim of privilege because the sole concern of the privilege "is to afford protection against being forced to give testimony leading to the infliction of penalties affixed to . . . .criminal acts."[174] The fact that compulsion may violate some zones of privacy, or infringes on individual dignity or the inviolability of the human personality, were obviously not relevant considerations for the court.

There were four votes in *Chavez* for this narrow reading of the Fifth Amendment. If this view — that the privilege against self-incrimination is solely a trial right — were to gain majority support, the implication for the torture debate is clear: there would be no claim under the privilege against even the most abusive police in-

171. *Id.* at 264 (emphasis supplied); *see also* Hubbell v. United States, 530 U.S. 27 (2000) (consistent with such dicta). In *Hubbell*, since the coerced statement led to statements used at trial, it could be argued that there is where the violation became complete. Simply coercing the initial information, in other words, was not a Fifth Amendment violation; if nothing else happened, the right against self-incrimination would not have been impugned.

172. Kastigar v. United States, 406 U.S. 441, 448-49 (1972).

173. *Id.* at 453. A person may not claim the privilege against self-incrimination if their testimony has been rendered non-incriminating by a grant of immunity from the government. *See* Ullman v. United States, 350 U.S. 422 (1956). There are two types of immunity: (1) use and derivative use immunity; and (2) transactional immunity. In use and derivative use immunity, the government cannot introduce into evidence the testimony that is specifically immunized, and any evidence derived therefrom. Transactional immunity is broader, prohibiting the government from prosecuting the immunized individual for any activity mentioned in the immunized testimony. *See generally Kastigar*, 406 U.S. 441; New Jersey v. Portash, 440 U.S. 450 (1979).

174. *Id.*; *accord,* 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, 1724 (2002); Steven D. Clymer, *Are Police Free to Disregard Miranda,* 112 YALE L. J. 447 (2002).

terrogation methods. As Professor Mark Godsey concluded: "[I]f a law enforcement officer were to use brute force and torture to extract an involuntary confession from a suspect, the officer would not at that time have violated the privilege because the suspect would not yet have testified against himself at trial."[175]

In sum, the constitutional limitation on torture imposed by the Fifth Amendment is as follows: If torture is used to extract admissions used in a criminal prosecution, the right against self-incrimination is clearly violated, and the statements will be excluded. If torture is used solely for informational purposes, however, the result is not yet clear. It is safe to say that at least four Justices clearly believe that the use of torture to elicit information only for investigative purposes does not violate the privilege against self-incrimination. Given the confusion in *Chavez*, however, I believe that the definitive answer awaits another day.

C. International Law Limits on Torture

There is no doubt that international law prohibits the use of torture.[176] In numerous resolutions, including Article 5 of the Universal Declaration of Human Rights of 1948,[177] Article 7 of the International Covenant on Civil and Political Rights of 1966,[178] and, most importantly, the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[179] (hereinafter, "CAT"), the international community has made clear its total disavowal of methods of torture. These conven-

175. Godsey, *supra* note 174, at 1724.

176. *See* Francois Laracque, *Opening Statement: The Choice of Torture,* THE LAWYERS WEEKLY, May 2, 2003 (among international crimes, torture is seen as one of the worst possible violations of human dignity and bodily integrity).

177. G.A. Res. 217 A, 3 U.N. GAOR, Resolutions A/810, at 71.

178. 999 U.N.T.S. 171.

179. G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (Dec. 10, 1984). For useful background information on the treaty, *see* J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION (1988). CAT has been ratified by 118 state parties to date. The United States became a signatory in 1988, but did not deposit its instrument of ratification with the U.N. until six years later. "At this point, CAT became binding on the United States." Montavon-McKillip, *supra* note 122, at 251.

tions, moreover, not only express utter disdain for torture, they admit of no exceptions to its prohibition.[180]

The United States has ratified these treaties, albeit with some reservations.[181] But the impact of these treaties on United States interrogation tactics, frankly, is seemingly insignificant. Although the treaties, and international law generally, establish important international norms of conduct, there is no real enforcement. CAT, for example, requires the United States to submit reports to the Committee Against Torture regarding its compliance with the treaty.[182] But the United States did not ratify the part of the Convention asserting the United Nation's authority to adjudicate cases by individuals against signatory states. Moreover, the United States has refused to recognize the authority of international tribunals over its actions.[183] Thus, while CAT obviously has symbolic importance, and does provide relief from torture in other ways (i.e., for refugees seeking asylum),[184] it is not likely to be a significant factor in deciding whether to use torture in an emergency situation.

D. Summary

A suspect's due process rights and the privilege against self-incrimination guaranteed under the Fourteenth and Fifth Amendments clearly prohibit the government from engaging in torture for

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180. *See* A GLIMPSE OF HELL: REPORTS ON TORTURE WORLDWIDE, ed by Duncan Forrest for Amnesty International, 1996 at 8; Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law,* 48 AM. J. COMP. LAW, 661, 672-73 (Fall 2000) (although recognizing that international law is usually seen as absolute, suggests ways to argue that it is not).

181. *See supra* note 44.

182. Montavon-McKillip, *supra* note 122, at 259.

183. *Id.* at 282 n.210. "The United States routinely refuses to condone the enforceability of whatever highly conditioned international human rights obligations it accepts. In part it achieves this goal by reliance on an extraordinarily fungible notion that most international rights are not 'self-executing' in consequence of which American courts are precluded from implementing them. Additionally, the United States refuses to allow its own citizens the right to access United Nations individualized complaint mechanisms, including those established to. . .[ensure] freedom from torture." James C. Hathaway & Anne K. Cusick, *Refugee Rights are Not Negotiable*, 14 GEO. IMMIGR. L. J. 481, 481 (2000).

184. *See* David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of other International Human Rights Treaties*, 5 Buff. Hum. Rts. L. Rev. 1 (1999).

the purpose of procuring evidence for prosecution. While the self-incrimination clause may or may not apply to torture if no evidence is used against an accused, the due process clause almost certainly does. Although due process *applies* to torture in any circumstance, whether that clause is ultimately *violated* if the government engages in torture in exceptional circumstances requires further consideration. Since the right to due process is not absolute, the government's compelling need to engage in torture, as well as the costs of such a policy, must be addressed.

III. The Arguments For and Against the Use of Torture: Policy Considerations

As previously discussed, the government's interest in permitting torture should not only include the potential human lives saved by forcing information out of a reluctant prisoner, but also the harm that utilizing torture entails for the society that sanctions such a tactic. Those who reject the use of torture in any circumstance make three main arguments. First, the use of torture is immoral and inconsistent with a democratic society, making us no better than the terrorists we are trying to defeat. Second, the use of torture is ineffective and does not yield reliable information. And third, torture cannot be cabined into a narrow, specific usage and inevitably would be resorted to in more and more situations.

A. A Philosophical Justification for Torture?

First, and perhaps most importantly, many argue that torture simply is morally wrong, and therefore should never be employed, no matter what. Torture is evil. The deliberate infliction of pain and suffering by the state is "an abominable practice."[185] Even those who recognize a justification for torture in certain circumstances concede that torture is a grievous wrong that can only be outweighed by the greatest need.[186]

185. Sanford Kadish, *Torture, the State and the Individual*, 23 Isr. L. Rev. 345, 352 (1989).

186. *See, e.g.*, Moore, *supra* note 17, at 334 ("Torture is an evil, and is only eligible to be justified when a greater evil is prevented. Torture for its own sake or for retaliation is not a balance of evils. It is only evil.").

Torture is evil not only because of what it does to those tortured,[187] but also because of the great cost it imposes on the torturer and society itself. The interrogator is corrupted; he learns to treat suspects as objects, as subhuman. Society suffers as well. "When the state itself beats and extorts, it can no longer be said to rest on foundations of morality and justice, but rather on force. When a state [employs] torture, it reduces the moral distance between a government act and a criminal act."[188]

Thus, the question is not whether torture is intrinsically wrong — it is.[189] The real issue is whether committing that wrong can ever be morally justified. Some scholars maintain that torture, although a despicable practice must nonetheless be an available weapon in the arsenal in the war on terrorism. They argue that torturing a suspect as a last resort, when there is no alternative and when hundreds, thousands, potentially hundreds of thousands of lives hang in the balance, is not morally bankrupt — it is the only conclusion that makes sense. As Professor Moore concludes:

> [I]t just isn't true that one should allow a nuclear war rather than killing or torturing an innocent person. It isn't even true that one should allow the destruction of a sizable city by a terrorist devise rather than kill or torture an innocent person. To prevent such extraordinary harms extreme actions seem to me to be to be justified.[190]

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187. *See* Peters, *supra* note 17, at 179-80, 187 (discussing horrors of torture, and quoting Francisco Campagnoni: "torture tends to the disintegration and consequent annihilation of the psyche and moral personality, to the non-physical destruction, practically speaking, of the human person, with lasting results").

188. Mordecai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the Needs of the Security Service?*, 23 ISR. L. REV. 216, 264 (1989); *see also Peters, supra* note 17, at 187 ("[I]f the victim is conceived to be without human dignity and therefore vulnerable to torture, the torturer also divests himself of human dignity."); Henrik Hertzburg, *Terror and Torture*, THE NEW YORKER, March 24, 2003, at 29 ("Torture is abhorrent not only for what it does to the tortured but for what it makes of the torturer").

189. *See* Donald A. Dripps, *Evidence and Procedure for the Future: Self Incrimination and Self Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329, 342 (asserting, without any reservation, "[a]ll agree on prohibiting torture."). Of course, Professor Dripps's article was written ten years before September 11.

190. Michael S. Moore, *Torture And The Balance Of Evils*, 23 ISR. L. REV. 280, 328 (1989).

How does one reach such conclusions? There are two main philosophical arguments that torture can be morally justified in order to save lives. First, torture is justified because the ends justify the means. And second, torture is justified as a form of self-defense.

1. Do the Ends Justify the Means?

Some advocates of torture make a simple "ends justify the means" argument. In other words, a utilitarian calculation is made: if more lives can be saved by torture than are harmed by it, the act is justified. And, in a normal utilitarian balancing process, the value of the human dignity of a terrorist does not stand a chance against the value of innocent human lives.[191]

An "ends justify the means" rationale, however, has never been viewed as the basis of our justice system. Many rules have been developed to precisely guard against such a philosophy. For example, evidence may be excluded from a trial even if it results in a guilty person going free, perhaps causing great harm, if the means of obtaining that evidence is deemed unconstitutional.[192]

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191. Kremnitzer, *supra* note 188, at 263.

192. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (the use of the exclusionary rule in criminal procedure, where illegally obtained evidence is excluded in order to deter police misconduct). As Justice Clark noted, "the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* at 659. *See also* the behavior of the Los Angeles Police Department during the so-called Rampart scandal in the 1990's, where police officers planted evidence on suspects very much on an "ends justify the means" rationale. *See* Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 LOY. L.A. L. REV. 545 (2001).

There is a doctrine in criminal law that seems to embrace a sort of "ends justify the means" mentality. For example, a doctrine called the "lesser of evils" is a possible defense to illegal conduct. Under that doctrine, conduct that an actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that the harm to be avoided is greater than that sought to be prevented by the law defining the conduct as wrongful. *See, e.g.*, MODEL PENAL CODE § 3.02 (1984); *see also* United States v. Schoon, 971 F.2d 193 (9th Cir. 1992). Thus, a prisoner may escape a burning prison, and a person may destroy property to prevent the spread of fire.

Because the necessity defense is utilitarian, it is strictly construed. *Schoon*, 971 F.2d at 196. It is not likely available in the torture context for three reasons. First, to apply the defense, there must be a clear choice of evils; it must be clear that an "alleged harm will be abated in the taking of illegal action." *Id.* at 198. It is not at all clear that torture would avoid the harm. *See infra* notes 206-212. Second, the possibility of legal alterna-

There is good reason, moreover, for rejecting an "ends justify the means" argument here. First, using such an argument to justify the torture of terrorists will cause our nation to lose the moral "high-ground" in the war against terrorism. Indeed, we would be "lowering" ourselves to the same level as the terrorists if we were to engage in state-sanctioned torture. Terrorists typically inflict pain and suffering upon others in order to achieve some ultimate end. The argument underlying the terrorists' actions is that the end (often some political objective) justifies the means (killing whatever number of innocent people). Condemning terrorist behavior as unacceptable and morally bankrupt requires us to reject "the ends justify the means" rationale as a moral compass. However laudable the objective, it cannot be achieved at any price.

Engaging in torture, however, would strip us of this argument.[193] As Professor Kremnitzer noted,

> [T]he license to employ physical pressure in interrogations constitutes a victory for terror, which has succeeded in causing the State to stoop to quasi-terrorist methods. The belief that the ends justifies the means, the willingness to harm fundamental human values in order to attain a goal . . . these are salient characteristics of terrorism . . . An ever-present danger faced by a state confronted by terrorism is that in the course of combating threats . . . its character as a law-abiding state will suffer.[194]

Even if an "ends justify a means" analysis were employed, whether saving lives actually justifies torture is a question that should be seriously considered. In other words, if one seriously weighs the conflicting harms, it is not at all clear that the "ends justify the means." First, the harms of torture to a suspect *and* the state employing it would need to be considered. And one should

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tives militates against the defense. There are a multitude of possible legal ways to interrogate a prisoner, and to investigate a possible criminal threat. Finally, the defense is not available if the competing values had been resolved the deliberate legislative choice. *See* MODEL PENAL CODE § 3.02 (1984). Here, it can be argued that the international denunciation of torture at all costs, as well as the internal condemnation, would be analogous to such a deliberate legislative determination.

193. *See* Clarence Page, *Confess. . . .or Else: Using Wicked Ways to Force Suspects to Talk,* CHI. TRIBUNE, Oct. 3, 2001, at 25.

194. Kremnitzer, *supra* note 188, at 263.

not assume that the saving of human lives would inherently outweigh or justify an interest in using immoral, degrading and unjust methods to gain information. Even if our nation's physical security were at stake, its moral security should matter. As Professor Zamir argues, "[n]ational security is not an end in itself . . . . If in the course of the struggle for survival, we sacrifice the principles of liberty, justice and peace on the altar of national security, no victory can be more than delusory. There is a form of survival which is not worth the effort."[195]

Moreover, the evil of accepting torture would have to be multiplied manifold in balancing the ends and means because once the United States employs torture, it is likely that such practices would spread worldwide. At a minimum, the nation would lose its ability to condemn torture or other unacceptable acts of cruelty perpetrated in other parts of the world. Even if we could assure the world that torture would be utilized only in extreme circumstances, any moral leadership would be destroyed. Such a situation would be intolerable. As Professor Kadish notes:

> "Since World War II, progress has been made internationally to mark the perpetrators of [torture as] outlaws . . . .Any claim by a state that it is free to inflict pain and suffering upon a person when it finds the circumstances sufficiently exigent threatens to undermine that painfully won and still fragile consensus . . . .And if any state is free of the restraint whenever it is satisfied that the stakes are high enough to justify it, then the ground gained since WWII threatens to be lost . . . .Lost would be the opportunity immediately to condemn as outlaw any state engaging in these practices. Judgment would be a far more complicated process of assessing the proffered justification and delving into all the circumstances."[196]

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195. Itzak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 379-80 (1989).

196. Kadish, *supra* note 185, at 345. And this would include at least a decreased ability to condemn torture as a means of political repression. After all, those countries surely could attempt to argue an "ends justify the means" rationale. *See* Montavon-McKillip, *supra* note 122, at 282 n.122 ("[A]s a world leader, when the United States is renitent towards international human rights law, it encourages other countries with unfavorable human rights records to do the same.").

2. Self Defense or Defense of Others

Besides a utilitarian argument — that the end objective of torturing a terrorist justifies the use of torture — an argument for torture can also be based on the doctrine of self-defense. After all, even the seemingly absolute prohibition: "thou shall not kill," admits of an exception when the killing is in self-defense or in defense of others. The law too, embodies the notion of self-defense as a justification for inflicting bodily harm.

> As every first year law student learns, one is justified in using deadly force in self-defense only in response to a threat of death or serious bodily harm, only if the danger is imminent and immediately forthcoming, and in some states and in some locations . . .only if there is no available path of safe retreat.[197]

So how do such arguments advance the debate over torture? The answer: if we can kill in defense of self or of others, certainly we could take action short of that — like torture to obtain critical information — in defense of others. Assume a police officer sees two men with loaded machine guns who begin, indiscriminately, to shoot hundreds of people in a crowded movie theatre. No one would doubt the officer could shoot to kill the men if necessary to stop the carnage. Let's change the hypothetical somewhat. One man is headed to a theatre in a city to randomly shoot and kill as many people as possible, and the police have, in custody, his partner who refuses to reveal where his confederate is heading. Wouldn't torture in order to stop the shooting be justified as an action in defense of others?

Of course, when considering whether to torture a suspect, the usual conception of self-defense is not operative: *captured* terrorists do not pose any imminent threat of deadly force. Nonetheless, one

197. Susan Estrich, *Justifiable Homicide: Battered Women, Self Defense and the Law,* 88 MICH L. REV. 1430, 1431 (1990).

In most jurisdictions, there is both perfect and imperfect self-defense. In perfect self-defense, the defendant is motivated by an honest belief of danger, and that belief was objectively reasonable. *See* People v. Aris, 215 Cal. App. 3d 1178, 1186 (4th Dist. 1989). In imperfect self-defense, the defendant honestly but unreasonably believes there was imminent threat to life, *e.g.*, Hartman v. Summer, 120 F.3d 157, 161 (9th Cir. 1997), or the defendant is the initial aggressor and the decedent escalates the conflict. State v. Norman, 324 N.C. 253, 260 (1989).

can make the argument by analogy. If a terrorist knows the location of a hidden bomb, or the plans of a co-conspirator, "he has culpably caused the situation where someone must get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible."[198]

In essence, the argument can be made that the same self-defense rationale that led our nation to declare war on al Qaeda could be employed to justify the use of torture. To stop the future threat of terrorism, this country was willing to wage war — a war, which not only killed those dedicated to harming us, but also, unfortunately, maimed and killed thousands of innocent lives in Afghanistan. If this action were morally justified (and there is no large groundswell of support that it is not), then why would inflicting harm, on the person who intends to cause significant death, in order to prevent those deaths, be beyond the pale of acceptable behavior for a state. Both acts — the act of war and the act of torture — are undertaken in self-defense.

Concededly, the self-defense argument has some persuasiveness. But the problem with this argument lies in its elasticity. The concept of self-defense has traditionally been carefully cabined to a situation where a defender acts in order to prevent a real and imminent harm, with no viable alternative way to prevent such a harm from occurring.[199] There has been only one situation in which some courts have permitted stretching the doctrine of self-defense somewhat, and that is where a person, usually a battered woman, kills or disables her persistent batterer.[200] In those cases, the imminence requirement may be somewhat relaxed, but there still exists a reasonable and real danger from the batterer to the defender. That is, even though the battered woman may kill her husband

198. Moore, *supra* note 17, at 323.

199. *See e.g.,* State v. Norman, 324 N.C. 253, 266 (1989); U.S. v. Peterson, 483 F.2d 1222 (D.C. Cir 1973); State v. Holland, 193 N.C. 713, 718 (1927).

200. *See, e.g.*, Christine Noelle Becker, *Clemency for Killers? Pardoning Battered Women who Strike Back*, 29 Loy. L.A. L. Rev. 297 (1995); Richard Rosen, *On Self Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. Rev. 371, n.4 (1993) (discussing cases which dispense with, or liberalize, imminence requirement); *see also* Lenore E. Walker, *Generalizing Justice, Terrifying Love: Why Battered Women Kill and How Society Responds*, 103 Harv. L. Rev. 1384, 1389 n.8 (1990) (book review) (discussing jurisdictions that have allowed expert testimony on battered women's syndrome).

while he is sleeping, and thus currently not harming her, the doctrine of self-defense is possibly accepted only if she still perceives that his very existence renders her life in peril and reasonably perceives no other alternatives available.

But torturing a captured suspect because he may have information of harmful conduct goes well beyond the battered wives scenario. The captured suspect himself, poses no possibility of harm at any time in the future. There are obvious possible alternatives to torture that could be used to prevent the harm. Allowing torture in this context, based on a self-defense rationale, would be akin to a person claiming self-defense to the murder of a prisoner locked in jail for life.

In other words, the argument to self-defense "by analogy" must fail because the analogy destroys the very notions of the doctrine.[201] Once you start "analogizing," and remove the doctrine from its established roots, you are left with a theory that says: the government is acting in self-defense whenever it does something necessary to prevent harm to society. Such an interpretation would truly turn us into the type of society lambasted in the recent popular movie, Minority Report.[202] There, government agents capture or kill people in advance of their committing a crime, based on a prediction by three reliable truthsayers as to the future. Surely, such preventive action would be justified under the theory of self-defense described above.

The point is, that once self-defense is stretched beyond its carefully established, narrowly drawn borders, it becomes a doctrine without bounds. A self-defense argument could be raised to justify torturing a drug dealer who distributed contaminated drugs in order to find out where his drugs are headed. The argument would justify torturing an innocent child in order to compel information from his parent. Torture could be used on someone who likely knows the name or whereabouts of a serial killer. The self-defense rationale, ultimately, would have no limit. In sum, there is a recog-

201. *Cf.* Estrich, *supra* note 197, at 1437 (asking to alter the rules of self defense for battered women "is a very uncomfortable request — at least for those of use who see in the rules of self-defense a laudable recognition of the value of human life and a desirable effort to articulate a normative standard which protects even aggressors and wrongdoers from instant execution and vigilante justice.").

202. MINORITY REPORT (20th Century Fox/Dreamworks, 2002).

nizable difference between killing someone engaged in the act of murder, and torturing another person to gain information to prevent a murder. Upholding that difference is crucial.[203]

B. Torture is Ineffective

Some argue that even if torture could be philosophically justified, it is ineffective as a means of obtaining truthful information and therefore, should be condemned.[204] Or, the ineffectiveness of torture is used in conjunction with the moral argument: torture cannot be morally justified because it does not even achieve its purpose of saving lives. In constitutional terms, the ineffectiveness of torture could be seen as minimizing any compelling government interest to engage in such behavior, and may make the search for viable alternative methods of "encouraging cooperation" easier.

So, does torture induce the subject to reveal truthful, important information? Torture, many argue, simply does not work in most cases. An individual subject to extreme physical and mental abuse will talk, but what they say will not be reliable. A person will say anything in these circumstances, but not necessarily the truth.[205] Even if someone wants to tell the truth, "minds clouded by pain or drugs, or addled by sleep deprivation, may have trouble recalling important details."[206]

There is a fair amount of support for this argument. Studies are replete with examples of false confessions under conditions far

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203. *Cf.* Cathryn Jo Rosen, *The Excuse of Self Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 Am. U. L. Rev. 11, 27 (1986) ("[T]o harmonize the principle that killings in self-defense are justified with the principle that human life is the highest value protected by the law, the range of defensive conduct that will be justified must be narrowly circumscribed.").

204. Of course, torture is very effective when used for the sadistic purpose to intimidate or terrorize dissidents. "Torture may also be counterproductive on other grounds: it may turn some innocent suspects into real terrorists, and turn terrorists into more determined monsters." Peter Maas, *Torture: Tough or Lite: If Suspect Won't Talk, Should it be Made to?"* New York Times, March 9, 2003, § 4 at 4.

205. *See* Haddock, *supra* note 3 (research demonstrates that torture often produces false confessions and phony information because victim reaches point where he will say anything to make it stop).

206. Reed Johnson, *The Art of Interrogation*, Los Angeles Times, March 15, 2003, at 1.

less egregious than torture.[207] Even the CIA has come to the conclusion that physical abuse usually is ineffective in ferreting out the truth.[208] Similar complaints are lodged against the use of so-called truth serum: while a person's inhibitions might be lessened, there is no strong evidence that the truth comes forth.[209]

Even if torture succeeded in coercing a suspect to honestly tell all he knows, it may still be ineffective in most cases because the suspect truly may not know much. As we have learned after September 11, sophisticated terrorist organizations, such as al Qaeda, operate on a strict "need to know" basis. There is significant evidence that most of the 19 hijackers did not know in advance, the details of the plot to hijack and pilot planes into the World Trade Center, the Pentagon, and presumably the White House.[210] Thus, unless the right person is in custody (which alone may foil the

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207. *See e.g.,* Welsh White, *What is an Involuntary Confession Now?* 50 RUTGERS L. REV. 1002, 1057 n.34 (1998); Richard J. Ofshe & Richard A Leo, *The Consequences of False Confession: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J.CRIM. L. & CRIMINOLOGY 429 (1998).

208. *See* Tim Werner, *CIA Taught, then Dropped Mental Torture in Latin America*, N.Y. TIMES, Jan. 29, 1997, at A1.

209. *See* Wendy Kisch, *From the Couch to the Bench: How Should the Legal System Respond to Recovered Memories of Childhood Sexual Abuse*, 5 AM U. J. GENDER & SOC. POL'Y & L., 207, 224-45 (1994) (no medical or scientific basis to believe sodium amytol acts as a real "truth" serum, citing to various medical studies); *see also* Robert Mathew, *Why Their Ways of Making You Talk Don't Include Truth Drugs Under Interrogation*, SUNDAY TELEGRAPH, Nov. 11, 2001, at 41 (while drugs make suspects more chatty, there is no evidence that they are "chirruping on" about the truth); John McDonald, *Truth Serum*, POLICE SCIENCE 259, 261 (suspect who is able to withstand competent and prolonged interrogation is arguably able to withstand interrogation under narcosis); Simon Crerar, *Giving the Lie to Truth Drugs*, TIME NEWSPAPER, Jan. 6, 2002 (truth serum least likely to work when administered in an antagonistic environment).

Because of its unreliability, most courts have rejected a request to admit statements voluntarily elicited under truth serum. *See* Anne E Donlan, *O'Brien Case Judge Nixes Truth Serum Test Evidence*, BOSTON HERALD, Sept. 10, 1997, at 6; *see also* People v. Johnson, 32 Cal. App. 3d 988, 1001 (4th Dist. 1977) (no Supreme Court nor lower court of this state has admitted truth serum tests for truth of matter stated due to lack of scientific evidence as to reliability); *accord,* State v. Linn, 93 Idaho 430 (1969). *But see* United States v. Solomon, 753 F.2d 1522 (9th Cir. 1985) (no error in admitting witness testimony enhanced through use of narcoanalysis). *See generally* Steven Friedland, *Law Science and Malingering*, 30 ARIZ. ST. L. J. 337, 364-65 (1998) (though courts reluctant to receive testimony under "truth serum," some courts have admitted it in limited circumstances).

210. The best evidence is from the horse's mouth, so to speak: bin Laden, on videotape, laughed about the fact that many of the hijackers did not realize their fate in advance of boarding the planes.

plot), torturing most confederates might not yield valuable information even if the person honestly relays what he knows.

But torture need not always be effective to be justified. First, it is important to remember that torture is not being advocated for purposes of obtaining evidence to prosecute someone. In that case, the reliability of information would be paramount. But here, the information is being sought in order to further investigate and to try to prevent future terrorist attacks. While, undoubtedly, there is ample evidence that torture frequently yields false confessions, this concern is less significant when the purpose of an interrogation is to obtain information and not to secure a conviction.[211] When torture is utilized for informational purposes only, the dangers of false information are the risks of wasted time and resources. The possibility of even a germ of truth coming from the mouth of an otherwise silent conspirator, conceivably, might be worth the risk.

Thus, evaluating the efficacy of torture requires information not currently available and perhaps, unknowable. There are times when torture has worked in the past, and there undoubtedly would be successes in the future.[212] So the question becomes an empirical

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211. *Cf.* Rock v. Arkansas, 483 U.S. 44 (1987) (distinguishing between necessary effectiveness when hypnosis is used for investigation versus prosecutorial purposes).

212. For example, Jordan broke the famous terrorist Abu Nidel by threatening his family. The Philippines reportedly cracked the 1993 World Trade Center bombings by convincing a suspect that they would turn him over to the Israelis. Jonathon Alter, *Time to Think about Torture*, NEWSWEEK, Nov. 5, 2001, at 48; *see also* Scott Martelle, *The Truth about Truth Serum*, L.A. TIMES, Nov. 5, 2001, at E4 (Ronald Katz, an anesthesiologist professor at USC and UCLA who has used sodium pentathol in thousands of patients says that in his experience, less than 50% of his patients answer honestly under the influence of the drug.). Even if only 40% of those tortured accurately "spilled the beans," that might justify the use of "truth serum." In 1995, the Philippine state police turned the testicles, and broke the ribs of one al Qaeda agent who, after two weeks, was broken and revealed a plot to hijack 11 airplanes. Jack Wheeler, *Interrogating KSM: How to Make the Al Qaeda Terrorist Sing in an Hour*, THE WASHINGTON TIMES, March 5, 2003, at A19.

Professor Feller explains why torture, or the threat of torture may work: "The whole secret to the effectiveness of pressure — of whatever kind, including physical pressure — is that the suspect never know what comes next. Then, as he does not know whether he will be unable to bear up under the next level, he decides that rather than break then, it may be worthwhile to surrender in advance and save himself unnecessary suffering that he will, in any event be unable to withstand. If the suspect knows from the start that the interrogator is unable to deviate from a moderate measure of pressure . . . information that the terrorist organizations will no doubt disseminate with all due dispatch — . . . then a suspect need only persevere until that upper limit of a moderate

one: how often would truthful information be obtained versus how often false information would be provided to set back an investigation and make it less likely that a criminal plot would be uncovered? After all, false information is only harmful if it has such consequences because the information is never utilized for prosecution. It would need to be determined, for example, whether forsaking torture but utilizing other techniques such as bribes or incentives, or acceptable, psychological strategies,[213] would be more effective.[214] Determination of whether false leads create such a diversion that the police efforts are actually hampered, would be necessary.

Until these questions are answered, there is no way to accurately assess the effectiveness of torture in those rare situations when it might be utilized in the war on terrorism. But the burden on those arguing that torture is too ineffective to utilize would be heavy. Even if nine times out of ten, a tortured suspect would falsely confess to a crime, or lie to stop being tortured, if the one time truth prevails is the situation where the terrorist has hidden a nuclear bomb in a major city, torture could arguably be seen as effective. Or to put it differently, even a 10% chance of success

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measure of physical pressure [is reached]." S.Z. Feller, *Not Actual 'Necessity' But Possible Justification; Not "Moderate" Pressure, but Neither "Unlimited" or "None at All,"* 23 Isr. L. Rev. 201, 211 (1989).

213. *See, e.g.*, *War on Terrorism: Mission Impossible*, CNN Transcripts, November 24, 2002, *available at* CNN.Com at 5 (copy on file with author) (quoting an expert interrogator as saying "you'd be amazed at what a kind word and a cup of hot cocoa on a fifteen degree night would do. . . even the highest ranking al Qaeda started crying before anything was said to him." The expert concluded that even without torture, some interrogations succeed because many suspects, coming from nations which indulge in torture, assume torture would be used.).

214. Of course, it can be presumed that the police would start with other incentives besides physical coercion to obtain cooperation. Promising leniency, or safety for the suspect's family, or other such incentives has been successful in the past. For example, the offer of reduced sentences worked for Ahmed Ressen, arrested in 1999 for bringing explosives into the United States for the planned bombing of Los Angeles International Airport during the millennium, and for Ali Mohamed, who pled guilty to the 1997 bombing of the U.S. embassy in Kenya and provided valuable information on al Qaeda. Haddad, *supra* note 4, at D.1

Some unknown successful interrogation tactic, presumably not torture, has been making Zubaydah, an al Qaeda "higher up," talk, and provide useful information. Richard Serrano, *U.S. Breaks Old Legal Ground*, L.A. Times, November 25, 2002 at A1, A16 (Zubaydah gave FBI information to capture Padilla, who is accused of plotting to plant a "dirty bomb" in the United States).

might make torture "effective" given the lack of any viable alternative.

C. The Slippery Slope Argument: Can the Use of Torture be Confined?

Even if torture is as morally justified as self-defense in narrow circumstances, and even if torture is possibly effective, a final argument is raised against permitting any use of torture: there is no convenient stopping point. As previously discussed, the post September 11th debate over torture involves a very narrow issue. Virtually no one seriously advocates the wholesale use of torture. But some suggest that it would be naïve to reject torture, outright, for all possible scenarios. Even the self-defense argument usually focuses on the use of torture in one seemingly narrow circumstance. For example, Alan Dershowitz sets the stage this way: "a captured terrorist knows the location of ticking bomb that threatens hundreds of innocent lives; the only way to prevent the mass murder is to torture the terrorist into disclosing the bomb's location; there is no time for reflection; a decision must be made."[215] In this situation, and this situation only, torture is reluctantly sanctioned.

On first glance, many people might concur that torture is appropriate in this one, narrow, and hopefully never-to-happen scenario. Accepting the use of torture only in this one factual setting, however, assumes that torture can be limited to such a circumstance. But there are obvious problems in even defining this situation — much less limiting the use of torture to this situation.

Numerous questions arise that make it impossible to even determine the exact scenario Dershowitz imagines. First, how certain should we be that the terrorist knows the location of the bomb? How certain should we be that there is a bomb? Criminal law speaks of different levels of certainty, ranging from reasonable suspicion, a minimal standard used to justify a brief stop of an individual,[216] to probable cause, the standard necessary to arrest a person,

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215. Alan M Dershowitz, *Is it Necessary to Apply "Physical Pressure" to Terrorist — and to Lie About It?*, 23 ISR. L. REV.192 (1989).

216. Reasonable suspicion exists when police officers are able to articulate some minimum level of subjective justification for stopping a person. It must be more than an "inchoate and unparticularized suspicion or hunch," but less than probable cause. Alabama v. White, 496 U.S. 325, 330 (1990).

or to search a person's possessions,[217]to beyond a reasonable doubt, necessary to convict an individual of a crime.[218] What level of suspicion is necessary before torture is undertaken? For example, there is certainly a reasonable possibility that Abu Zabaydah, a top lieutenant to Osama bin Ladin, might have information about future terrorist attacks. Is that possibility about some amorphous future event that might involve loss of life, enough to fit within the ticking bomb scenario?

Moreover, how many lives need be on the line before the "ticking bomb" scenario comes into play? What if the danger is to ten lives? Is that enough? And need it literally be a bomb? It makes no sense to view the "ticking bomb" literally. For example, if a suspect knew about the planned release of smallpox as a weapon, the same justifications for torture would apply.[219] So, what if the danger is from a sniper or a kidnapper — is one child hidden away sufficient to justify the use of torture?[220] And of course, this brings us out of the realm of terrorism and into the world of "traditional crimes." If torture can be utilized to save ten lives from a bomb, why not allow

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217. Probable cause exists when there is a fair probability that contraband or evidence of a crime will be found, or, for purposes of an arrest, that the person arrested committed the crime. *See* United States v. Sokolow, 490 U.S. 1, 7 (1989); C.M.A. McCauliff, *Burden of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantee?* 35 VAND. L. REV. 1293, 1325 (discussing difference between probable cause and reasonable suspicion).

218. The "beyond a reasonable doubt" standard is a due process requirement that a trial judge must instruct a jury in a criminal proceeding to support a conviction. Victor v. Nebraska, 511 U.S., 1 (1994); In Re Winship, 397 U.S. 358, 363 (1970). It is defined as proof that satisfies the fact-finder to a near certitude of the guilt of the accused. Jackson v. Virginia, 443 U.S. 307, 315 (1979) (beyond a reasonable doubt plays a vital role in implementing the presumption of innocence; it impresses upon the fact-finder "the need to reach a subjective state of near certitude of the guilt of the accused. . .."); *see also*, Note, *Reversal of Fortunato: Textualism Un-Dunn in State v. Dunn*, 3 ROGER WILLIAMS U. L. REV. 253, 317 (1998).

219. Of course, once the "bomb" aspect of the equation need not be viewed literally, the exigency component — "ticking" need not as well.

220. The natural tendency to expand the nature of exigencies is evident in the controversy over "questioning outside Miranda." For example, in investigating a homeless man for the murder of young girl, the police officers said they "put aside our normal standard procedure for the greater good of possibly finding the bodies of the young girl and other missing persons." Klein, *supra* note 131, at 457-58. "Apparently, these officers determined that the greater good necessitated ignoring Clark's more than 100 requests for an attorney during the interrogation, and threatening Clark with death in the gas chamber." *Id.*

it to be used to save the lives of five children hidden by a crazed neighbor? Or why not sanction torture to reveal the name of a madman who has killed a random, innocent person almost every day for a few weeks and shows no sign of stopping?[221]

Even if we could determine the number of lives at risk that justifies the use of torture, and the level of certainty that a crime has occurred or is about to occur, and that the suspect in custody has critical information, how do we assess the level of exigency and the inability to obtain the information through traditional means? Must the bomb literally be ticking — what if the information pertains to a plot to plant a bomb within the month? A week?[222] Of course, the longer the time period, the greater the chance that traditional methods of law enforcement will detect the plot. But where do we draw the line? And how do we decide that methods besides torture will not work in time?[223]

The point is simply this: no matter how one tries to confine the use of torture to extreme, narrow circumstances, the temptation to broaden those circumstances is inevitable.[224] Without an absolute prohibition on the use of torture, it is virtually impossible to ensure that "special cases" remain special. Once torture is a weapon in an officer's arsenal, once the social unacceptability of utilizing torture breaks down, the practice will be legitimized. "The legitimization of repugnant practices in special cases inevitably loosens antipathy to them in all cases."[225] As Professor Kadish so eloquently con-

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221. This is borrowed from the story of the "D.C. Sniper," who "terrorized" the Washington D.C. area between October 2 and October 22. *See, e.g.*, Donna Leinwand and Jack Kelley, *New Killing, Sniper's Threat Add Urgency to Manhunt*, USA TODAY, Oct. 23, 2002, at A1. Of course, it also reveals the difficulty at time differentiating between "crime" and "terrorism."

222. *See, e.g.*, Kremnitzer, *supra* note 188, at 253 (Landau Commission states that it may be justifiable to employ actual torture to discover a bomb about to go off in a crowded building, and that there is no significant difference between a bomb set to explode in five minutes and one set to detonate in five days).

223. One recent example that comes to mind in this regard involves the arrest of 3 American medical students of Middle Eastern descent appearance in Florida. Their car was stopped after a woman at a diner where they had eaten earlier claimed she overheard them talking about a future attack. All three were later exonerated. If torture were allowed in ticking bomb cases, wouldn't it possibly likely be used here? *See* Alexander Glassbrook, *Would Torture Ever be Legal in the UK?* THE TIMES, March 25, 2003.

224. *See* Steve Chapman, *Should we Use Torture to Stop Terrorism?*, CHI. TRIBUNE, Nov. 1, 2001, at 31.

225. Kadish, *supra* note 185, at 353.

cludes, "when torture is no longer unthinkable, it will be thought about."[226]

IV. Putting it all Together

Thus far, what I have attempted to argue is this: Torturing a terrorist suspect in the "ticking bomb" scenario — or any other situation — would clearly violate the Constitution if any resulting statement is used against the suspect in a court of law. If the information is never used against a suspect in a criminal case, however, it might not violate the Fifth or Fourteenth Amendments. The most credible constitutional argument against torture in such a circumstance would be that it infringes upon an individual's substantive due process rights. But even the most egregious physical abuse may not violate the Constitution. Finding a substantive due process violation would ultimately require balancing the intrusion on the individual against any compelling government interest in torturing. It is possible, therefore, that no constitutional violation would be found if the circumstances surrounding the use of torture were sufficiently compelling.

Nonetheless, I argue that the use of torture should be viewed as presumptively unconstitutional, and even if not, a prohibited policy for the United States. Torture is presumptively unconstitutional because rarely would there be a compelling government interest that outweighs the harms of torture. Why is this so? First, any compelling government interest in engaging in torture must be discounted by the ineffectiveness of torture, and the availability of successful alternative methods of interrogation and investigation. If torture rarely achieves its goals, and there are other, less harmful means of obtaining information, even a seemingly compelling interest may not justify torture.

Second, the compelling government interest should not only include the possibility of saving lives if certain information is obtained from torture. Rather, any evaluation of the government interest must also consider the harm that would inure to society if it were it to endorse and engage in, torture. Specifically, the inability of the United States to maintain the moral high ground both in its

226. *Id.*

fight against terrorism and in its fight against torture and human rights abuses around the world must be part of the calculus as well. Permitting torture here, even in exceptional circumstances, makes it more likely that torture will gain prevalence elsewhere in all circumstances. Moreover, the government has an interest in preventing the inherent banality of its agent's deliberately inflicting pain and suffering on a person in order to coerce information. Accordingly, for the foregoing reasons, the United States should absolutely, and without condition, condemn the use of torture in interrogation, even if the behavior would somehow comport with due process.[227]

Does this truly mean that I would condemn the torture of suspects in all circumstances, without exception? Consider a hypothetical that gives me nightmares. The police in New York have, in custody, a suspect known to be a terrorist. He is adjudged perfectly lucid and rational. He admits to planting a nuclear weapon in the heart of the city and informs that police that the bomb will go off

227. Another alternative that has been suggested recently is that, rather than have the United States engage in torture, it should send the recalcitrant prisoner to a country where torture is practiced. Or, it merely need threaten to send the person — that may be enough to ensure cooperation. Would the Constitution be violated in either circumstance? It's likely that in either case, any information obtained cannot be used at trial against the person in the United States. *See* United States v. Toscanino, 500 F.2d. 267 (2d Cir. 1974) (constitutional fundamental protections, like the Fifth Amendment, apply even to foreign nationals abroad). A person tortured in a country where the United States does not exercise de facto political control, and who is not brought to trial in the United States, however, has no claim for constitutional protection. *See* Harbury v. Deutch, 233 F.3d 596 (D.C. Cir 2000).

Although sending a prisoner abroad in extreme circumstances might create less harm to our nation than permitting torture here would, the implicit endorsement of torture such an action entails would raise serious human rights concerns. Moreover, in the true emergency — the only situation that should permit such an option to be considered — it likely would not work. If there is sufficient time to send a prisoner to a foreign country and permit interrogation to begin there, there probably is not a true "ticking" bomb.

Interestingly, the torture of a terrorist suspect by foreign nations in order to provide information to the United States was the opening sequence in a recent popular television show, "24 Hours" on Fox Television. A man was tortured in a foreign country by members of that country; while tortured, the man revealed that a nuclear bomb was set to explode in Los Angeles that day. An American representative did not "participate" in the torture, but waited in an adjacent room to merely "receive" the results. The television show, which aired October 29, 2002, did not explore any of the ethical issues; it has yet to be revealed whether the information will prove useful!

within five hours. Other evidence obtained by the police makes the threat totally credible. There is no possibility of evacuation and no possibility of finding the bomb, except by the most amazing stroke of luck, during this time. Would I really argue that the state must refrain from torture in this case?

In part, my answer may turn on the definition of torture. As explained earlier, I believe that certain things so easily tossed into the pot, as methods of torture, should not be. Thus, for example, I would have no problem with the use of sodium pentothal administered under medical supervision in the above scenario.

But what if the use of "truth serum" does not work. Time is running out. Should the state try electrodes, needles under the nails, the vomit mask — any method that might make this person talk? My answer still must be no. Why? Obviously, it is not an easy resolution. It is tempting to say that torture is permissible in this one hypothetical, and this hypothetical situation only. So why do I ultimately stand firm? First, it is my strong belief that this hypothetical, almost certainly, will never happen. Rather, there would be some variation to the facts that would make the use of torture less compelling. For example, the person in custody does not confess to planting the bomb, and the evidence against him is less than absolute. Or, the person in custody may not have much information to share, even if he is part of a terrorist organization, because the organization operates on a strict "need to know" basis. Alternatively, if the person in custody is such an important figure in the terrorist plot that he has all the relevant information, it may be that the mere detention of that person foils any plans. Or, the time period in which the police have to utilize traditional methods of investigation will be longer than a few hours. In other words, the "best-case scenarios" to justify torture, assumes virtually mythic proportions rather than operate as a realistic event. We should be loathe to create an exception to a policy of "no torture ever" based on a situation that almost certainly would not happen, especially when the harms from torture are most assuredly to occur.

Rather than base an exception around a specific hypothetical, rules determining when the nation can engage in torture would need to be devised. Thus, the government policy must be either an absolute ban on torture, or a rule that allows torture in "compelling

circumstances," or in the "ticking bomb scenario." As previously argued, these "rules" are no rules at all. No rule can cover every situation. What number of anticipated casualties must be countenanced before indulging in torture? How certain must the evidence against the suspect be? How much time does the officer have before the public is jeopardized? What method of torture should be used? What amount of pain inflicted? No rule can take into account all the possible variations in these factors.

Any generalized rule that establishes an exception for the use of torture would, undoubtedly, lead to an expanding role for torture as officials explore the outer boundaries of the law.[228] Torture would be used on a suspected al Qaeda member who *might* know of future attacks. It would not only be used if a nuclear bomb were hidden, but in the more likely scenario of a single suicide bomber. It would be used on the most vulnerable and the least powerful to protest. If rules are promulgated permitting torture in a "ticking bomb scenario," torture will become the norm rather than the exception, particularly when dealing with anyone suspected of terrorist ties. Only an absolute ban on torture would prevent the state from inflicting pain and suffering in those circumstances.

A variation on the ticking bomb scenario has been suggested: the state may indulge in torture in extreme circumstances, but only if the judiciary sanctions the use of torture through the issuance of a "torture warrant."[229] The idea here is that the decision to torture is not left unscrutinized, or left to the whims of those who might be most easily swayed by the emotions of the moment. Rather, the interrogator's discretion is checked by the wisdom of a judicial officer. Would this requirement for a torture warrant solve any of the problems discussed above?

I believe that the use of a torture warrant has the same flaws as does establishing rules permitting torture, and then some. It too, would act as an official, government sanction of torture, with all the

228. As Judge Posner argues: "If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Having been regularized, the practice will become regular. Better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances." *See* Posner, *supra* note 17.

229. This is the suggestion made by Professor Alan Dershowitz. *See supra* notes 3 & 12.

resultant costs. It would also do little to control the use of torture.[230] If officers were insulated from any liability by a warrant, they may well seek it in questionable cases, cases where they would not engage in such behavior on their own. Officers would have nothing to lose by requesting such a warrant, and there is a significant possibility that some judge would grant such a request. Thus, were warrants available for torture, government agents may very well seek them against detainees in Cuba, or at least some of the captive upper level members of al Qaeda who might have some information about possible future attacks. Clearly, these circumstances are far removed from the "ticking bomb" scenario envisioned by Dershowitz and others.

Moreover, a warrant requirement would do little in providing oversight to the process of torturing. It is certain, that proceedings to obtain a warrant would be conducted in secret.[231] After all, a torture warrant would presumably be sought only in extreme circumstances dictated by national security. Even now, much of what happens to the detainees at Camp X-Ray, in Guantanamo Bay, is shrouded in secrecy.[232] Public disclosure of a desire to obtain a "torture warrant" because of concern that a weapon of mass destruction is hidden in a major city, simply, would not happen. Such secrecy would "go a long way to dissipating the advantages proposed to be obtained by subjecting cruel treatment to the rule of law. Indeed, to the horror of legal brutality would be added the evil of secret law, secretly applied."[233]

Finally, a warrant requirement would do little to cabin the use of torture since there undoubtedly would be exceptions to such a requirement. For example, while warrants are supposed to be the

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230. *See also* comments by Robert Posner, *supra* note 17, criticizing the idea of a torture warrant.

231. For example, there currently is a "secret federal court" that approves wiretaps and searches in terrorism and espionage cases. *See e.g.*, Editorial*: Rights and the New Reality*, L.A. Times, Sept. 9, 2002, at B10. Recently, it was revealed that the FBI gave false information in more than 75 requests for secret warrants in recent years. Eric Lichtblau and Josh Meyer, *Terror Probe Feuds Revealed by Secret Court*, L.A. Times, Aug. 23, 2002, at A1.

232. *See, e.g.,* Coalition of Clergy, Lawyers and Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002); *see also* Henry Weinstein, *Prisoners May Face Legal "Black Hole,"* L.A. Times, December 1, 2002 at A1.

233. Kadish, *supra* note 185, at 356.

norm for police officers conducting searches and seizures under the Fourth Amendment, the courts have carved numerous exceptions out of that constitutional requirement.[234] One major exception is for exigency — a warrant need not be sought if there is no time to obtain one.[235] Since much of the argument for torture revolves around a "ticking bomb" scenario that, by definition, involves elements of exigency, any warrant requirement might well be excused.

In sum, the warrant requirement would do nothing to rectify the evils of torture, and do little to restrict its use. Indeed, having a warrant process established might encourage police officers to seek the right to torture more often than they would engage in such behavior on their own. And, in the current climate of ever-present national emergency, a judge might very well issue a warrant permitting torture in circumstances that do not begin to resemble a "ticking bomb" scenario. Put simply, a warrant procedure likely would be an invitation to the increasing use of torture.

Thus far, I have tried to argue that establishing a rule of "no torture except in emergencies," or "no torture, except via a warrant issued in an emergency" would be undesirable alternatives to an absolute ban on torture. Having said all that, here is the case that really gives me nightmares were the state to recognize an acceptable role for torture: The police in New York have, in custody, a suspect known to be a terrorist. He is adjudged perfectly lucid and rational. He admits to planting a nuclear weapon in the heart of the city and informs the officers that the bomb will go off within five hours. Other evidence obtained by the police makes the threat totally credible. There is no possibility of evacuation, no possibility of finding the bomb, except by the most amazing stroke of luck, during this time. The state tortures this suspect — physically mutilating him until he is near death, all to no avail. The suspect is a fanatic and no amount of pain inflicted upon him will cause him to thwart his mission. So, the police turn to the only option they have available. They bring into the interrogation room the suspect's be-

234. The history of the Fourth Amendment is riddled with exceptions to the requirement that officers must get a warrant in order to search. California v. Acevedo, 500 U.S. 565, 569 (1991).

235. For a discussion of the exigency exception, see Welsh v. Wisconsin, 466 U.S. 740 (1984); Warden v. Hayden, 387 U.S. 294 (1967).

loved four-year-old son. And they start to torture the child. As they strip the child naked, the suspect says nothing. They strike the child. The suspect reacts; he is obviously tormented by the treatment of his child. The police apply electrodes to the child's genitals. After the child is shocked several times, the suspect caves and tells the police the location of the bomb.

This scenario would clearly fit the "ticking bomb" exception. Arguments that the "ends justify the means," or defense of others could easily justify such action. Yet a nation that intentionally and brutally harms an innocent child has clearly lost its moral bearings. The United States must not become such a nation. The temptation to forfeit our most precious values is always most pressing in times of emergency and war. Yet, it is at precisely those times when it is most important to maintain our moral compass. Only an absolute ban on torture without exception will enable this nation to resist the impulse to ignore critical core values in favor of an elusive security.