BEYOND BIN LADEN AND LINDH: CONFESSIONS LAW IN AN AGE OF TERRORISM

M.K.B. Darmer†

† Assistant Professor, Chapman University School of Law. J.D., Columbia University School of Law, 1989; former Assistant United States Attorney, Southern District of New York. I thank the Chapman University School of Law for a research stipend, Professor Yale Kamisar for generously offering his wisdom and insights and commenting on an earlier draft, Professor Mark Godsey for sharing his forthcoming article and offering helpful comments on mine, Robert Maynes and Karl Triebel for research assistance, Rik Silverman for helpful editing, and, most especially, Roman E. Darmer II, for enduring support and assistance. Any errors are entirely my own.

INTRODUCTION

In *United States v. Bin Laden*,[1] a federal district court suppressed statements made abroad during the investigation of the 1998 bombings of U.S. embassies in Kenya and Tanzania,[2] holding, in essence, that the suspect should have been given *Miranda* warnings.[3] In 2002, lawyers for the "American Taliban,"[4] John Walker Lindh, moved to suppress statements made by their client after his capture in Afghanistan, alleging violations of both his *Miranda* and due process rights.[5] Both cases arose shortly after the Supreme Court's decision in *Dickerson v. United States*,[6] which reaffirmed the continuing validity of *Miranda v. Arizona*.[7] In *Dickerson*, the Court held unconstitutional Congress's efforts to overrule the controversial *Miranda* decision[8] through legislation,[9] passed shortly after *Miranda* was decided, that used a "totality of the circumstances" test to determine a confession's admissibility.[10]

---

1 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

2 Although Usama bin Laden (now more commonly referred to as Osama bin Laden) was indicted and named the lead defendant in the case, he was never actually captured or tried in connection with the embassy bombings. Bin Laden is, of course, most notorious for his suspected role as mastermind of the terrorist events of September 11, 2001.

3 For a thorough discussion of the case, see Mark A. Godsey, Miranda*'s Final Frontier — The International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703 (2002).

4 James Dao, *U.S. Hopes American Taliban Will Tell All*, N.Y. TIMES, Dec. 4, 2001, at B3.

5 Defendant's Memorandum of Points and Authorities in Support of Motion to Suppress Statements for Violations of His Fifth Amendment Rights (*Miranda* and *Edwards*), United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002); Defendant's Memorandum of Points and Authorities in Support of Motion to Suppress Involuntary Statements, United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002) [hereinafter Involuntary Statements Mem.].

6 530 U.S. 428 (2000).

7 384 U.S. 436 (1966). *But see Dickerson*, 530 U.S. at 445 (Scalia, J., dissenting) ("Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence.").

8 *See* Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 99 (referring to *Miranda* as "highly controversial"); *see also* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 674 & n.4 (1992) (noting that *Miranda* "generated a backlash that has permanently affected the political alignment of the country" and was "likely . . . a major factor" in the Nixon election of 1968).

9 *See* 18 U.S.C. § 3501 (2000).

10 *See* M.K.B. Darmer, *Lessons from the* Lindh *Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 268 & n.198–99 (2002). As discussed more fully in that article, the Supreme Court held in *Dickerson* that § 3501 essentially reinstated the due process voluntariness test used by the Court before *Miranda* and thus failed to provide a "constitutionally adequate substitute for the *Miranda* warnings." *Id.* at 269 (citing *Dickerson*, 530 U.S. at 442–43).

Obtaining confessions from suspected terrorists will play an integral role in this country's current "war on terror."[11] Yet as this article goes to press, the news is full of confessions that have been shown to be false, including those made by young men convicted in the notorious "Central Park Jogger" case.[12] Similarly, in a case involving an Egyptian national detained as a material witness after the terrorist attacks on September 11, 2001, the witness falsely confessed to owning a suspicious radio device that was discovered in a hotel across the street from the former World Trade Center.[13] This article examines the current state of confessions law in light of society's need for confessions and proposes specific approaches designed to serve the legitimate needs of law enforcement while remaining true to the Constitution.[14]

Despite the fact that *Dickerson* settled the question of *Miranda*'s survival, at least in the near term, questions of the constitutional legitimacy of the original decision endure. Moreover, the Court's broader confessions jurisprudence can perhaps best be described as incoherent. Long before the *Miranda* decision, issues related to confessions bedeviled the courts.[15] Though *Miranda* itself replaced the former case-by-

---

[11] George W. Bush, Address to Joint Session of Congress, Sept. 20, 2001, *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (using phrase "war on terror").

[12] *See* Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, N.Y. TIMES, Dec. 20, 2002, at A1. *But see* Robert D. McFadden, *Police Panel Says 5 Convicted Men Most Likely Raped Central Park Jogger*, N.Y. TIMES, Jan. 28, 2003, at A21. (The *Times* subsequently published a correction to clarify its "imprecise[ ]" headline; the report concluded that "the five were most likely guilty of having started an attack with sexual overtones on the jogger, who was later raped and beaten by Mr. Reyes [the serial rapist whose confession to acting alone caused the convictions against the five defendants to be vacated]. It did not say they were most likely guilty in the rape itself." *Correction*, N.Y. TIMES, Jan. 29, 2003.)

[13] *See* In re Application of the United States for Material Witness Warrant, 214 F. Supp. 2d 356 (S.D.N.Y. 2002) [hereinafter Material Witness Warrant]. The Egyptian national, Abdallah Higazy, had entered the United States on a student visa on August 27, 2001, and checked into the Millennium Hotel, located across from the World Trade Center. *Id.* at 357. Higazy was still at the hotel on September 11 and was evacuated along with other guests. A security guard at the hotel later advised the F.B.I. that a safe in Higazy's room contained his passport, a copy of the Koran, and the radio, known as a transceiver, which is capable of being used for "air-to-air and air-to-ground communication with persons in possession of a similar radio." *Id.* at 358. It later turned out, however, that the radio was not used for nefarious purposes and actually belonged to an American pilot staying at the same hotel as the Egyptian national. *Id.* at 359. "Still further investigation revealed that the hotel security guard had repeatedly lied to the F.B.I. in stating that he found the transceiver in the safe in Higazy's room." *Id.*

[14] This is my second of two articles dealing broadly with this topic. The first focused specifically on John Walker Lindh's allegations involving violations of his Fifth Amendment rights as interpreted by *Miranda v. Arizona* and *Edwards v. Arizona*, 451 U.S. 477 (1981). Darmer, *supra* note 10.

[15] The Supreme Court has relied, variously, on the Fifth Amendment right against self-incrimination, the Sixth Amendment right to counsel, and the Due Process clauses of the Fifth and Fourteenth amendments in struggling with cases involving the admissibility of confessions

case due process approach with a structure designed to be easier in application, the Court continues to struggle with confessions cases. As discussed more fully, *infra*, the Court has carved out a number of exceptions to *Miranda* and, in cases in which the *Miranda* requirements have been fulfilled or do not apply, continues to use the case-by-case due process approach as essentially a "backup" test.

While there are inherent difficulties in balancing the rights of criminal suspects with the legitimate goals of law enforcement,[16] these difficulties are magnified in cases involving terrorism and national security. Confessions may be critical to such cases,[17] and obtaining justice in cases involving terrorism is of critical importance.

Part I of this article traces the development of confessions law in the United States. It discusses the Supreme Court's early application of the Fifth Amendment Self-Incrimination Clause to a nineteenth-century confessions case, its later focus on the Due Process Clause during a fertile period of confessions law development between 1936 and 1964, and its return to the Fifth Amendment as the anchor for its landmark decision in *Miranda v. Arizona*. Part I then briefly addresses the current state of confessions law after the Court's recent decision in *Dickerson v. United States*, in which the Court putatively reaffirmed the "constitutional"

---

made under questionable circumstances. *See* Bram v. United States, 168 U.S. 532 (1897) (finding confession coerced based on Fifth Amendment analysis); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (relying on due process analysis in concluding that confession was involuntary); *id.* at 157 (Jackson, J., dissenting) (criticizing majority's due process analysis, in an opinion joined by two other justices); Fikes v. Alabama, 352 U.S. 191 (1957) (finding due process violation); *id.* at 199 (Harlan, J., dissenting) (finding that majority opinion "oversteps the boundary between this Court's function under the Fourteenth Amendment and that of the state courts in the administration of state criminal justice," in an opinion joined by two other justices); Escobedo v. Illinois, 378 U.S. 478 (1964) (finding that interrogation violated Sixth Amendment right to counsel, in a 5-4 decision); *id.* at 494 (Stewart, J., dissenting) (criticizing Court for holding inadmissible a "voluntary" confession). *See* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 451 (1987) (noting that the "flexible," pre-*Miranda* due process test "created numerous problems, not only for suspects facing interrogation, but also for the courts and for the police"); *id.* ("difficulties of the due process approach remained" even after *Miranda* shifted the Court's focus to the Fifth Amendment).

16 *See* Spano v. New York, 360 U.S. 315, 315 (1959) ("As in all such [confession] cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."); Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 53 (2001) ("There is widespread agreement on achieving instrumental reliability in the criminal process. There is no such agreement on the relative priority of public security and individual autonomy or dignity.").

17 *See* William Glaberson, *Whether Walker Knew of Counsel Is Issue*, N.Y. TIMES, Jan. 17, 2002, at A17 ("'The case against him is almost entirely based on his own statements,' said H. Richard Uviller, a criminal law expert at Columbia Law School, 'so if those statements are barred from court, there goes the case.'"); *see also* Steven Brill, *End of Their Rope*, NEWSWEEK, Apr. 15, 2002, at 48 (emphasizing importance of confession to *Lindh* case).

foundation of *Miranda* while, paradoxically, apparently leaving intact a line of pre-*Dickerson* cases premised on the view that the *Miranda* warnings were subconstitutional "prophylactic rules."

Part II then turns to the special issues raised by interrogation that occurs outside the territorial limits of the United States. It takes a close look at a district court's recent decision in *United States v. Bin Laden*,[18] which held that the privilege against self-incrimination applied even to nonresident aliens whose only connection to the United States was their prosecution in this country for the bombing of the U.S. embassies in Kenya and Tanzania. While I agree that the Self-Incrimination Clause applies to aliens tried in United States courts, I do not agree that the clause is implicated by a technical violation of *Miranda* when the confession is voluntary, and I propose a "foreign interrogation" exception to *Miranda*.

Part III discusses the due process limits on custodial confessions, a critical issue that was raised — but never resolved by the court — in the *Lindh* case[19] and that inevitably will recur in future cases dealing with terrorism and national security. Part III argues that evolving notions of due process must take into account risks to national security but argues that truly compelled statements should never be admitted into evidence. It is those statements — rather than statements taken in technical violation of *Miranda* — that violate the Self-Incrimination Clause.

I. THE EVOLUTION OF CONFESSIONS LAW IN THE UNITED STATES

A. THE FIFTH AMENDMENT AND *BRAM*

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."[20] The Self-Incrimination Clause has been termed "an unsolved riddle of vast proportions,"[21] and tracing the origin, meaning, and scope of the privilege is an elusive task.[22] Since the Supreme Court's 1966 *Miranda* decision, the

---

18 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

19 Lindh ultimately pleaded guilty to two felony charges carrying a prison sentence of twenty years. United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); Plea Agreement, United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002); Neil A. Lewis, *Admitting He Fought in Taliban, American Agrees to 20-Year Term*, N.Y. TIMES, July 16, 2002, at A1. The plea was entered on the day that a hearing on Lindh's motions to suppress his statements was scheduled to begin, meaning that the court never had to rule on the motions. *See* Scheduling Order, *Lindh* (filed Feb. 15, 2002); *see also* Lewis, *supra*. For a further discussion of details of Lindh's plea, see Darmer, *supra* note 10, at 253.

20 U.S. CONST. amend. V.

21 Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857 (1995).

22 The task has been undertaken by others. *See, e.g.*, Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625

Fifth Amendment has been associated with the right to refuse to answer police questions, but that is a modern development, as police interrogation itself is "a thoroughly modern phenomenon."[23]

From well before the days of modern police forces, however, confessions have been used to convict those suspected of crimes, and a body of law developed governing the use of such evidence.[24] The degree to which confessions doctrine and the constitutional right against self-incrimination were historically intertwined has been the focus of intense scholarly debate,[25] entry into which is beyond the scope of this article.

(1996); LEONARD L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1986); *see also generally* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT (Richard H. Helmholz et al. eds., 1977); Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101 (1992), Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)*, 53 OHIO ST. L.J. 497 (1992)

23 Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 310, 314 (1998).

24 *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 92–101 (1989) (tracing history of common-law voluntariness doctrine).

25 Wigmore's classic treatise on evidence has become associated with the view that "there was no *historical* connection or association between the constitutional clause and the confessions doctrine." 3 JOHN HENRY WIGMORE, EVIDENCE § 823, at 338 & n.5 (3d ed. 1970) (noting that "[t]here has been much scholarly writing on the relationship between the confessions rule and the privilege against self-incrimination"). Wigmore traces four "distinct stages" in the history of confessions law. *See id.* § 817. The first stage includes the sixteenth and seventeenth centuries, which is an era characterized by an uncritical acceptance of confessions into evidence "without question as to their proceeding from promises or from fear of threats, even of torture." *Id.* § 818, at 292. In the second stage, during the second half of the eighteenth century, "apparently untrustworthy" confessions were excluded, though confessions *per se* were not viewed unfavorably and were considered to be compelling evidence of guilt. *See id.* § 819, at 297. However, by the early part of the nineteenth century, "[t]here was a general suspicion of all confessions, a prejudice against them as such, and an inclination to repudiate them upon the slightest pretext." *Id.* § 820, at 297. Wigmore attributes this prejudice to peculiarities of the English system, including features of its class system and limits of the English judicial system in that era. *See id.* § 820a, at 298–300. In the fourth stage, Wigmore concludes that the U.S. Supreme Court has rejected a policy favoring the reception of all "well-proved confessions" into evidence. *See id.* § 820c, at 306 & n.5.

In his Pulitzer Prize-winning book, *Origins of the Fifth Amendment*, Leonard W. Levy takes issue with Wigmore's claim regarding the essential separateness of the "rule against involuntary confessions" and the "right against self-incrimination" (which, Levy notes, Wigmore refers to merely as a "privilege"). According to Levy, "the nexus between the right against self-incrimination and the rule against involuntary confessions emerged in the Parliamentary debates in 1742." LEVY, *supra* note 22, at 328–29. In addition, he argues that "[t]he history of the confessions rule in the eighteenth century and the present state of constitutional law in the United States show the intimacy, not the opposition or differences, of the two rules." *Id.* at 496 n.43. Levy's book provides an exhaustive historical account of the common-law history of the rule against self-incrimination. However, he acknowledges that the scope and meaning of the text of the Fifth Amendment to the U.S. Constitution is not self-evident:

> Whether the framers of the Fifth Amendment intended it to be fully co-extensive with the common law cannot be proved — or disproved. The language of the clause

What is uncontroverted is that the U.S. Supreme Court did not rely on the Fifth Amendment right against self-incrimination as a basis for evaluating the admissibility of confessions until its 1897 decision in *Bram v. United States*.[26] Before *Bram*, the Court used "reliability" as the determining factor in admitting confessions,[27] though it couched its concern with reliability in the language of "voluntariness." Confessions induced by threats or promises were viewed as "involuntary" because threats or promises might cause an innocent person to confess, yielding an unreliable confession.[28] So long as such threats or promises were absent, "[c]onfessions were admitted notwithstanding the fact that they were obtained in custody, in the absence of counsel, and without prior warnings of the right to silence or right to counsel."[29]

In *Bram*,[30] the Supreme Court shifted gears by relying explicitly on the Fifth Amendment, though it again employed the language of "voluntariness."[31] Its concern for "voluntariness," however, went beyond traditional reliability concerns. The Court determined that to ascertain whether Bram's confession was admissible under the Fifth Amendment, it had to consider the confession's surrounding circumstances and the nature of the detective's communication to Bram. First, "Bram had been brought from confinement to the office of the detective, and there, when alone with [the detective], in a foreign land, while he was in the act of being stripped, or had been stripped, of his clothing, was interrogated by

---

> and its framer's [*sic*] understanding of it may not have been synonymous. The difficulty is that its framers . . . left too few clues. Nothing but passing explication emerged during the process of state ratification of the Bill of Rights from 1789 through 1791. . . . That it was a ban on torture and a security for the criminally accused were the most important of its functions, as had been the case historically, but these were not the whole of its functions. Still, nothing can be found of a theoretical nature expressing a rationale or underlying policy for the right in question or its reach.

Id. at 429–30. Lawrence Herman also argues that Wigmore's position is flawed. *See* Herman, *The Unexplored Relationship (Part I)*, *supra* note 22, at 105.

26 168 U.S. 532 (1897).

27 *See* Penney, *supra* note 23, at 325.

28 *See id.* (citing Hopt v. Utah, 110 U.S. 574 (1884); Pierce v. United States, 160 U.S. 355 (1896)).

29 *Id.*

30 For a thorough discussion of the *Bram* case in historical context, see Benner, *supra* note 24, at 101–13; Penney, *supra* note 23, at 326–30. *See also* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 59 (1993); Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 730 (1999) (discussing the Supreme Court's reliance on common law in cases decided before *Bram*).

31 The Court used the phrase "free and voluntary" and defined a "free and voluntary" confession as one not extracted by force, threats, or violence, "nor by the exertion of any improper influence"; in other words, free of coercion. The Court then proceeded to analyze the confession before it, relying explicitly on the Fifth Amendment. *Bram*, 168 U.S. at 542–43 (internal citation omitted).

the officer."[32] Second, in reviewing the interrogation, the Court considered the impression made upon Bram's mind. After Bram was told that the only other suspect had accused him of the crime, "the result . . . produce[d] upon his mind the fear that, if he remained silent, it would be an admission of guilt . . . and . . . by denying, there was a hope of removing the suspicion from himself."[33] The Court ruled that placing a suspect in such circumstances, which "perturbs the mind and engenders confusion of thought,"[34] yields a confession that cannot truly be considered free of coercion.

The *Bram* case is illustrative in part because the circumstances surrounding the interrogation were relatively tame, not only in terms of prior cases,[35] but also in light of later confession cases that confronted the Court.[36] If taken seriously, the language of *Bram* suggests that the Fifth Amendment places extraordinary limits on the scope of permissible interrogations.[37] In essence, "[t]he words of the detective which elicited the allegedly incriminatory response from Bram were: 'Bram, we are trying to unravel this horrible mystery' and '[y]our position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.'"[38] This hardly amounts to the kind of police pressure that later led the Court to formulate the *Miranda* rules.

---

[32] *Id.* at 563.

[33] *Id.* at 562. The detective testified about the conversation as follows:

> When Mr. Bram came into my office, I said to him: "Bram, we are trying to unravel this horrible mystery." I said: "Your position is rather an awkward one. I have had Brown [the other suspect] in this office and he made a statement that he saw you do the murder." He said: "He could not have seen me; where was he?" I said: "He states he was at the wheel [of the ship]." "Well," he said, "he could not see me from there." I said: "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." He said: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it."

Id. at 539.

[34] *See id.* at 564.

[35] Indeed, Penney describes the decision as "a radical turn" taken by the Supreme Court. Penney, *supra* note 23, at 326.

[36] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (holding that confession extracted through brutal means was barred by Due Process Clause).

[37] According to Penney, although the Court "did not set out a clear, bright line rule as to what kinds of inducements would be considered improper in future cases," it "intimated, however, that restrictions on the police would be stringent." Penney, *supra* note 23, at 329; *see also* Benner, *supra* note 24, at 107 ("[U]nder the *Bram* test, any interrogation tactic which ordinarily would have the effect of producing either hope or fear in the mind of the suspect rendered the confession involuntary without regard to the degree of influence exerted or whether that influence was sufficient to overcome the suspect's 'will.'").

[38] Penney, *supra* note 23, at 326.

According to Steven Penney, "the *Bram* Court was asserting that it was wrong for the state to pressure criminal suspects to confess, even when the confession is perfectly trustworthy and was obtained in a humane and non-abusive manner."[39] The profound nature of that assertion may have been masked, however, by the Court's reliance on "voluntariness" language from prior cases.[40] In Penney's view, the Court's reliance on "voluntariness" and its failure to "repudiate the reliability-based exclusionary rationale" of earlier cases "set the stage for future doctrinal and theoretical confusion."[41] The Court had, in essence, expanded the concept of "voluntariness" in such a way as to prohibit tactics beyond those that might result in a false confession.

Bram was one in a long line of cases in which the Court has struggled to define the meaning of an "involuntary" confession and the question — sometimes related, sometimes not — of the scope and meaning of the Fifth Amendment. In the immediate aftermath of *Bram*, however, the Supreme Court's reliance on the Fifth Amendment as a basis for excluding confessions went into a state of hibernation.[42] In part, that was a necessary corollary of the fact that the Court, until 1964, had held that the Fifth Amendment did not apply to the states.[43] In federal cases, the Court "can, and has, formulated rules of evidence in the exercise of its 'supervisory authority' over the administration of federal criminal justice

---

39 *Id.* at 331.

40 *Cf. id.* ("[T]he *Bram* court explained that it was merely applying the voluntariness test which had previously been set out in Hopt [v. Utah, 110 U.S. 574 (1884)]."). The *Hopt* Court held that a murder suspect's confession, made almost immediately after he was taken into custody, was an example of a confession that was "freely and voluntarily made," and therefore admissible. 110 U.S. at 584. Penney points out that "in linking the voluntariness doctrine with the privilege against self-incrimination, the [*Bram*] Court reformulated the elements of the former to conform with the strictures of the latter . . . by detaching the voluntariness standard from its implicit grounding in the reliability rationale." The Court "conceived of voluntariness as a matter of individual freedom." Penney, *supra* note 23, at 327.

Benner argues that the privilege against self-incrimination was designed to encompass a "cluster of rights," Benner, *supra* note 24, at 89, and that the emphasis on the voluntariness of a confession failed to appreciate the scope of the privilege, *see id.* at 67–100. In his view, the *Bram* Court "placed its imprimatur on this veil of ignorance, by engrafting the common law voluntariness rule onto the [F]ifth [A]mendment and virtually equating the two." *Id.* at 100. Wigmore had earlier criticized the Court for confusing the Fifth Amendment's requirements with the common-law voluntariness doctrine. *See supra* note 25.

41 Penney, *supra* note 23, at 331.

42 *See* Stephen J. Schulhofer, *supra* note 15, at 437 ("Bram was promptly forgotten, and for the next sixty years the Court consistently held that the fifth amendment privilege was inapplicable to police interrogation.").

43 *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding that Fifth Amendment applied to the states via the Fourteenth Amendment and protected witness from answering potentially incriminating questions in state gambling inquiry); *id.* at 17 (Harlan, J., dissenting) (pointing out that "[a]s recently as 1961, this Court reaffirmed that 'the Fifth Amendment privilege against self-incrimination was not applicable against the States'" (citing Cohen v. Hurley, 366 U.S. 117 (1961)).

which go well beyond due process requirements."[44] Confessions in state courts, however, were limited only by the constraints of the Fourteenth Amendment Due Process Clause.

B. THE PRE-EMINENCE OF THE DUE PROCESS "VOLUNTARINESS" TEST[45]

As Joseph P. Grano has pointed out, the "effort to distinguish voluntary from involuntary actions dates back at least to Aristotle,"[46] and it is an enterprise fraught with difficulty.[47] Bookended by its Fifth Amendment decisions in *Bram* and *Miranda*, the Court's analysis of the notion of "voluntariness" in the confessions context was carried out under the auspices of the Due Process Clause of the Fourteenth Amendment.[48]

The due process voluntariness test was, not surprisingly, slippery. The Court's confession cases "yield no talismanic definition of 'voluntariness,' mechanically applicable to 'the host of situations where the question has arisen.'"[49] Rather, "a complex of values underlies the stricture against the use by the state of confessions which, by way of convenient shorthand, the Court terms involuntary."[50] Although the Court's rela-

---

44 YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 446 (10th ed. 2002) (discussing development of *McNabb-Mallory* rule for confessions in federal cases).

45 It is beyond the scope of this article to provide more than a thumbnail sketch of the Court's due process jurisprudence before *Miranda*, with an emphasis on cases that may have particular relevance to an assessment of cases like *Lindh*. For a thorough treatment of the due process cases, see Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1427–37 (1985).

46 GRANO, *supra* note 30, at 61.

47 *See generally* DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE (Sydney Hook ed., 1957). Yale Kamisar suggests a way out of the dilemma. He argues that the terms "voluntary" and "involuntary" are unhelpful in analyzing the "real reasons for excluding confessions." Yale Kamisar, *What Is an "Involuntary" Confession? Some Thoughts on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 759 (1963). The key, he suggests, is not to look at the Court's conclusory labels but rather at what the Court *does* in various confessions cases decided under the Due Process Clause. *See id.* at 745–46.

48 *See* Dickerson v. United States, 530 U.S. 428, 433 (2000) (explaining that "notions of due process" prohibited coerced confessions before *Miranda*); Michigan v. Tucker, 417 U.S. 433, 441 (1974) ("In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary."); Spano v. New York, 360 U.S. 315, 315 (1959) (describing case as "another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."); *see also* Hancock, *supra* note 45, at 2196 (stating that due process had a "constitutional reign of thirty years").

49 Schneckcloth v. Bustamonte, 412 U.S. 218, 224 (1973) (seeking guidance from Court's confessions jurisprudence in resolving question of voluntariness in Fourth Amendment consent search context).

50 Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

tively recent decision in *Colorado v. Connelly*[51] inexplicably suggests to the contrary,[52] one such historical value was the desire to prevent the introduction into evidence of false, or unreliable, confessions.[53] Another value was ensuring that police methods in law enforcement were appropriate.[54] Initially, the concern with police methods was with physical abuse.

The chilling case of *Brown v. Mississippi*[55] in 1936 ushered in an era of profound concern about police tactics in extracting confessions, particularly in the South, where black suspects were frequently subjected to grossly abusive police tactics.[56] It was the Court's first review of a confession admitted into evidence in state court[57] and, as Morgan Cloud wrote recently, the Court's decision was "so progressive that after more than half a century it remains one of the Court's great opinions."[58] As Gerald M. Caplan has noted, *Brown* "was as appalling on its facts as *Miranda* was benign."[59] Officials, accompanied by an angry mob, extracted a confession from one suspect after hanging him from a limb of a tree with a rope, tying him to the tree, whipping him, then whipping him again on a separate occasion.[60] Two other suspects were whipped with a leather strap and buckle.[61] The facts relating to the defendants' torture

---

51 479 U.S. 157 (1986).

52 The case is discussed in some detail in Part III.D, *infra*.

53 *See* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2009–14 (1998).

54 *See id.* at 2013.

55 297 U.S. 278. For a fuller discussion of the case, see generally Morgan Cloud, *Torture and Truth*, 74 TEX. L. REV. 1211 (1996).

56 *See* Hancock, *supra* note 45, at 2203 ("Due Process doctrine for police interrogations began its life with the Court's dramatic creation of a Fourteenth Amendment exclusionary rule in *Brown v. Mississippi*, where white police officers had procured murder confessions from African American men by torturing them."); *see also* Caplan, *supra* note 45, at 1428 (the application of the "third degree" in the South, "where it was fueled by racial prejudice and the spectre of mob violence, was particularly shocking. *Brown* represented a twentieth century application of the rack."); Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1173 (2001) ("In *Brown* and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable."); *see generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

57 *See* Schulhofer, *supra* note 15, at 437; *cf.* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (noting that *Brown* "was the first case in which the Court held that the Due Process Clause prohibited the States from using the accused's coerced confessions against him").

58 Cloud, *supra* note 55, at 1211.

59 Caplan, *supra* note 45, at 1427. The facts are recounted in detail in GRANO, *supra* note 30, at 3–4, relying on both the United States and Mississippi Supreme Court opinions.

60 *Brown*, 297 U.S. at 281–82.

61 *Id.* at 282.

and abuse were undisputed[62] and plainly repulsed the Court.[63] In a unanimous decision, the Court found a clear violation of due process.[64]

Later cases decided under the due process test were neither as easy nor as uncontroversial as *Brown*. In particular, as the concern with brute force diminished, the Court struggled in determining under what circumstances more subtle psychological pressures violated due process. Unanimity in denouncing this species of pressure largely evaded the Court, and the decisions — far from speaking with the unified voice of *Brown* — reflect bitter divisions. In addition, as Laurie Magid has noted, "[e]ven though reliability was clearly uppermost in the Court's mind when it decided *Brown v. Mississippi*, the Court gave mixed and confusing signals in subsequent cases about the precise rationale for the voluntariness requirement."[65] In *Ashcraft v. Tennessee*,[66] for example, a 6-3 majority of the Court held that the confession, if made at all,[67] was "compelled" under circumstances that involved psychological pressure rather than the use of brute force.[68] The Court described the relevant considerations as follows: "For thirty-six hours after Ashcraft's seizure[,] during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."[69] Under those circumstances, the Court found the situation "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."[70]

Justice Jackson wrote a rousing dissent in *Ashcraft*.[71] Noting constraints on the Court rooted in "the sovereign character of the several

---

62 *Id.* at 281; *see also id.* at 284–85 (noting that three witnesses who participated in whippings, including the deputy, were introduced, and "not a single witness was introduced who denied it").

63 *See id.* at 286 (describing procedure used to extract confession as "revolting to the sense of justice"); *cf.* Michigan v. Tucker, 417 U.S. 433, 448 (1974) (describing fact situation in *Brown* as "classical third-degree torture").

64 *Brown*, 297 U.S. at 287.

65 Magid, *supra* note 56, at 1174.

66 322 U.S. 143 (1944).

67 The Court's opinion reflects a jaded weariness with the testimony, which "follows the usual pattern and is in hopeless conflict" as to both the circumstances surrounding the confession and the issue of whether the defendant confessed at all. *See id.* at 150–51.

68 *See id.* at 153.

69 *Id.*

70 *Id.* at 154.

71 322 U.S. 143, 156 (Jackson, J., dissenting). His dissenting opinion was joined by Justices Roberts and Frankfurter. As Yale Kamisar put it more than twenty-five years ago, "*Ashcraft* is a great case only because Jackson's dissent makes it so. The dissent is worth quoting at length." Yale Kamisar, *Fred E. Inbau: The Importance of Being Guilty*, 68 J. CRIM. L. &. CRIMINOLOGY 182, 185 (1977). The dissent is, in fact, widely quoted, *see, e.g.*, Schulhofer, *supra* note 15, at 450 (describing how Jackson "passionately protested" the Court's approach), and has been described as "one of the most honest and accurate statements

States,"[72] he found the Court powerless to reverse state convictions merely for "conduct which we may personally disapprove."[73] While reiterating the propriety of the Court's refusal to countenance confessions that are deemed "involuntary" because of physical brutality,[74] he found that "we are in a different field" when considering confessions based merely upon questioning, even if "persistent and prolonged."[75] Referring to questioning itself as an "indispensable instrumentality of justice,"[76] he wrote that "the principles by which we may adjudge when it passes constitutional limits are quite different from those that condemn policy brutality, and are far more difficult to apply."[77] Saying that those principles demand a "responsible and cautious" exercise of the Court's power to limit the states, he warned that "we cannot read an indiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal."[78]

Justice Jackson pointed out that it is human nature to deny a "shameful or guilty act"[79] and noted that a "'voluntary confession' is not likely to be the product of the same motives" that would influence the giving of innocuous information.[80] However, he was unpersuaded by the majority's conclusion that Ashcraft's confession should be suppressed on the basis of the coercion inherent in a lengthy interrogation.[81] "The term 'voluntary' confession does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt. . . . To speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional."[82] He acknowledged the inherent coercion of a thirty-six-hour interrogation but also pointed out that coercion also inheres in a one-hour interrogation and in arrest and detention itself.[83] He found it self-evident that such circumstances "put pressure" upon the prisoner but questioned whether such pressure is prohibited by the Constitution.[84] Foreshadowing the Court's decision in *Miranda* twenty-two years later,[85] he asked, "does

---

on confession from the Supreme Court," Peter Brooks, Essay, *Storytelling Without Fear? Confession in Law and Literature*, 8 YALE J.L. & HUMAN. 1, 19 (1996).

72 *Ashcraft*, 322 U.S. at 157 (Jackson, J., dissenting).

73 *Id.* at 158.

74 *Id.* at 159–60.

75 *Id.* at 160.

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.* at 160–61.

81 *See id.* at 161.

82 *Id.*

83 *See id.*

84 *Id.*

85 *See* Hancock, *supra* note 45, at 2226 (noting that Jackson's dictum was "prophetic").

the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'? The Court does not quite say so, but it is moving far and fast in that direction."[86]

Jackson's dissent also noted that the Court had historically relied upon the duration and intensity of interrogation as factors in "estimating its effect on the will of the individual involved"[87] and that "some men would withstand for days pressures that would destroy the will of another in hours."[88] Previously, the "ultimate question" was whether the suspect "was in possession of his own will and self-control at the time of confession," and Justice Jackson argued that the majority refused to abide by that test in this case.[89] After a close examination of the circumstances surrounding Ashcraft's confession and the proceedings in state court,[90] he concluded that Ashcraft's "is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice"[91] and warned of the dangers of using the Due Process Clause to "disable the States" from protecting society against crime.[92] Justice Jackson noted that:

> [W]e are not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination, although we admit them to be "inherently coercive," are denied to a State by the Constitution, where they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer.[93]

Five years later, however, in *Watts v. Indiana*,[94] the Court again found a due process violation after a lengthy interrogation. The Court failed to reach a consensus as to how the case should be analyzed. Appropriately, Justice Frankfurter, who wrote an opinion announcing the judgment of the Court, acknowledged at the outset that "[i]n the applica-

---

[86] *Ashcraft*, 322 U.S. at 161 (Jackson, J., dissenting). As Kamisar points out:

> Justice Black, who wrote the opinion for the Court in *Ashcraft*, no less than Justice Jackson, who authored the ringing dissent, knew full well that in 1944 neither the Court nor "the country" was "ready" for an affirmative answer to the question, "[D]oes the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is 'inherently coercive'?" As we know now, it was not until 1966 [in the *Miranda* decision] that the Court, if not "the country," grew "ready."

Kamisar, *The Importance of Being Guilty*, *supra* note 71, at 187.

[87] *Ashcraft*, 322 U.S. at 161.

[88] *Id.* at 162.

[89] *Id.*

[90] *See id.* at 163–73.

[91] *Id.* at 173.

[92] *Id.* at 174.

[93] *Id.* at 170.

[94] 338 U.S. 49 (1949).

tion of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of view."[95] Indeed, only two other justices joined his opinion; two justices separately concurred, one concurred in part and dissented in part, and three dissented.[96] In that case, the suspect had been arrested, held for six days without arraignment in derogation of state law, and subjected to lengthy nighttime interrogation sessions.[97]

In addition to the length of interrogation, the Court considered the circumstances under which Watts was confined, including two days of solitary confinement in a cell called "the hole."[98] Justice Frankfurter further noted that Watts was "without friendly or professional aid and without advice as to his constitutional rights" and that "[d]isregard of rudimentary needs of life — opportunities for sleep and a decent allowance for food" were relevant "as part of the total situation out of which his confessions came and which stamped their character."[99]

Justice Jackson concurred and dissented in *Watts*. In the course of that opinion, he ruminated on the fact that suspects are not advised of their right to counsel and pointedly identified a critical dilemma for criminal procedure:

> The suspect neither had nor was advised of his right to counsel. This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because, under our adversary system, he deems that his sole duty is to protect his client — guilty or innocent — and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal proce-

---

95 *Id.* at 51. Justice Frankfurter expounded upon the elusive concept of voluntariness as follows:

> A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary.

Id. at 53.

96 *See id.* at 55–57.

97 *See id.* at 56 (Douglas, J., concurring). The suspect was interrogated for about four hours starting at 11:30 p.m. the first night and for about nine and a half hours starting at 5:30 p.m. on three of the next four nights. *Id.* at 52. Finally, at the end of the last such session, he confessed. *Id.* at 57.

98 *Id.* at 53. "The hole" had no place but the floor to sleep or sit. *Id.* at 56.

99 *Id.* at 53; *see also* Fikes v. Alabama, 352 U.S. 191 (1957) (suppressing confession on similar facts, in 6-3 decision).

> dure, *any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.*[100]

Five years after *Watts*, in *Spano v. New York*,[101] the Court ruled that a state's use of psychological pressure went out of bounds. It found a due process violation when the defendant's refusals to talk were ignored in a persistent series of interrogation sessions spanning almost eight hours.[102] The defendant's repeated requests to consult with his attorney were denied. He finally confessed after a close childhood friend, who was then attending the police academy, falsely told Spano that Spano's situation had gotten the friend "in a lot of trouble" and that he was concerned for the financial welfare of himself, his pregnant wife, and his three children.[103] The "friend"[104] prevailed upon Spano on three occasions without success. "Inevitably," however, "in the fourth such session . . . lasting a full hour, petitioner succumbed to his friend's prevarications and agreed to make a statement."[105]

In finding a due process violation, Chief Justice Warren explained that society's "abhorrence" at the use of "involuntary confessions" is based not just on their "inherent untrustworthiness" but also on the "deep-rooted feeling that the police must obey the law while enforcing the law."[106] He acknowledged that, in the days since *Brown v. Mississippi*,[107] the Court had not been confronted with such a case of brute force, nor had any subsequent case approached "the 36 consecutive hours of questioning present in *Ashcraft v. Tennessee*."[108] Nonetheless, Chief Justice Warren noted that the more "sophisticated" methods being used currently to "extract confessions" only make more difficult the Court's

---

100 *Watts*, 338 U.S. at 58–59 (Jackson, J., concurring in part and dissenting in part) (emphasis added). The emphasized language, which so succinctly states the likely effect of having defense counsel present in the interrogation room, is widely quoted. *See, e.g.*, Culombe v. Connecticut, 367 U.S: 568, 577–78 (1961); *see also* Caplan, *supra* note 45, at 1438 (characterizing Jackson's *Watts* dissent as "the most forthright and penetrating statement of the interests at stake").

101 360 U.S. 315 (1959).

102 *Id.* at 315.

103 *Id.* at 319.

104 As the Chief Justice noted, Spano "was apparently unaware of John Gay's famous couplet: 'An open foe may prove a curse, But a pretended friend is worse.'" *Id.* at 323.

105 *Id.* at 319.

106 *Id.* at 320. As Kamisar points out, *Spano* makes clear "[t]hat the Court was applying a 'police methods' — as well as a 'trustworthiness' — test.'" KAMISAR, MODERN CRIMINAL PROCEDURE, *supra* note 44, at 441. Again, while Chief Justice Warren concludes that Spano's will was "overborne" such that the confession was "involuntary," the key appears to be his rejection of the police methods used. *Cf.* Kamisar, *What Is an Involuntary Confession?*, *supra* note 47, at 741.

107 297 U.S. 278 (1936). *See supra* notes 55–64 and accompanying text.

108 Spano, 360 U.S. at 321 (citing Ashcraft v. Tennessee, 322 U.S. 143 (1944) (discussed *supra* notes 66–93 and accompanying text)).

"duty to enforce federal constitutional protections" because of "the more delicate judgments to be made."[109] In this case, Spano's will was "overborne by official pressure, fatigue and sympathy falsely aroused."[110] In emphasizing Spano's "overborne will," Chief Justice Warren's concern seemed more that the state interfered with the defendant's freedom to choose whether to confess rather than with a concern that it extracted a factually false confession from him.[111]

Indeed, in *Rogers v. Richmond*,[112] the Court went even further, expressly rejecting the notion that reliability *per se* was at the heart of the voluntariness inquiry. The Supreme Court chided the trial court for admitting a confession based on its reliability without focusing on whether law enforcement acted "such as to overbear petitioner's will to resist and bring about confessions not freely self-determined — a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth."[113]

In 1961, *Culombe v. Connecticut*[114] represented one of the Court's last internal struggles over the limits of the Due Process Clause in the confessions cases during this era. Justice Frankfurter announced the judgment of the Court, suppressing a confession on voluntariness grounds, but his sprawling opinion[115] garnered only one additional vote.[116] In expounding upon the state of the law, he wrote:

---

109 *Id.*

110 *Id.* at 323.

111 *See Developments in the Law — Confessions*, 79 HARV. L. REV. 935, 973 (1966) (stating that due process inquiry focusing on defendant's state of mind "assumes that the constitutionally protected interest of the accused is the right to decide, free from unfair pressure, whether he wants to confess"). The difficulty, of course, comes in determining when pressure is "unfair." *Cf. id.* (noting evolution of definition of "unfair pressure" in thirty years leading up to 1966).

In significant concurring opinions that foreshadow the later case of *Massiah v. United States*, 377 U.S. 201 (1964), Justices Douglas and Stewart emphasized the absence of counsel after indictment as a significant basis for excluding the confession. Noting that the Constitution guarantees the assistance of counsel during a trial that is open to the public and protected by procedural safeguards, Justice Stewart exhorted that "[s]urely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station." *Spano*, 360 U.S. at 327 (Stewart, J., concurring). Ultimately, *Massiah* "adopted the view advanced in the *Spano* concurring opinions." KAMISAR, MODERN CRIMINAL PROCEDURE, *supra* note 44, § 448.

112 365 U.S. 534 (1961).

113 *Id.* at 544.

114 367 U.S. 568 (1961).

115 His opinion spans sixty-six pages and includes ninety-seven footnotes. *See id.* at 568–635.

116 Justice Stewart joined the Frankfurter opinion. *Id.* at 568. Chief Justice Warren wrote a separate concurring opinion, taking issue with Justice Frankfurter's "lengthy and abstract dissertations." *Id.* at 635. Justice Douglas wrote a separate concurrence, joined by Justice Black. *Id.* at 637. Justice Brennan, joined by Chief Justice Warren and Justice Black, also concurred separately. *Id.* at 641. Justice Harlan, joined by Justices Clark and Whittaker, filed a dissenting opinion, although agreeing with "the general principles governing police interro-

> In light of our past opinions and . . . the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain: It is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. . . . The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[117]

In writing about the history of confessions law, Steven Penney makes a compelling case that the Court's pre-*Miranda* jurisprudence charts an uneven path.[118] He identifies three themes that dominate the Court's opinions: concerns with the unreliability of confessions extracted under questionable circumstances,[119] a desire to deter abusive police

---

gation" outlined in the Frankfurter opinion. *Id.* at 642. In addition to deeply dividing the Court, Justice Frankfurter's ambitious opinion has drawn decidedly mixed academic reviews. *See* Kamisar, *What Is an Involuntary Confession?*, *supra* note 47, at 744 ("One who plods through the sixty-seven page *Culombe* 'treatise' . . . cannot help but wonder whether the struggle was worth it"; illustrating that opinion's use of "colorful" but unilluminating language "threatens to enhance existing uncertainty and confusion"); Penney, *supra* note 23, at 352 (describing the opinion as "the most sophisticated, honest, and intellectually rigorous of any of the Court's explications of the due process voluntariness rule"); *id.* at 351–52 (noting that the opinion is "[w]idely condemned for its verbosity and abstruseness"); Seidman, *supra* note 8, at 730 (referring to the *Culombe* opinion as a "total disaster" and "riven with contradiction" despite being "elegantly written," "meticulously researched and filled with erudition").

117 *Culombe*, 367 U.S. at 601–02. Justice Frankfurter noted that Culombe was a "mental defective," *id.* at 620, and judged that persistent questioning acted to overbear the suspect's will:

> Culombe was detained in the effective custody of the police for four nights and a substantial portion of five days before he confessed. During that time he was questioned so repeatedly, although intermittently, that he cannot but have been made to believe what the police hardly denied, that the police wanted answers and were determined to get them.

Id. at 625.

118 *See* Penney, *supra* note 23, at 309.

119 *But see* Colorado v. Connelly, 479 U.S. 157 (1986) (discussed *infra* Part III.D) (suggesting that reliability of confessions is not a concern of due process).

practices,[120] and a concern with protecting the autonomy of the individual suspect.[121]

Gerald M. Caplan, however, in his classic article, *Questioning Miranda*,[122] defends the Court's development of the voluntariness standard, noting that "[p]ragmatism may have been preferable to principles at a time when there was little general agreement on the principles to be applied."[123] In his view, "When social cohesion and solidarity are strained, there is merit in an approach that, while showing direction toward increased police restraint, proceeds imprecisely and with some ambiguity, avoiding reductionism and overgeneralization."[124]

Of course, the goals of avoiding unreliable confessions and deterring police misconduct are complementary. Abhorrent police practices are often the tactics likely to produce unreliable confessions.[125] One of the problems, however, is that of the Court's legitimacy in decreeing "unconstitutional" any tactics that fall far short of the outrageous conduct that prompted the confession in *Brown*.[126] The *Brown* decision was unanimous, while the later decisions were the product of a deeply fractured Court.

---

120 Most commentators have focused on some version of Penney's first two concerns. *See* GRANO, *supra* note 30, at 65 ("In the view of most commentators, courts have had two real reasons for excluding confessions as involuntary: (1) a desire, surviving from the common-law approach, to eliminate untrustworthy confessions and (2) a desire to control offensive police practices.").

121 *See* Penney, *supra* note 23, at 313. Penney argues forcefully that the third concern, which he refers to as the "self-determination theory," is "morally suspect" because "the idea that criminal suspects should have an intrinsic, deontological right to silence fails to accord with widely-held views of political and personal morality." *Id.*

122 *See* Caplan, *supra* note 45.

123 *Id.* at 1434.

124 *Id.*

125 *Cf.* Edith Rose Gardner, Comment, *Coerced Confessions of Prisoners of War*, 24 GEO. WASH. L. REV. 528, 534–40 (1955) (detailing conditions endured by American prisoners of war in the Korean conflict, some of whom made false confessions).

126 *See* Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) (noting that the Court should be "more responsible and cautious" in adjudging when interrogation, as compared to brutality, "passes constitutional limits").

C. THE *MIRANDA* DECISION AND A RETURN TO THE FIFTH AMENDMENT

The Supreme Court's landmark decision[127] in *Miranda v. Arizona*[128] adopted a different approach,[129] relying on the Fifth Amendment right against self-incrimination.[130] The Court surveyed police manuals that encouraged the police to use relentless questioning techniques and psychological ploys to encourage confessions and expressed grave concern that a suspect's will could be overborne in a custodial setting, undermining his privilege against self-incrimination.[131]

As commentators have pointed out, *Miranda* "combines several distinct holdings."[132] One is that stationhouse interrogation is inherently coercive.[133] Having surveyed various tactics used in modern interrogation practice, the Court put it this way:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the indi-

---

127 Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1121 (2001) ("*Miranda v. Arizona* established the high water mark of the protections afforded an accused during a custodial interrogation. During the decades that followed, the United States Supreme Court allowed *Miranda*'s foundation to erode, inviting a direct challenge to the landmark ruling.") (citation omitted).

128 384 U.S. 436 (1966). The *Miranda* opinion actually disposed of four cases, all of which involved confessions that were ultimately suppressed. *See id.*

129 *See* White, *supra* note 53, at 2003 (*Miranda* "established the most important new approach for dealing with the constitutional admissibility of confessions").

Two years earlier, the Court had decided two confessions cases under the auspices of the Sixth Amendment. Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964). Those cases are addressed in Darmer, *supra* note 10, at 255–59. Not surprisingly, "[o]n the heels of the Court's decisions in *Escobedo* and *Massiah*, the lawyers for Ernesto Miranda [had] relied on the Sixth and Fourteenth Amendments in urging reversal of his conviction." *Id.* at 259 (citing Paul C. Cassell, *The Statute That Time Forgot, § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 191 n.35 (1999)). *Miranda*, however, rooted modern confessions jurisprudence in the Fifth Amendment.

130 *Miranda*, 384 U.S. at 439, 467. While this was the first time since *Bram* that the Court explicitly applied the Fifth Amendment to custodial interrogation, the majority asserted that "our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings." *Id.* at 442. *But see id.* at 531 (White, J., dissenting) ("[T]he Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent.").

131 *See id.* at 448–58. Bernard Weisberg, who argued the earlier *Escobedo* case for the A.C.L.U. as *amicus*, had likewise relied on police interrogation manuals in his brief in that case. KAMISAR, MODERN CRIMINAL PROCEDURE, *supra* note 44, at 451. *See also* Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21, 22–26 (1961).

132 Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 112 (1998); Schulhofer, *supra* note 15, at 436.

133 *See Miranda*, 384 U.S. at 458; Schulhofer, *supra* note 15, at 436. Indeed, as Donald A. Dripps has argued, "[t]he essence of *Miranda* is the proposition that statements obtained by custodial interrogation are presumed to be compelled in violation of the Fifth Amendment." Dripps, *supra* note 16, at 28.

> vidual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[134]

The Court thus held that a custodial confession would be presumed involuntary, and thus would be inadmissible, if the police failed to give a suspect four specified warnings, now widely recognized: that he has the right to remain silent; that any statements he makes can be used against him; that he has the right to an attorney during questioning; and that an attorney will be appointed for him if he cannot afford one.[135] Attaching a presumption of involuntariness to a confession just because it was obtained during the course of custodial interrogation was a startling break with precedent.[136] On the facts, the confessions at issue in *Miranda* almost certainly would have been admissible under the old voluntariness test.[137]

Miranda was decided by a vote of only 5-4.[138] In strongly worded opinions, the dissenting justices questioned its constitutional underpinnings and predicted dire consequences for law enforcement.[139] Justice

---

134 *Miranda*, 384 U.S. at 457–58.

135 *Id.* at 444. For fuller treatment of the decision, see Caplan, *supra* note 45; Cassell, *supra* note 129, at 183–94 (including in-depth account of the underlying investigation and confession of Miranda based upon the firsthand account of former Phoenix police Captain Carroll F. Cooley); Dripps, *supra* note 16, at 13–23 (including discussion of certiorari process); Fred E. Inbau, *"Playing God": 5 to 4 (The Supreme Court and the Police)*, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 377, 377 (1966); Yale Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); and Weisselberg, *Saving* Miranda, *supra* note 132, at 117–25 (including discussion of certiorari process).

136 *See, e.g.*, *Miranda*, 384 U.S. at 531 (White, J., dissenting). *But see* Hancock, *supra* note 45, at 2232–36 (arguing that *Miranda* was natural outgrowth of concerns about custodial interrogation expressed in Court's due process cases).

137 *See* GRANO, *supra* note 30, at 102 (noting that "*Miranda* and *Brown* are fish from very different kettles" and that the Court had "conceded with magnificent understatement that it might not have found Miranda's statement 'to have been involuntary in traditional terms'") (quoting *Miranda*, 384 U.S. at 457).

138 Critics of the decision have emphasized that point. *See, e.g.*, Inbau, *supra* note 135, at 377.

139 *Miranda*, 384 U.S. at 500 (Clark, J., dissenting in three cases and concurring in one) ("The ipse dixit of the majority has no support in our cases."); *id.* at 504 (Harlan, J., dissenting) ("the decision of the Court represents poor constitutional law and entails harmful conse-

Harlan, in an opinion joined by two other justices,[140] argued that the due process clauses provide an "adequate tool" to deal with confessions problems.[141] In his view, the new rules fashioned by the majority under the auspices of the Fifth Amendment were not truly designed to guard against police brutality or illegal coercion.[142] Rather, he believed, "the thrust of the new rules is to negate all pressure, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward 'voluntariness' in a utopian sense, or to view it from a different angle, voluntariness with a vengeance."[143]

As Justice Harlan assumed, this new way of defining "compulsion" was something quite different from the definition of "coercion" in the due process line of cases. As counsel for one of the petitioners conceded at oral argument in response to a question from Harlan, his client's confession was "[i]n no sense" coerced.[144] Rather, "compulsion" under the Fifth Amendment was a broader concept than "coercion" under the Due Process Clause.[145]

Meanwhile, "[c]ommentators and politicians proclaimed the decision a disaster for law enforcement"[146] and denounced the decision as "an illegitimate and misguided instance of judicial fiat."[147] The majority denied that its decision "create[d] a constitutional straitjacket"[148] and en-

---

quences for the country at large"); *id.* at 526 (White, J., dissenting) ("The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.").

140 *Id.* at 504 (Harlan, J., dissenting). Justices Stewart and White joined the Harlan opinion.

141 *See id.* at 505. For a criticism of the Harlan view, see Hancock, *supra* note 45, at 2201 ("Thanks to Justice Harlan and to those who credit his interpretation, a kind of mythology now envelops the old Due Process cases, so that their complexities are simplified and their inconsistencies forgotten.").

142 *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

143 *Id.*

144 KAMISAR, MODERN CRIMINAL PROCEDURE, *supra* note 44, at 460–61 (quoting Victor M. Earle III, counsel for petitioner Vignera).

145 *See id.* at 461; George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1087 (2001) ("The substitution of Fifth Amendment 'compulsion' for due process 'coercion' as the relevant inquiry was almost certainly intended to lower the bar and make it easier for defendants to suppress confessions."). Subsequent to the *Miranda* decision, however, the line between "compelled" confessions under the Fifth Amendment and "coerced" confessions under the due process voluntariness test has become blurred, with the Supreme Court treating the two terms as synonymous. *See infra* note 267. Steven Schulhofer, however, argues that "Fifth Amendment requirements do 'sweep more broadly' than those of the Fourteenth" and insists that "[t]he premise that Fifth Amendment compulsion means involuntariness is simply incoherent." Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 950, 946 (2001).

146 Lunney, *supra* note 30, at 745–46.

147 *Id.* at 746.

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

couraged Congress and the states to search for alternative procedures that would protect a suspect's rights while promoting efficient law enforcement.[149]

One of the weaknesses of *Miranda* is that it accomplishes both too little and too much.[150] As Justice Harlan noted in his dissenting opinion, the rules do not prevent "blatant coercion," because police officers predisposed to use inappropriate tactics are equally able and likely to lie about warnings and waivers.[151] Put bluntly, an officer inclined to take a swing at a suspect surely would not hesitate to ignore the *Miranda* protections yet then insist on the witness stand that he had given the prescribed warnings.

On the other hand, *Miranda* goes too far by providing no flexibility to balance other factors against the lack of warnings.[152] Its rationale is flawed because it constructs a legal fiction of "compulsion" that applies to any custodial interrogation, regardless of the particular circumstances.[153] Thus, compulsion is implied when a terrified, uneducated immigrant is questioned relentlessly by a team of seasoned interrogators, but compulsion is likewise implied when a hardened criminal responds to a single question put by a lone rookie investigator more scared of the suspect than the suspect is of him.[154]

---

149 *See id.* Congress responded two years later with Title II of the Omnibus Crime Control and Safe Streets Acts of 1968, which purported to overrule *Miranda* in 18 U.S.C. § 3501. *See generally* Cassell, *The Statute That Time Forgot*, *supra* note 129. The constitutionality of § 3501 was not squarely addressed until *Dickerson v. United States*, 530 U.S. 428 (2000).

150 *See* R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 68 (1981) (citation omitted) ("As the dissenters in *Miranda* clearly recognized, the *Miranda* rules are not fully responsive to the concern that underlay their creation."); Schulhofer, *Reconsidering* Miranda, *supra* note 15, at 461 (arguing that *Miranda*'s requirement that specified warnings be given does not go far enough in protecting a suspect from compulsion); *cf.* Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 387 (2001) ("Over the years, *Miranda v. Arizona* has been criticized both for going too far and for *not going far enough*.") (citations omitted).

151 *Miranda*, 384 U.S. at 516 (Harlan, J., dissenting).

152 *Cf.* Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898, 918 (2001) ("*Miranda's* lack of proportionality is shown not only by its overbroad reach in particular cases, but also by its unlimited application.").

153 *See Miranda*, 384 U.S. at 533–34 (White, J., dissenting); *cf.* Dripps, *supra* note 16, at 23 ("If custody is inherently coercive, it is hard to see how the suspect can make a voluntary waiver in a coercive environment.").

154 Moreover, this presumption of compulsion presents problems for the concept of meaningful waiver. As Joseph D. Grano points out, "If a simple response to a single custodial question must be viewed as presumptively compelled, the possibility of having a voluntary waiver is difficult to understand." Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 89 J. CRIM. L. & CRIMINOLOGY 1465, 1476 (1999) (citing *Miranda*, 384 U.S. at 536 (White, J., dissenting)).

D. THE COURT'S POST-*MIRANDA* JURISPRUDENCE

Ultimately, however, *Miranda* changed the landscape of confessions law less than might have been predicted. "In practice, the grand vision of *Miranda* soared only on the pages of the majority opinion, and foundered in the workaday world of competing considerations, such as crime control."[155] Since *Miranda* was decided, the Court has held that statements taken without providing warnings can be used to impeach a defendant,[156] has recognized a "public safety exception" to the provision of warnings,[157] and has held that, in at least some circumstances, the "fruits" of a *Miranda* violation need not be suppressed.[158]

Despite strong language in *Miranda* itself about the constitutional nature of that decision and its relationship to the Fifth Amendment, the Court later undermined the holdings of *Miranda* by describing the *Miranda* rules as merely "prophylactic."[159] In *New York v. Quarles*, for example, the Court declined to suppress the defendant's answer to a question about the location of a gun, despite the fact that the question was not preceded by warnings.[160] In an opinion authored by Justice Rehnquist, the Supreme Court found that "this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the *prophylactic rules* enunciated in *Miranda*."[161]

The Court emphasized that there was no suggestion that the statements at issue were "actually compelled by police conduct which overcame [the defendant's] will to resist."[162] Accordingly, the Court framed the issue as whether the officer had been "justified in failing to make

---

155 Darmer, *supra* note 10, at 264. *Cf.* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 998 (2001) (describing *Miranda* as a "modest failure" that "is not the guardian of civil liberties that its defenders think it is"); *see generally* Seidman, *supra* note 8, at 744–46 (suggesting that vulnerable suspects are worse off under *Miranda* than they were before).

156 Harris v. New York, 401 U.S. 222 (1971).

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

158 Oregon v. Elstad, 470 U.S. 298, 318 (1985) (when police initially interrogated suspect and obtained admission without giving *Miranda* warnings, a later statement made after *Miranda* warnings were given was admissible); *cf.* Michigan v. Tucker, 417 U.S. 433, 449 (1974) (in case in which statement was taken before *Miranda* was decided, unwarned statement was not allowed into evidence but witness identified in statement was permitted to testify). As one commentator has pointed out, "although the Court in *Tucker* did not decide whether the 'fruits' doctrine is applicable to *Miranda*, a holding of inapplicability would now seem to be within easy reach." Stone, *supra* note 8 at 123. This is even more true after the *Elstad* decision, which sowed the seeds for a far-reaching exception to the fruits doctrine.

159 For a more thorough discussion of the Court's "prophylaxis line" of cases, see Darmer, *supra* note 10, at 264–68. For the competing view that the interpretation of *Miranda* as both a prophylactic rule and constitutionally based is constitutionally principled, see Godsey, *supra* note 3, at 1745–52.

160 *Quarles*, 467 U.S. 659. The following discussion of *Quarles* is taken from the fuller discussion of the case in Darmer, *supra* note 10, at 266–68.

161 *Quarles*, 467 U.S. at 653 (emphasis added).

162 *Id.* at 654.

available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*."[163] The Court held that the officer was justified and that "the doctrinal underpinnings of *Miranda*" do not require that it "be applied in all its rigor to a situation" in which questions are "reasonably prompted by a concern for the public safety."[164]

The Rehnquist opinion drew a sharp dissent from three other justices.[165] Justice Marshall asserted that, in crafting a "public safety" exception:

> [T]he majority makes no attempt to deal with the constitutional presumption established by [*Miranda*]. . . . Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety" exception and remain faithful to the logic of *Miranda v. Arizona*.[166]

In the dissent's view, authorities faced with a genuine emergency that demands immediate answers are not confronted with a dilemma. Rather:

> 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 confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.[167]

---

163 *Id.* at 654–55.

164 *Id.* at 656.

165 *See id.* at 674 (Marshall, J., dissenting). Justices Brennan and Stevens joined the Marshall dissent. Justice O'Connor filed a separate opinion, concurring in part and dissenting in part. *Id.* at 673–74.

166 *Id.* at 684 (Marshall, J., dissenting).

167 *Id.* at 686 (citing Weatherford v. Bursey, 429 U.S. 545 (1977) (Sixth Amendment violated only if trial affected)). Justice O'Connor made a similar point in her concurring opinion:

> *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. . . . When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers be presumed compelled and that they be excluded from evidence at trial.

Id. at 664 (concurring in the judgment in part and dissenting in part).

Justice Marshall was quite right in insisting that the Court's decision betrayed the logic of *Miranda*. By emphasizing that Quarles's statements were not "actually compelled,"[168] the Court drew a line between *real* compulsion and the presumption of compulsion that inheres in every situation involving custodial interrogation, according to *Miranda*.[169] Yet the irrebuttable presumption established by *Miranda* is itself problematic.

Given the Court's repeated reference to *Miranda* as a "prophylactic" decision that "sweeps more broadly than the Fifth Amendment itself," many expected the Court to overrule *Miranda* outright[170] when it was given the chance in *Dickerson v. United States*.[171] In that case, however, the Court rejected a statute[172] designed to replace *Miranda*[173] that prescribed a totality-of-the-circumstances test to determine whether a confession was coerced.[174] The Court referred to *Miranda* as a "constitutional decision" that Congress cannot overrule.[175] Acknowledging that cases such as *Quarles* had carved out exceptions to its rule, Chief Justice Rehnquist, writing for the Court, noted that those decisions:

> illustrate the principle — not that *Miranda* is not a constitutional rule — but that no constitutional rule is immutable. No court laying down a general rule can

---

168 *Id.* at 654.

169 Thomas, *supra* note 145, at 1085 ("As *Quarles* makes clear, the Court has over the years adopted the less expansive, or 'weak' version of *Miranda*'s holding — not that every statement is compelled but that the warnings are necessary because the risk of compulsion is so great. If the warnings are not given, the presumption of coercion will usually, but not always, require suppression of statements made in response to custodial interrogation.").

170 *Cf.* KAMISAR, MODERN CRIMINAL PROCEDURE, *supra* note 44, at 561 (noting that most experts expected Rehnquist, Scalia and Thomas to uphold the validity of § 3501 and considered Kennedy and O'Connor to be "'swing votes.' But a number of *Miranda* supporters feared that, based on the basis of her majority opinion in *Oregon v. Elstad* and her strong dissent in *Withrow v. Williams*, Justice O'Connor would vote to uphold § 3501. As it turned out, most experts were wide of the mark.") *But see* Kamisar, *The Importance of Being Guilty*, *supra* note 71, at 187 n.27 (correctly doubting, more than twenty-five years ago, that *Miranda* would "be formally overruled" and attributing its survival to Court's "niggardly interpretations" of the decision).

171 530 U.S. 428 (2000).

172 18 U.S.C. § 3501. The statute essentially tracked the pre-*Miranda* due process voluntary test that *Miranda* had been designed to replace. *See* Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 951 (2000) (Congress "chose not to replace the *Miranda* warnings with a credible substitute. Instead . . . Congress contented itself with making the pre-*Miranda* voluntariness test the sole test for admissibility of confessions.").

173 Weisselberg, *In the Stationhouse After* Dickerson, *supra* note 127, at 1131. Section 3501 has been thoroughly discussed elsewhere, most notably by Paul C. Cassell. *See* Cassell, *The Statute That Time Forgot*, *supra* note 129.

174 *See Dickerson*, 530 U.S. at 434.

175 *Id.* at 432. The case has been the subject of extensive academic analysis and, for the most part, criticism. *See, e.g.*, Symposium, Miranda *After* Dickerson: *The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

> possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.[176]

II. THE APPLICATION OF *MIRANDA* TO SUSPECTS QUESTIONED ABROAD

A. THE *BIN LADEN* CASE

One set of circumstances that the *Miranda* Court perhaps did not foresee was the application of the rules to nonresident aliens captured abroad. In *United States v. Bin Laden*,[177] a district court confronted this issue when dealing with the admissibility of confessions made by two suspected bin Laden confederates in connection with the bombing of U.S. embassies in Kenya and Tanzania.

In addressing the issue as "a matter of first impression," Judge Leonard B. Sand asked whether a nonresident alien defendant's non-Mirandized statements were admissible at trial in the United States when the statements were the result of interrogations conducted abroad by U.S. law enforcement officials.[178] The court concluded that the Fifth Amendment's right against self-incrimination applies to the extent that the alien suspect is on trial in the United States.[179] In addition, U.S. law enforcement agents conducting investigations abroad should still use the familiar *Miranda* warnings framework, "even if [the] interrogation by U.S. agents occur[s] wholly abroad . . . while [the defendant is] in the physical custody of foreign authorities."[180]

The court refused to define the issue as one of extraterritorial application of the Fifth Amendment, despite the government's argument that it should.[181] The government's definition of the issue as whether Fifth Amendment rights "reach out to protect individuals . . . outside the United States" failed to convince the court because "any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but

---

176 *Dickerson*, 530 U.S. at 441. I think Justice Scalia, who argued that many of the Court's post-*Miranda* decisions "do not make sense" if confessions taken in violation of *Miranda* are "compelled" in violation of the Constitution, *id.* at 455 (Scalia, J., dissenting), had the better of the arguments in this regard. For a fuller discussion of his dissenting opinion, see Darmer, *supra* note 10, at 270. *But see* Godsey, *supra* note 3, at 1742–52 (arguing that *Dickerson*'s interpretation that *Miranda* is both a prophylactic rule and constitutionally based is consistent with other jurisprudence).

177 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

178 *Id.* at 181.

179 *Id.*

180 *Id.*

181 *See id.*

when a defendant's involuntary statements are actually used against him at an American criminal proceeding."[182] Therefore, according to this court, the admissibility of custodial confessions hinges upon the scope of the privilege as it applies to a nonresident alien defendant currently subject to American domestic criminal proceedings.[183]

The court noted that the "expansive language" of the Fifth Amendment "neither denotes nor connotes any limitation in scope."[184] The use of "no person" instead of the familiar phrase "the people" suggests that the right against self-incrimination applies "without apparent regard to citizenship or community connection."[185] The Supreme Court has already determined that the Fifth and Fourteenth amendments' due process protections apply without limitation to "every one."[186] Judge Sand determined that even without an explicit Supreme Court ruling granting the privilege against self-incrimination in this context, the circumstances exemplified the widely accepted notion that these protections apply "universally to any criminal prosecution brought by the United States within its own borders."[187] Notably, the U.S. Supreme Court has defined the right against self-incrimination as a "fundamental trial right of criminal defendants."[188] Finally, Judge Sand believed that the underlying policies of the Fifth Amendment "are no less relevant when the criminal defendant at issue is an unconnected, non-resident alien."[189]

Judge Sand further held that "a principled, but realistic application of *Miranda*'s familiar warning/waiver framework . . . is both necessary and appropriate under the Fifth Amendment."[190] *Miranda* is required because "the inherent coerciveness of [police interrogation] is clearly no less troubling when carried out beyond our borders and under the aegis of a foreign stationhouse."[191] A foreign stationhouse presents an even "greater threat[ ] of compulsion" because the American authorities lack

---

182 *Id.* at 181–82.

183 *Id.* at 182.

184 *Id.* at 183; *see also* note 20 and accompanying text.

185 *Bin Laden*, 132 F. Supp. 2d at 183. For a thorough discussion of this point, see Godsey, *supra* note 3, at 1729–33. The government maintained that the scope of any Fifth Amendment privilege was directly related to the level an alien "has sought to insert himself" into the community. *Bin Laden*, 132 F. Supp. 2d at 183 (internal citation omitted). While the court suggested that this proposition might be valid in other contexts, such as immigration, it found the idea of differing levels of Fifth Amendment protections for "criminal defendants on trial in a U.S. court" to be "unsupportable." *Id.* For a discussion of the "ascending scale of rights test" and its applicability to the privilege against self-incrimination, see Godsey, *supra* note 3, at 1729–33 (rejecting test in context of privilege).

186 Matthews v. Diaz, 426 U.S. 67, 77 (1976).

187 *Bin Laden*, 132 F. Supp. 2d at 183.

188 *Id.* at 184 (*citing* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

189 *Id.* at 185.

190 *Id.* at 185–86.

191 *Id.* at 186.

total control over the suspect.[192] Judge Sand also noted that suspects might be "unduly predisposed" to talk to U.S. authorities in hopes of relocation to the United States, where there are greater protections afforded criminal defendants.[193] American law enforcement agents should therefore employ the *Miranda* warnings to safeguard the privilege against self-incrimination.[194] Judge Sand specifically held that custodial confessions "should be admitted as evidence at trial only if the Government demonstrates that the defendant was first advised of his rights and that he validly waived those rights."[195] In the absence of either condition, suppression is the appropriate protection afforded the defendant and the appropriate deterrent on U.S. agents.[196]

Judge Sand acknowledged that the specific *Miranda* warnings related to the right to counsel and the ability to have counsel appointed are subject to modification in the context of foreign interrogation, where counsel may be unavailable.[197] He held, however, that "the specific admonitions recited should conform to the local circumstances regarding access to counsel."[198] As Mark Godsey has recently argued, Judge Sand imposed upon U.S. agents conducting investigations abroad an extraordinary and unrealistic duty to discern relevant foreign law, and Godsey proposed an alternative modification to the *Miranda* warnings abroad.[199]

---

192 *Id.*

193 *Id.* at 186 n.12.

194 *Id.* at 187.

195 *Id.*

196 *Id.* Judge Sand discusses further the fact that certain aspects of *Miranda* have limited application in foreign settings, namely the right to the assistance and presence of counsel. *Id.* at 187–88. The right to counsel varies depending upon the availability in the foreign context of foreign counsel and willingness of the foreign state to provide such counsel. *See id.* at 188. Essentially, U.S. law enforcement must, to the extent possible, replicate the rights that would be available if the interrogation took place in the United States. *Id.* Because such replication is not always possible, "the fair and correct approach under *Miranda* is for U.S. law enforcement simply to be clear and candid as to both the existence of the right to counsel and the possible impediments to its exercise." *Id.* The fact that the defendant is in foreign custody at the time an interrogation by U.S. agents occurs "matters only insofar as the specific admonitions recited should conform to the local circumstances regarding access to counsel." *Id.* at 189. Judge Sand ultimately determined that the warnings given to one defendant, Mohamed Rashed Daoud Al-'Owhali, were initially defective and only cured by subsequent statements; thus, portions of Al-'Owhali's statements were suppressed. *Id.* at 192–94. Suppression was not granted in the case of another defendant, K.K. Mohamed, because he was twice advised of his right to counsel under South African law, in addition to the facially deficient warnings. *Id.* at 194. In his recent article about the case, Godsey advocated a modification of Sand's approach to the warnings regarding waiver. *See* Godsey, *supra* note 3, at 1780–81.

197 *See Bin Laden*, 132 F. Supp. 2d at 188.

198 *Id.* at 189.

199 *See* Godsey, *supra* note 3, at 1774–75 (proposing that "American law enforcement officials" should be required only to "act in good faith and make a reasonable effort, under the circumstances, to determine what rights are available to a suspect" in the country where the interrogation occurs); *see also* Mark A. Godsey, *The New Frontier of Constitutional Confession Law — The International Arena: Exploring the Admissibility of Confessions Taken by*

I would go even further than Godsey by carving out a "foreign interrogation" exception to *Miranda* in situations such as those present in *Bin Laden*.[200]

B. THE IMPLICATION OF INTERPRETING *MIRANDA* AS ONLY A TRIAL RIGHT

Before analyzing the justification of Judge Sand's holding that *Miranda* warnings are required abroad, however, it is important to scrutinize the theoretical underpinnings of that holding. Central to Judge Sand's analysis was the notion that a *Miranda*-based violation of the Fifth Amendment does not occur until the trial itself. This view is exemplified in *Kastigar v. United States*[201] and the rest of the immunity line of cases, in which witnesses have been granted immunity from prosecution in exchange for their testimony. In those cases, "the Supreme Court made clear that the 'sole concern' of the privilege was not the forcible extraction of statements; rather, the privilege only prohibits the *introduction into* evidence of such statements at trial or similar proceeding to inflict criminal penalties upon the person who has been 'compelled' to speak."[202]

Applying this interpretation of the privilege to the context of custodial questioning of suspects, the interrogation process itself works no Fifth Amendment violation; an interrogator could ask questions without providing warnings — and could even brutalize or torture a suspect — without violating the Self-Incrimination Clause.[203] Justice Marshall espoused just this view of the Fifth Amendment in his dissenting opinion in *Quarles*, and the implications of that view are once again relevant, particularly in the terrorism context:

> 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 confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda* proscribes this sort of emergency question-

---

U.S. Investigators from Non-Americans Abroad, 91 GEO. L.J. (forthcoming April 2003, draft on file with author) ("courts should not require FBI agents to strictly adhere to the dictates of *Miranda* abroad").

200 *See* Part II.C, *infra*.

201 406 U.S. 441 (1972).

202 Godsey, *The New Frontier*, *supra* note 199. Godsey discusses the immunity line of cases at some length in his forthcoming article. *See id.*

203 However, doing so would presumably violate the Due Process Clause. *See* Brown v. Mississippi, 279 U.S. 278 (1936) (discussed *supra* Part I.B).

> ing. *All the Fifth Amendment forbids is the introduction of coerced statements at trial.*[204]

Judge Sand, echoing the views of Justice Marshall, similarly suggested that American intelligence efforts abroad would not be unduly impeded by applying the *Miranda* rules abroad: "To the extent that a suspect's *Miranda* rights allegedly impede foreign intelligence collection, we note that *Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place."[205]

Similarly, in *United States v. Verdugo-Urquidez*,[206] upon which Judge Sand explicitly relied,[207] the Supreme Court described the privilege against self-incrimination as a "fundamental trial right of criminal defendants."[208] Accordingly, "[a]lthough conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial."[209]

Though this is a conventional assumption, the Ninth Circuit has recently challenged it. In the case of *Martinez v. City of Oxnard*,[210] an individual brought a civil suit[211] alleging that a police officer violated his rights under both the Fifth and Fourteenth amendments by "subjecting him to a coercive interrogation while he was receiving medical care."[212] The court denied the officer's defense of qualified immunity, holding that coercive questioning itself violates the Fifth Amendment, even if the

---

204 New York v. Quarles, 467 U.S. 649, 686 (1985) (Marshall, J., dissenting) (emphasis added). Interestingly, Justice Harlan had made a similar point years earlier in his dissenting opinion in *Mapp v. Ohio*: "The pressures brought to bear against an accused leading to a confession, unlike an unconstitutional violation of privacy, do not, apart from the use of the confession at trial, necessarily involve independent Constitutional violations." 367 U.S. 643, 684–85 (1961) (Harlan, J., dissenting). In *Mapp*, over Harlan's strong dissent, the Court first applied the exclusionary rule to the states. *Id.* at 660. In *Quarles*, discussed in Part I.D, *supra*, the Court held that there was a "public safety" exception to *Miranda*, a position with which Marshall strenuously disagreed. New York v. Quarles, 467 U.S. 649, 653 (1985); *id.* at 674 (Marshall, J., dissenting).

205 *Bin Laden*, 132 F. Supp. 2d at 189.

206 494 U.S. 259 (1990) (holding that the Fourth Amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen who had no voluntary attachment to the United States). The case is discussed in some detail in Godsey, *The New Frontier*, *supra* note 199.

207 *See Bin Laden*, 132 F. Supp. 2d at 184.

208 *Verdugo-Urquidez*, 494 U.S. at 264.

209 *Id.*

210 270 F.3d 852 (9th Cir. 2001), *cert. granted sub nom.* Chavez v. Martinez, 122 S. Ct. 2326 (2002).

211 The suit was brought pursuant to 42 U.S.C. § 1983. *Martinez*, 270 F.3d at 854.

212 *Id.* at 855.

resulting statements are not used against the suspect at a later trial.[213] The Ninth Circuit acknowledged the Supreme Court's statements, in *Verdugo-Urquidez*, that a Fifth Amendment violation occurs only at trial, but it characterized those statements as uncontrolling dicta.[214] The Supreme Court has now granted certiorari in *Martinez* and thus will itself resolve the question whether the language in *Verdugo-Urquidez* means that the Fifth Amendment is not violated by coercive questioning itself.[215]

Should the Supreme Court affirm the Ninth Circuit,[216] finding that coercive questioning itself violates the Fifth Amendment, that arguably "expansive" view of the Fifth Amendment would not benefit nonresident aliens questioned abroad, so long as the statements were not introduced into evidence at a trial in this country. The Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[217]

The Supreme Court will most likely reject the Ninth Circuit's interpretation, however,[218] supporting Judge Sand's analysis that the Fifth Amendment itself is not violated if statements are not introduced at trial.[219] The question remains: Does it violate the Fifth Amendment to

---

213 *Id.* at 857. The court relied on its earlier decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc). *See also Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000).

214 *Martinez*, 270 F.3d at 857 n.3. The Ninth Circuit went on to find that a confession obtained by coercive questioning also violates the Fourteenth Amendment Due Process Clause. *Id.* at 859.

215 Chavez v. Martinez, 122 S. Ct. 2326 (2002) (granting certiorari). As this article was going to press, the Supreme Court issued its ruling in *Chavez*, reversing the Ninth Circuit and confirming that coercive questioning does not violate the Self-Incrimination Clause absent the use of the suspect's compelled statements in criminal case against him. *See* Chavez v. Martinez, 2003 WL 21210419 (May 27, 2003).

216 I think this is unlikely. As Judge Sand noted in *Bin Laden*, "if the Fifth Amendment injury resulted from the forcible extraction of a statement and not its later evidentiary use — then no statute compelling witness testimony under grants of immunity could withstand constitutional challenge." United States v. Bin Laden, 132 F. Supp. 2d 161, 182 (S.D.N.Y. 2001). For a thorough discussion of this issue, see Godsey, Miranda*'s Final Frontier*, *supra* note 3, at 1721.

217 United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (citing cases). Of course, one could also argue that the Fifth Amendment can actually be violated twice: once when unwarned statements are taken, and another time if those statements are admitted into evidence against the defendant at trial. *See, e.g.*, Weisselberg, *In the Stationhouse After* Dickerson, *supra* note 127, at 1159 n.203. Again, however, even were the Supreme Court to accept this notion, nonresident aliens would not be protected by the Fifth Amendment if questioned by U.S. agents overseas, unless resulting statements were also introduced at an eventual U.S. trial.

218 *See* Withrow v. Williams, 507 U.S. 680, 691 (1993) (describing *Miranda*'s protections as a fundamental trial right); Godsey, *The New Frontier*, *supra* note 199, (noting the slim chance that the Court in *Martinez* would hold that the Fifth Amendment can be violated before statements are actually introduced at trial).

219 *See Bin Laden*, 132 F. Supp. 2d at 185.

introduce into evidence at trial a statement, taken by American agents abroad, that was not preceded by *Miranda* warnings?

C. CREATING A FOREIGN INTERROGATION EXCEPTION TO *MIRANDA*

The Fifth Amendment provides that "No person . . . shall be compelled in any criminal case to be a witness against himself."[220] *Miranda*, as discussed above, presumes that any statement given without the benefit of the warnings is compelled. That presumption — probably because it is so problematic to begin with — often breaks down in practice. As discussed above, for example, the Court has created a "public safety" exception to *Miranda*. In addition, lower courts have admitted into evidence statements made to foreign police that were not preceded by the warnings,[221] so long as the statements were actually voluntary (as opposed to being simply "presumptively compelled" under *Miranda*).[222] The rationale for admitting such statements into evidence in American courts, despite the lack of warnings, is that "the *Miranda* requirements were primarily designed to prevent United States police officers from relying on improper interrogation techniques"[223] and have "little, if any, deterrent effect upon foreign police officers."[224]

Although the Supreme Court has not yet addressed the question of the admissibility of a statement taken by foreign authorities that was not preceded by American-style *Miranda* warnings, it would almost certainly approve the lower courts' reasoning on this point. Those cases are consistent with other Supreme Court cases holding that the presumption of compulsion does not always apply. As George C. Thomas III has put it: "The Court chooses sometimes not to apply the *Miranda* presumption of compulsion even though 'actual' compulsion would produce an outcome in favor of the defendant."[225]

If statements taken without *Miranda* warnings truly amounted to "compulsion" forbidden by the Fifth Amendment, then the question whether exclusion would "deter" misconduct should be irrelevant, and unwarned statements taken by either American or foreign police should be excluded. Unlike the exclusionary sanction in connection with the Fourth Amendment, which does not by its terms require that evidence

---

220 U.S. CONST. amend. V.

221 *See, e.g.*, United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973). The *Welch* decision is discussed in some detail in Godsey, *The New Frontier*, *supra* note 199.

222 However, after the Supreme Court's decision in *Colorado v. Connelly*, it is possible that even "really involuntary" statements taken by foreign agents might be admissible, so long as U.S. agents were not involved. *See infra* Part III.D.

223 *Welch*, 455 F.2d at 213.

224 *Id.*

225 Thomas, *supra* note 145, at 1085.

seized in an illegal search be excluded,[226] the Fifth Amendment by its terms forbids the introduction into evidence of "compelled" testimony. *Miranda* presumes compulsion where it does not necessarily exist, however. As Justice O'Connor recently wrote in a powerful dissenting opinion in *Withrow v. Williams*:

> Because *Miranda* "sweeps more broadly than the Fifth Amendment itself," it excludes some confessions even though the Constitution would not. . . . *Miranda*'s overbreadth, of course, is not without justification. . . . But, like the exclusionary rule for illegally seized evidence, *Miranda*'s prophylactic rule does so at a substantial cost. Unlike involuntary or compelled statements, which are of dubious reliability and are therefore inadmissible for any purpose,[227] confessions obtained in violation of *Miranda* are not necessarily untrustworthy. In fact, because *voluntary* statements are "trustworthy" even when obtained without proper warnings, their suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact.[228]

The juxtaposition of the Court's recent *Miranda* and due process jurisprudence[229] might lead to the bizarre result that unreliable confessions extracted by foreign agents using brute force would be admissible as evidence in American courts,[230] whereas reliable and voluntary confessions taken by U.S. agents who failed to give *Miranda* warnings would be inadmissible. Whether *Miranda* warnings were given should not be the *sine qua non* for the admissibility of statements made in response to foreign interrogation, however.[231] Rather, the Court should focus on the historic concern for reliability and have a healthy regard for the demands of national security in this context.

While the *Miranda* decision was recently reaffirmed, the Court explicitly acknowledged its mutability.[232] Cases involving foreign interro-

---

226 U.S. CONST. amend. IV.

227 The notion that a statement's "unreliability" makes it inadmissible for any purpose appears to contradict the Court's opinion in *Connelly*, discussed *infra* Part III.D. Interestingly, however, Chief Justice Rehnquist, who wrote the majority opinion in *Connelly*, which was joined by O'Connor, joined O'Connor's dissent in *Withrow*.

228 Withrow v. Williams, 507 U.S. 680, 702–03 (1993) (O'Connor, J., concurring in part and dissenting in part). In *Withrow*, a 5-4 majority of the Court held that alleged violations of *Miranda* are cognizable on habeas review.

229 With regard to the Court's due process jurisprudence, see especially *Connelly*, discussed *infra* Part III.D.

230 *See infra* Part III.

231 *See* United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972) (using phrase "*sine qua non*").

232 Dickerson v. United States, 530 U.S. 428, 441 (2000).

gation of terrorism suspects present a situation ripe for another *Miranda* exception. The need for information in such cases is even more pressing than was the need for information in *Quarles*. In *Quarles* the police needed to locate a gun that they believed the suspect had discarded in a grocery store; in cases in which U.S. agents travel overseas to interrogate terrorism suspects, the stakes are potentially much higher. Agents should be able to question suspects freely in such circumstances, without the constraints of *Miranda* and without having to establish that, before questioning began, there was an immediate safety concern that justified dispensing with *Miranda* under *Quarles*. In cases involving foreign interrogation of suspected terrorists, the courts should not require agents to advise suspects of *Miranda* rights, regardless of the citizenship of the suspect.

This new exception could be squared with the Court's *Miranda-Quarles-Dickerson* jurisprudence. While the *Dickerson* Court noted that *Miranda* "concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements,"[233] *Dickerson* did not reiterate *Miranda*'s claim that all unwarned statements will be presumed compelled. Indeed, it could not have done so; *Quarles* is squarely to the contrary. Rather, the Court's primary rationale for reaffirming *Miranda* was *stare decisis*.[234] *Miranda*, however, dealt only with domestic questioning in routine criminal cases; foreign interrogation was not at issue, much less foreign interrogation of terrorism suspects. Accordingly, Supreme Court doctrine in no way requires extending the "warnings requirement" beyond those circumstances in which it has already been applied.

Without a foreign interrogation exception, American agents investigating terrorism may be forced to choose between intelligence-gathering in the broad interests of preventing future attacks and evidence-gathering

---

233 *Id.* at 435.

234 *Id.* at 443 ("Whether or not this Court would agree with *Miranda*'s reasoning and its rule in the first instance, *stare decisis* weighs heavily against overruling it now."); *see The Supreme Court 1999 Term — Leading Cases*, 114 HARV. L. REV. 179, 200 (2000) (noting that the Court's failure to acknowledge *Miranda*'s core substantive holding "left the *Dickerson* Court with no firmer ground for the protection of Fifth and Sixth Amendment rights than the half-hearted assertion that *Miranda* has become a national habit"). Academics have speculated that the majority opinion reflected an uneasy compromise. *See* Dripps, *supra* note 16, at 3 ("The fact that Chief Justice Rehnquist, for decades an implacable critic of *Miranda*, wrote the majority opinion, is . . . a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*'s continued vitality.") (footnote omitted); *cf.* Yale Kamisar, *From* Miranda *to § 3501 to* Dickerson *to* . . . , Foreword to Symposium, *supra* note 175, at 889 (speculating that Chief Justice Rehnquist "may have decided that the best resolution of *Dickerson* would be a compromise").

for the purpose of bringing criminals to justice.[235] This is an untenable dilemma. In the name of upholding purported constitutional rights, American agents may have a perverse incentive to turn suspected terrorists over to foreign agents, who may be under no constraints regarding the use of physical force or brutality, rather than risk the exclusion of non-Mirandized statements taken by American law enforcement representatives. In such a case, the prophylactic goals of *Miranda* backfire, although the Fifth Amendment itself poses no such dilemma.

The Fifth Amendment prohibits compelled statements, of course, and if statements are truly involuntary, they should be excluded on that basis. Unwarned statements are of a different order. George C. Thomas III has argued, compellingly, that the requirement for *Miranda* warnings is better understood as a requirement for due process notice than as a Fifth Amendment Self-Incrimination Clause requirement.[236] I would argue, moreover, that the Court's post-*Miranda* "involuntary confession" cases should have been analyzed under the auspices of the Self-Incrimination Clause, because that clause specifically forbids "compelled" testimony. Instead, even after *Miranda*, the Court has deemed "truly compelled" statements a violation of due process, relegating the Self-Incrimination Clause to a mere backdrop to the resolution of *Miranda* claims.

III. THE COURT'S POST-*MIRANDA* DUE PROCESS JURISPRUDENCE: IMPLICATIONS IN THE TERRORIST CASES

In cases in which the government complies with the dictates of *Miranda*, or when *Miranda* does not apply, confessions still may be suppressed if judged "involuntary" under a traditional due process

---

235 *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 189 (S.D.N.Y. 2001) ("To the extent that a suspect's *Miranda* rights allegedly impede foreign intelligence collection, we note that *Miranda* only prevents an unwarned or involuntary statement from being used as evidence in a domestic trial; it does not mean that such statements are never to be elicited in the first place."). In the *Lindh* case, the government explicitly argued that military questioning done for the purpose of gathering military intelligence is not governed by *Miranda*. *See* Darmer, *supra* note 10, at 280 n. 277. While this is almost certainly true, the foreign interrogation exception proposed here would go beyond military questioning. I do not share Judge Sand's apparent sanguinity about the prospect of the government forgoing the chance to use evidence at trial in the interests of gathering intelligence. *See Bin Laden*, 132 F. Supp. 2d at 189.

236 *But see* Susan R. Klein, Miranda*'s Exceptions in a Post-*Dickerson *World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 569 passim (2001) (disagreeing with Thomas).

analysis.[237] Indeed, with the erosion of *Miranda*,[238] one scholar has described the voluntariness test as the "central gatekeeper in determining the admissibility of confessions in an increasing number of circumstances."[239]

Yale Kamisar, one of the most influential scholars in the area of confessions law,[240] predicted explicitly that the government would have trouble overcoming the due process voluntariness requirement in the *Lindh* case.[241] Because of Lindh's eventual guilty plea, Kamisar's prognostications — made several months before the government had responded to Lindh's allegations — were never tested. However, an examination of Lindh's due process claims is useful for purposes of addressing the implications of due process requirements in future terrorist cases.

A. THE *LINDH* CASE

On July 15, 2002, a citizen of the United States described as the American Taliban, John Walker Lindh, pleaded guilty to supplying services to the Taliban and to carrying explosives during the commission of a felony.[242] The plea obviated the need for the U.S. District Court for the Eastern District of Virginia to rule on Lindh's motion to suppress statements made to U.S. authorities who interrogated him in Afghanistan. Lindh's motion to suppress had alleged violations of his Fifth Amendment privilege against self-incrimination and due process rights.[243]

In alleging violations of his due process rights, Lindh described conditions he endured in Afghanistan that, in his view, rendered his statements to American authorities involuntary. Lindh argued that his statements were "extracted by techniques the U.S. Supreme Court has unequivocally condemned," including "incommunicado detention; food, sleep, and sensory deprivation; denial of a timely presentment before a magistrate; denial of clothing and proper medical care; humiliation, and

---

237 *See Dickerson*, 530 U.S. *at* 434 ("We have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily."); *see also* United States v. Quarles, 467 U.S. 649, 655 n.5 (noting, after rejecting respondent's *Miranda* argument, that he "is certainly free on remand to argue that his statement was coerced under traditional due process standards").

238 *See supra* Part I.D.

239 Lunney, *supra* note 30, at 787.

240 *See* Cassell, *The Paths Not Taken*, *supra* note 152, at 900 (2001) (describing Kamisar as "preeminent academic defender of *Miranda*"). Indeed, Kamisar is credited with having influenced the direction taken by the Supreme Court in the *Miranda* decision. *See* Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359, 399–401 (2001).

241 *See* Yale Kamisar, *More than* Miranda, LEGAL TIMES, Feb. 25, 2002, at 51.

242 Plea Agreement, para. 1, United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002).

243 Issues related to his privilege against self-incrimination are the subject of the first article in this series, Darmer, *supra* note 10.

failure to inform Mr. Lindh of his rights."[244] Lindh relied upon, among other cases, *Bram*, *Ashcraft*, *Spano*, *Watts*, *Rogers*, and *Culombe*.[245]

In making his factual allegations,[246] Lindh argued that he suffered terribly at the hands of the Northern Alliance troops before the United States ever took him into custody. Those troops had a reputation for brutality and torture, including the use of "mutilation, castration and rape."[247] While a prisoner of the Northern Alliance, Lindh was shot and imprisoned in a basement, where "soldiers poured fuel down several air ducts," then lighted it, and fired several large rockets, killing many prisoners.[248] Later, the Northern Alliance soldiers flooded the basement with cold water, drowning other prisoners.[249] Eventually, "[w]ounded, starved, frozen and exhausted," Lindh emerged from the basement on December 1, 2001, with about eighty-five other survivors of the 300 prisoners who had arrived with him.[250] American forces ultimately took custody of Lindh and transported him to Camp Rhino.

Lindh alleged that U.S. forces then provided him with inadequate food and medical care,[251] failed to apprise him of his constitutional rights,[252] and subjected him to taunts and abuse.[253] At Camp Rhino, he alleged, U.S. forces bound him, naked and blindfolded, with duct tape to a stretcher, then placed him in a windowless metal shipping container.[254] Lindh made statements to a CNN reporter and to various U.S. interrogators, which he alleged were involuntary. In those statements, in substance, he acknowledged fighting with the Taliban, training at an al Qaeda terrorist training camp and meeting Usama bin Laden. It was his understanding that bin Laden had ordered the September 11 attacks, which Lindh learned about by radio on September 11 or 12.[255]

The United States sharply disputed Lindh's claim that his statements were in any way involuntary.[256] Specifically, the government ar-

---

244 Involuntary Statements Mem., *supra* note 5, at 1.

245 *See generally id. See supra* Part I.A–B, in which these cases are discussed in detail.

246 *See generally* Proffer of Facts in Support of Defendant's Suppression Motions, United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002) (filed June 13, 2002) [hereinafter Lindh's Proffer].

247 *Id.* at 2–3.

248 *Id.* at 9.

249 *Id.* at 9–10.

250 *Id.* at 10.

251 *Id.* at 15.

252 *Id.* at 14. The government's alleged failure to apprise Lindh of his *Miranda* rights is discussed extensively in Darmer, *supra* note 10.

253 Lindh's Proffer, *supra* note 246, at 17.

254 *Id.* at 18.

255 For a fuller description of Lindh's statements, see Darmer, *supra* note 10, at 252.

256 *See generally* Government's Opposition to Defendant's Motion to Suppress Involuntary Statements, United States v. Lindh, No. CR 02-37-A (E.D. Va. 2002) (served July 1, 2002) [hereinafter Gov't's Opp'n].

gued, *inter alia*, that the United States had not engaged in coercive conduct,[257] that Lindh was eager to talk, spoke freely and was never subjected to lengthy periods of interrogation,[258] and that Lindh's privations were the inevitable consequences of war.[259]

B. THE DE FACTO DILUTION OF DUE PROCESS

Despite the continued existence of the old due process voluntariness test, few would disagree that its practical significance has diminished in the post-*Miranda* world. With courts primarily focused on questions of warnings and waivers under *Miranda*, the question of voluntariness serves as a "backup" test that is increasingly difficult to meet. As the Court noted in *Berkemer v. McCarty*: "We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable claim that a self-incriminating statement was 'compelled' despite the fact that law enforcement authorities adhered to the dictates of *Miranda* are rare."[260] Indeed. As Louis Michael Seidman pointed out in 1994, the Supreme Court had at that time "reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement."[261] No additional Supreme Court reversals have been forthcoming in the eight years since the Seidman piece was published. In sharp contrast, the Court had reversed twenty-three convictions based on involuntary confessions "in the comparable time period immediately preceding *Miranda*."[262] With the Supreme Court now turning a virtual blind eye to circumstances that might have led to a reversal under the due process standard before *Miranda*, "many lower courts have adopted an attitude towards voluntariness claims that can only be called cavalier."[263]

Thus, it appears to be an unintended consequence of *Miranda* that a decision widely viewed as protective of the rights of defendants has actually resulted in the wider admission of confessions under both state and

---

257 *Id.* at 10–11.

258 *Id.* at 12–13, 15–16.

259 *Id.* at 21–24.

260 468 U.S. 420, 433 n.20 (1984). The Court held in that case that the *Miranda* warnings need not be given in connection with roadside questioning during a routine traffic stop.

261 Seidman, *supra* note 8, at 745 (citing Arizona v. Fulminante, 499 U.S. 279 (1991); Mincey v. Arizona, 437 U.S. 385 (1978)).

262 *Id.*; *see also* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1220 n.57 (2001) (collecting cases).

263 Seidman, *supra* note 8, at 745–46.

federal law.[264] Looking back at the facts of *Bram*,[265] for example, it is highly unlikely that such facts would lead to the suppression of a confession today. Of course, *Bram* was decided explicitly under the Self-Incrimination Clause, and not under the Due Process Clause. However, the *Bram* Court used the language of "voluntariness,"[266] the central inquiry in a due process analysis, in finding that a confession should be suppressed if influenced *in any way* by pressure being brought to bear upon the suspect.[267] If Lindh's case had been governed by the standard articulated in *Bram*, he would have had a compelling case for suppression. But the fact is that the Court does *not* now define an "involuntary confession" in the way that it did in *Bram*. In short, it appears that the Supreme Court reads the constitutional protections of suspects more narrowly now than it did in 1897.[268]

One explanation of this seeming anomaly was recently articulated by George C. Thomas III in his article about the consequences of the incorporation of the Bill of Rights into the Fourteenth Amendment.[269] Thomas argues that the role of incorporation has been "largely hidden" in the "steadily diminishing scope" of criminal procedure rights.[270] Once

---

264 *See* White, Miranda*'s Failure*, *supra* note 262, at 1219 ("Ironically, *Miranda*'s practical limitations have derived from the fact that *Miranda* effectively reduced the efficacy of the due process voluntariness test."); *id.* at 1246 ("*Miranda* may have had the unintended effect of reducing the extent to which the due process voluntariness test provides protection."); *see also* Stuntz, *supra* note 155, at 976 ("*Miranda* imposes only the slightest of costs on the police, and its existence may well forestall more serious, and more successful, regulation of police questioning."); *cf.* Seidman, *supra* note 8, at 746 (arguing that *Miranda* "traded the promise of substantial reform implicit in prior doctrine for a political symbol" because it was politically "impoten[t]" to "make good on the promise of *Culombe*, *Massiah*, and *Escobedo*").

265 *See* discussion *supra* Part I.A.

266 *See id.*

267 Scholars disagree about whether an "involuntary" or "coerced" confession under the Due Process Clause means the same thing as a "compelled confession" under the Fifth Amendment. *See* Alschuler, *supra* note 22, at 2627 n.6 (discussing work of Stephen J. Schulhofer); Schulhofer, *Fifth Amendment Exceptionalism*, *supra* note 145, at 944 ("Compulsion *cannot* mean involuntariness."); Thomas, *supra* note 145, at 1085 n.19 (stating that, in reference to Schulhofer's work, "Commentators have sought to draw differences between involuntary, compelled, and coerced statements."). However, as Thomas also points out, "Whatever the common law approach, or the best philosophical approach, the Court today treats all three as synonymous." *Id.* (citing Oregon v. Elstad, 470 U.S. 298, 307 (1985); New York v. Quarles, 467 U.S. 649, 655 n.5 (1984)).

268 *See infra* note 309 and accompanying text; *cf.* George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 346 (1988) ("The Supreme Court's 1986 and 1987 Term cases continued the trend toward narrowing the protections afforded criminal suspects and defendants under federal constitutional confession law.").

269 *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

270 *Id.* at 148. Thomas makes a compelling historical argument for the case that the relatively restrictive Bill of Rights, parts of which were only recently applied to the states through Fourteenth Amendment incorporation, was borne of a profound distrust of the federal government that did not extend to state governments. Those rights were never intended to fetter the

that occurred, "the Court has never had the appetite to apply the provisions to the States as rigorously as it had applied them against the federal government."[271] So instead, the Court has applied a "watered-down" version to the states, and it is that diluted version that then gets applied, even in federal cases, and even when that means ignoring prior federal precedent interpreting the Bill of Rights more robustly.[272]

While Thomas's work does not focus specifically on the impact of incorporation on the Fifth Amendment,[273] an examination of cases decided since *Bram* provides strong support for his views. In 1897, the Court ruled definitively that the circumstances surrounding Bram's confession — circumstances that were hardly onerous by later standards — rendered that confession inadmissible as a violation of Bram's Fifth Amendment right against self-incrimination.[274] *Bram* has never been explicitly overruled[275] and, in fact, is widely cited, though the facts of the case get scarce treatment by modern courts. The fact is that *Bram* has been de facto overruled, in the sense that if the facts arose today, they would not warrant suppression under the Court's more modern confessions jurisprudence.[276]

Moreover, the "reflection back" of weakened rights for suspects in federal prosecutions may be quite palatable to the courts — and society

---

state governments, which had to contend with garden-variety criminal matters. In a statement that was doubtless more true before the events of September 11, 2001, Thomas asserts that "[t]he crimes Americans fear most — everyday property crimes and crimes of violence — have always been the responsibility of local police and prosecutors." *Id.* at 173. Elsewhere in his article, Thomas acknowledges that the September 11 attacks will naturally lead to questions regarding his claims that a stricter interpretation of the Bill of Rights in the federal criminal arena would not "unduly burden" federal law enforcement. *Id.* at 174.

271 *Id.* at 148.

272 In Thomas's words:

> Think of the Fourteenth Amendment as a lens projecting the Bill of Rights upon the States. For the criminal procedure guarantees, the lens is also a mirror. As the lens projects fundamental rights versions of the criminal procedure guarantees onto the States, it also reflects back onto the Bill of Rights, distorting their purpose as a barrier against federal prosecutors and judges. The original Bill of Rights criminal procedure guarantees — intended to establish a high wall with a narrow gate — has been reduced to an annoying speed bump on a broad interstate that leads to a set of more or less accurate outcomes.

Id. at 151–52.

273 Most of Thomas's specific examples involve the Fourth and Sixth amendments. *See, e.g.*, *id.* at 174, 222–30.

274 Bram v. United States, 168 U.S. 532 (1897).

275 However, as Welsh S. White has pointed out, "the majority went out of its way to repudiate *Bram*" in *Arizona v. Fulminante*, 499 U.S. 279 (1991). White, *What Is an Involuntary Confession Now?*, *supra* note 53, at 2016 (citing *Fulminante*, 499 U.S. at 285); *see infra* note 309 and accompanying text; *see also* White, Miranda*'s Failure*, *supra* note 262, at 1234 (2001) (noting that in *Fulminante*, "the Court expressly repudiated *Bram*'s holding prohibiting confessions induced by any promises, stating that the rule 'does not state the standard for determining the voluntariness of a confession' ").

276 *See* White, Miranda*'s Failure*, *supra* note 262, at 1234.

— in a post-September 11 world. We are in an era of high expectations for aggressive law enforcement.[277] The dictates of due process will likely be read even more narrowly in this context, and that is as it should be. Although Thomas implicitly criticizes the "watered-down" version of rights now being applied in both state and federal courts,[278] many of the Court's pre-*Miranda* confessions cases, particularly those that sought to vindicate the "autonomy" of the suspect, were not firmly grounded in constitutional principles and were theoretically unsound.[279]

C. THE COURT'S POST-*MIRANDA* TREATMENT OF "COMPELLED STATEMENTS" UNDER THE DUE PROCESS CLAUSE RATHER THAN THE SELF-INCRIMINATION CLAUSE

Despite holding in *Miranda* that the Self-Incrimination Clause forbids the use of compelled confessions, the Court has since relied on that clause as a basis for exclusion only in cases that implicate *Miranda*. When the defendant relies on the argument that his confession was "actually compelled" or "involuntary," the Supreme Court has continued to apply the due process voluntariness test, despite the fact, as Mark Godsey puts it, that "from textual and doctrinal standpoints, the privilege [against self-incrimination] seems the more appropriate provision with which to regulate confessions, as it speaks directly to the issue of compulsory self-incrimination, while the Due Process Clauses are silent on the matter."[280]

Since *Miranda* went into effect,[281] the Supreme Court has analyzed the admission of confessions under the pre-existing due process voluntariness test on three occasions:[282] in *Mincey v. Arizona*,[283] *Colorado v. Connelly*,[284] and *Arizona v. Fulminante*.[285] The confessions were

---

277 *Cf.* Hamdi v. Rumsfeld, 316 F.3d 450, 465 (4th Cir. 2003) (noting that "'the government has no more profound responsibility' than the protection of American citizens from further terrorist attacks").

278 *See generally* Thomas, *When Constitutional Worlds Collide*, *supra* note 269.

279 *See* Seidman, *supra* note 8, at 686 (discussing political instability of cases grounded in the concern for individual self-determination); *see also* Penney, *supra* note 23, at 313 (noting that self-determination theory is "morally suspect").

280 Godsey, *The New Frontier*, *supra* note 199.

281 Because *Miranda* did not apply retroactively to trials that commenced before the decision was rendered, the due process voluntariness test continued to be the test for admissibility of confessions in cases such as *Davis v. North Carolina*, 384 U.S. 737 (1966).

282 *See* White, *What Is an Involuntary Confession Now?*, *supra* note 53, at 2014–15.

283 437 U.S. 385 (1978).

284 479 U.S. 157 (1986).

285 499 U.S. 279 (1991). In addition, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court held that the "voluntariness" of a confession is a legal question, rather than a factual one, which is to be independently considered in a federal habeas proceeding.

deemed inadmissible in *Mincey*[286] and *Fulminante*[287] but admissible in *Connelly*.[288] Those cases suggest that:

> [T]he post-*Miranda* due process test is essentially identical to the pre-*Miranda* test. As under the old test, confessions induced by force, threats of force, promises of protection from force, or by excessively lengthy continuous interrogations are involuntary. When these extreme techniques are absent, however, the voluntariness of a confession is determined on the basis of a totality of circumstances test, under which a court must assess both the interrogators' practices and the suspect's individual characteristics for the purpose of determining whether the suspect's will was overborne.[289]

Mincey involved a rather classic example of police overreaching[290] in which a confession was taken from a suspect who had been shot by the police and was lying in a hospital bed in extreme pain.[291] *Fulminante*,[292] a closer case,[293] involved a confession made by a suspect to a fellow inmate who was a police informer posing as a member of organized crime and offering "protection" to Fulminante[294] in exchange for a confession.[295]

Lindh sought to rely on *Mincey* in suggesting that his own confession was not voluntarily made.[296] That case provided the Court's first post-*Miranda* opportunity to address the question of the implications of a truly "involuntary" confession, as opposed to a confession simply violative of *Miranda*. Noting that Mincey was seriously wounded, depressed, confused, and "encumbered by a tubes, needles, and breathing apparatus," the Court concluded that "[i]t is hard to imagine a situation less

---

286 437 U.S. at 401–02.

287 499 U.S. at 302.

288 479 U.S. at 170–71.

289 White, Miranda*'s Failure*, *supra* note 262, at 1218 (citations omitted).

290 *See* White, *What Is an Involuntary Confession Now?*, *supra* note 53, at 2015 ("*Mincey v. Arizona* provides a stark example of a case in which the police refused to honor the suspect's decision to remain silent.").

291 437 U.S. at 396, 398–99.

292 The case is perhaps best known for extending the "harmless error rule" to cases in which involuntary confessions have been improperly admitted. That portion of the opinion was authored by Chief Justice Rehnquist and joined by four other justices. *Fulminante*, 499 U.S. at 302–03, 306–12. That aspect of the case has received extensive academic treatment. *See, e.g.*, Kenneth R. Kenkel, Note, Arizona v. Fulminante*: Where's the Harm in Harmless Error?*, 81 KY. L.J. 257 (1992).

293 *See Fulminante*, 499 U.S. at 287.

294 Fulminante was suspected of having sexually assaulted and killed his stepdaughter and therefore had reason to fear "tough treatment" by other inmates. *See id.* at 282–83.

295 *Id.* at 286.

296 Involuntary Statements Mem., *supra* note 5, at 10.

conducive to the exercise of 'a rational intellect and free will'" than Mincey's.[297] A detective gave him *Miranda* warnings but persisted in interrogation despite Mincey's repeated requests for an attorney.[298] The statements were used against Mincey to impeach his testimony at trial.[299] The Court noted that "[s]tatements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona* . . . are admissible for impeachment if their 'trustworthiness . . . satisfies legal standards.'"[300] Relying on the Court's pre-*Miranda* due process confessions jurisprudence, however, the Court held that "*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law."[301]

Consistent with *Miranda*'s theory that custodial interrogation implicates the Self-Incrimination Clause, the Court could have found that any trial use of Mincey's statements violated his right to be free of compelled self-incrimination. Instead, it grounded the exclusion entirely on the Due Process Clause. By focusing exclusively on the presence or absence of *Miranda* warnings in its interpretation of the Self-Incrimination Clause, the Court requires both too little and too much.[302] Were the Court to focus on real compulsion, its application of the Self-Incrimination Clause to interrogation would be constitutionally principled. The Court has not yet, however, clearly defined "compulsion" in the context of police interrogation.[303] The Court may prefer the due process test to the privilege because it is perceived as more flexible.[304]

---

297 437 U.S. at 398–99.

298 *Id.* at 396.

299 *Id.* at 397.

300 *Id.* at 397–98 (quoting Harris v. New York, 401 U.S. 222, 224 (1971)).

301 *Id.* at 398.

302 *Cf.* Thomas, *Separated at Birth*, *supra* note 145, at 1102 ("It seems odd, at best, to say that the Fifth Amendment requires suspects to be warned that they have a privilege not to answer police questions, but that once they agree to answer, they are in the due process soup where police can lie and cheat to get a confession. This view of the Fifth Amendment impoverishes it.").

303 *Cf.* Godsey, *The New Frontier*, *supra* note 199 ("Although the Court has not given clear guidance on the meaning of 'compulsion' in the police interrogation context, it has clearly defined this term in the context of formal proceedings, such as trial or congressional hearings."). In his forthcoming article, Godsey goes on to formulate an "objectively identifiable penalty test" that would reconcile notions of "compulsion" in the interrogation context with notions of "compulsion" in other formal settings. *See id.* I would define compulsion in the interrogation context more narrowly than does Godsey, but a full discussion of this issue is beyond the scope of this article.

304 *See* Herman, *The Unexplored Relationship (Part II)*, *supra* note 22, at 521 (noting that "a plausible explanation" for Chief Justice Rehnquist's pointing out in *Connelly* that the Court has retained a due process focus is that Rehnquist "perceives due process as a significantly less stringent limitation on police interrogation because it permits balancing in the ordinary criminal context").

D. WAS LINDH'S STATEMENT INVOLUNTARY? DUE PROCESS LIMITS ON CONFESSIONS IN AN AGE OF TERROR

The Court is unlikely to abandon its due process jurisprudence in the conceivable future. Therefore, it is useful to analyze Lindh's claims under a traditional due process analysis. Lindh's reliance on *Mincey* likely would have been unavailing. Unlike in *Mincey*, it is doubtful that a court would have found that repeated requests for counsel were ignored.[305] And unlike Mincey, Lindh was not shot at the hands of the same government that later tried to question him. Rather, Lindh was wounded in the theater of war.

In terms of Lindh's allegations regarding being in pain, the recent Second Circuit case of *United States v. Khalil*[306] is instructive. In that case, the court allowed a confession given under circumstances in which the defendant was shot and wounded by police, then questioned in the hospital while he was in pain, then questioned later "intermittently" between "several post-surgical procedures."[307] The Second Circuit affirmed the decision of the district court, which credited the agent's testimony that "although Abu Mezer [the defendant] was in pain, he was alert, seemed to understand the agent's questions, and gave responsive answers."[308] Under this rationale, the fact that Lindh may have been in pain did not automatically render his confession involuntary. And while *Khalil* is not a Supreme Court opinion, it seems highly likely that the Court would adopt its reasoning. Moreover, Lindh was wounded at the hands of the Northern Alliance — not the United States. After *Connelly*, discussed *infra*, courts likely will focus exclusively on conduct by the U.S. government in assessing due process voluntariness in cases such as Lindh's.

The Supreme Court wrote in *Fulminante*: "Although the Court noted in *Bram* that a confession cannot be obtained by 'any direct or implied promises, however slight, nor by the exertion of any improper influence' . . . this passage from *Bram* . . . under current precedent does not state the standard for determining the voluntariness of a confession."[309] While a "credible threat" of violence renders a confession in-

---

305 Matters related to Lindh's allegations regarding request for counsel are discussed more fully in Darmer, *supra* note 10.

306 214 F.3d 111 (2d Cir. 2000).

307 *Id.* at 122.

308 *Id.* at 121. The court analyzed the afternoon statements separately, affirming the admission of those statements based largely on testimony that Abu Mezer "appeared to understand his rights." *Id.* at 122. With regard to both sets of statements, the court further ruled that any error in their admission was harmless. *See id.* at 122.

309 Arizona v. Fulminante, 499 U.S. 279, 285 (1991) (citations omitted). Of course, *Bram* was decided under the Fifth Amendment privilege, while *Fulminante* involved the Due Process Clause. The broad language of *Bram*, however, simply no longer applies to confessions in either context.

voluntary,[310] lesser circumstances — such as those outlined in *Bram* — do not.

Standing as a particularly formidable barrier to an involuntariness claim in circumstances like Lindh's is *Colorado v. Connelly*.[311] In that case, the Court explicitly held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[312] In that case, the defendant, suffering from mental delusions, walked into a police station and confessed to a murder, but the defendant's mental state did not render his confession "involuntary" under the Court's test.[313] The Court specifically found that "the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'"[314] Moreover, "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law,"[315] even if the statements were "quite unreliable."[316] The Court disagreed with the Supreme Court of Colorado's finding that the admission of the evidence into court was "sufficient state action" to trigger the Due Process Clause: "The difficulty with [this approach] is that it fails to recognize the essential link between the coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other."[317]

The *Connelly* Court thus appeared to collapse the traditional "complex of values" underlying the due process voluntariness test[318] into a single concern: preventing "police overreaching" or "coercive police conduct."[319] In particular, the Court displayed little constitutional concern for the inherent reliability of the confession at issue.[320] Scholars have criticized the Court for this, particularly in light of the fact that "reliability" was historically central to the Court's due process jurisprudence.[321]

---

310 *Id.* at 287.

311 479 U.S. 157 (1986).

312 *Id.* at 167.

313 *Id.* at 160–61, 164–67. For a further discussion of the case, see Dix, *supra* note 268, at 244–46.

314 *Connelly*, 479 U.S. at 170 (quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985) (discussing standards for waiver of privilege)).

315 *Id.* at 164.

316 *Id.* at 167.

317 *Id.* at 165.

318 *See supra* Part I.B.

319 *Connelly*, 479 U.S. at 163–64.

320 According to the Court, an unreliable confession is a matter to be governed by the law of evidence, rather than by the Due Process Clause. *Id.* at 166–67.

321 *See* Benner, *supra* note 24, at 141–42 (1989) ("Viewed from the perspective provided by the historical development of the due process voluntariness doctrine, a lack of trustworthi-

If the due process clauses prevent the admission into evidence of only those confessions caused by deterrable police misconduct, then no conditions or pressure entirely independent of such conduct would render a confession "involuntary" for purposes of the Constitution. This is true even if pressure were imposed, externally, by foreign agents, such as Northern Alliance troops in Afghanistan,[322] rather than by internal psychological conditions, such as those present in *Connelly*. In the Ninth Circuit case of *United States v. Wolf*,[323] for example, the court suggested that *Connelly* "cast into serious doubt" the "continuing vitality" of an earlier Ninth Circuit case holding that an involuntary confession obtained by Mexican police would be inadmissible in an American court.[324] This is because, after *Connelly*, with its emphasis on wrongful, deterrable state action, there is necessarily no due process violation in the absence of wrongful conduct by a state actor that U.S. courts can hope to control.

An echo of this theme was played out in the recent *Bin Laden* case. In discussing the deterrence of U.S. law enforcement officials from omitting *Miranda* warnings, the court noted that:

> The Government calls it "positively perverse" that the admissibility of Defendants' statements would not require any *Miranda* warnings at all if those statements were instead the product of questioning by foreign police. Yet we see nothing at all anomalous in requiring *our own* Government to abide by the strictures of *our own* Constitution whenever it seeks to convict an accused, in *our own* courts, on the basis of admissions culled via an inherently coercive interrogation conducted by *our own* law enforcement.[325]

While it may not be anomalous to require suppression of un-Mirandized statements taken by U.S. agents but not require suppression of such statements taken by foreign interrogators, surely it *would be* perverse to require suppression of voluntary, reliable, but un-Mirandized statements taken by U.S. agents but to admit statements taken by foreign agents that

---

ness should therefore remain a sufficient, but not a necessary condition precedent to a due process violation. In *Connelly*, however, the Court obliterated trustworthiness altogether."); Dix, *supra* note 268, at 276 ("[A]t least in the absence of more thorough consideration than *Connelly* demonstrates, a total deconstitutionalization of traditionally important reliability issues is unjustified.").

322 The situation would be different, of course, if the foreign agents were effectively acting as agents of the United States. In Lindh's case, however, Lindh did not appear to allege that the Northern Alliance troops under the control of General Dostum were in any way controlled by U.S. forces.

323 813 F.2d 970 (9th Cir. 1987).

324 *Id.* at 972 n.3 (citing *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir. 1967)).

325 United States v. Bin Laden, 132 F. Supp. 2d 168, 187 n.13 (S.D.N.Y. 2001) (citation omitted).

were extracted by brute force. Before *Connelly*, one could have argued that the introduction into evidence of such statements was itself sufficient to trigger "state action" calling for due process review. After *Connelly*, that argument is foreclosed.[326]

In his forthcoming article on the admissibility of confessions taken by U.S. investigators from non-Americans abroad,[327] Mark Godsey identifies noncitizens as being particularly vulnerable after *Connelly*. In his analysis, he explains that the *Connelly* Court "converted the due process involuntary confession rule from a trial right like the privilege against compulsory self-incrimination, to a freestanding civil liberty like the Fourth Amendment."[328] Noncitizens are not protected by extraterritorial violations of "freestanding civil liberties," he points out, as demonstrated in *Verdugo-Urquidez*, in which the Fourth Amendment did not enable Mexican nationals to exclude the fruits of a warrantless search conducted by American authorities in Mexico.[329] Likewise, the Due Process Clause would not protect a noncitizen from abusive questioning by the FBI overseas, and a confession resulting from such questioning could be admitted at trial without violating the Due Process Clause.[330]

Similarly, the Due Process Clause would not protect a U.S. citizen who was brutally interrogated by foreign agents. Perversely, as discussed more fully, *supra*, applying *Miranda* to our agents operating overseas may given them an incentive to turn over suspects — American and foreign — to foreign agents for questioning.

Lindh, of course, was interrogated directly by representatives of the U.S. government, and as a citizen, he could claim the protections of both the Fifth Amendment's Self-Incrimination Clause and its Due Process Clause. As part of his due process argument, however, he suggested that

---

326 *But see* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991) (finding adequate "state action" for purposes of equal protection clause when private civil litigants exercised race-based peremptory challenges within a government courtroom). The rationale of *Edmonson* would provide one basis for arguing against the holding of *Connelly*.

327 *See generally* Godsey, *The New Frontier*, *supra* note 199.

328 Godsey, *The New Frontier*, *supra* note 199. Elsewhere, Godsey defines a "freestanding civil liberty" as "not concerned with ensuring fair and accurate trials; rather, it protects people generally from government overreaching in a variety of non-trial settings — from the private home to the public street corner. Accordingly, a freestanding civil liberty can be triggered and/or violated in situations outside the criminal trial context." *Id.*

329 *See id.*; *see also supra* note 206 (describing holding of *Verdugo-Urquidez*).

330 Godsey, *The New Frontier*, *supra* note 199 (using the example of an FBI agent located in Italy extracting a confession from an Italian citizen suspected of trafficking in child pornography by depriving him of food and sleep for seventy-two hours: "Because the due process violation was fully accomplished in Italy, and no separate constitutional deprivation occurred by the mere introduction of his involuntary confession at trial, his motion to suppress on due process grounds would not be successful under *Verdugo-Urquidez*"). Elsewhere, Godsey argues that the noncitizen is protected by the Fifth Amendment's privilege against self-incrimination, and he develops an "objectively identifiable penalty test" for determining whether a confession is "compelled" under the Fifth Amendment. *Id.*

his treatment at the hands of Northern Alliance forces left him in a weakened condition.[331] The problem with this part of his argument is that he was not "wounded, starved, frozen [or] exhausted" as a result of any behavior of United States troops. Essentially, Lindh came into United States custody in a weakened condition not brought about by the United States, just as Connelly appeared at a stationhouse suffering from delusions not brought about by action of the state police. Under the rationale of *Connelly*, if the U.S. agents were not responsible for Lindh's condition, then they did not violate his due process rights by taking his confession when he was suffering from that condition. Nor, under *Connelly*, would the introduction into evidence of Lindh's confession, standing alone, violate the strictures of due process.

I do not view this resulting analysis of Lindh's case as particularly problematic under the Constitution. Even applying a pre-*Connelly* due process analysis to the facts of Lindh's confession, it would likely have been admissible. The confession bore strong earmarks of reliability, for example. It is not hard to imagine, however, a future situation in which this might not be the case.

There is another aspect to Lindh's case that bears addressing, however. To the extent that Lindh's due process arguments also included the claim that he suffered while in U.S. custody, his arguments would not have been foreclosed by *Connelly*. As due process, after *Connelly*, is primarily concerned with deterrence, then a critical issue would have been whether U.S. law enforcement agents engaged in the kind of "wrongful" tactics that U.S. courts would seek to deter in future cases. Because Lindh was being interrogated as a wartime detainee, the question naturally arises: What does "due process" mean in these circumstances? In other words, while Lindh was subjected to relatively harsh conditions *as a result of surrendering on the battlefield*, should those conditions be weighed in the same manner as if Lindh were a conventional suspect subjected to such conditions *incident to trying to get a confession*? I submit that they should be weighed differently.[332]

This does not appear to be a case, like *Ashcraft* or *Watts*,[333] in which the defendant was subjected to unduly long interrogation, where

---

331 *See generally* Gov't's Opp'n, *supra* note 256; *see also supra* Part III.A.

332 The question naturally arises whether it is only in cases of "foreign interrogation" that suspected terrorists' due process claims should be looked at under a special lens. I think the argument can be made that, regardless of the location of interrogation, suspected terrorists should be treated differently, though that argument goes beyond the scope of this article. It bears noting, however, that the government has demonstrated a willingness to treat some terrorist suspects as "enemy combatants," motivated, perhaps in part, by a desire to avoid the constitutional constraints imposed in civilian courts. This point is addressed more fully in Darmer, *supra* note 10 at 242–43, 286–87.

333 *See supra* Part I.B.

finally his will to resist was broken. Rather, his cooperation was rather immediately forthcoming. Lindh says, of course, that his cooperation was motivated by a desire for better treatment — and that such better treatment was forthcoming after he made statements to U.S. interrogators. But Lindh was a wartime captive. His conditions were commensurate with his status as a dangerous detainee at war with this country. Moreover, in terms of food, medical, and sleeping provisions, the government argued that his treatment was equal to or better than that of American forces.[334] If the government's claims are credited, it appears that Lindh's treatment in this regard was consistent with the requirements of the Geneva Convention.[335] In assessing "voluntariness" under such unusual circumstances, the courts should consider the government's legitimate safety concerns, and the constraints imposed by war conditions, in evaluating whether the government "coerced" suspects like Lindh.[336]

As with "evolving standards of decency" in the Eighth Amendment context,[337] one generally thinks of a forward evolution of notions of "due process," resulting in an increasingly "civilized" treatment of suspects in custody. When society faces real threats, such as from terrorism, however, it is much harder for that society to tolerate an expansive view of the rights of criminal defendants.

Connelly suggests that, in assessing the "voluntariness" of a confession under the Due Process Clause, a statement should be judged involuntary only in instances of police misconduct. But what is "police misconduct" in the context of interrogating terrorist suspects? Before *Miranda*, the Court had not developed bright-line rules about which tactics were in and which were out, other than banning physical abuse. Instead, as discussed more fully, *supra*, the Court's due process line of cases reflects a mix of values and does not provide clear guidance about prohibited tactics. Since *Miranda*, the Court has provided little additional guidance.

While the Court generally hesitates to prescribe different standards for different types of crimes, it makes sense to do so in the terrorism

---

334 *See generally* Gov't's Opp'n, *supra* note 256.

335 *See* Geneva Convention Relative to the Treatment of Prisoners of War, Chapter III, arts. 25, 26, 29 & 30 (21 Oct. 1950), *available at* http://www.unhcr.ch/html/menu3/b/91.htm (describing requirements for quarters, food, and medical attention).

336 It should be noted that, in addition to confessing to the FBI, Lindh gave an interview to CNN on December 2, 2001. *See* Transcript of John Walker Interview, *at* http://www.cnn.com/2001/WORLD/asiapcf/central/12/20/ret.walker.transcript. Even had some of Lindh's statements to the government been deemed inadmissible, his statements made to CNN likely would have been admissible because they were made to a private party not constrained by the Constitution.

337 Atkins v. Virginia, 122 S. Ct. 2242, 2247 (2002) (holding that execution of mentally retarded criminals amounted to "cruel and unusual punishment" prohibited by Eighth Amendment).

context.[338] Consider, for example, language from the Court's opinion in *Rochin v. California*,[339] which involved the forcible stomach-pumping of the defendant to remove capsules after agents could not extract them from his mouth. In that case, the Court said the following:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even the most hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.
>
> It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. [The confession] decisions [are] only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[340]

Would government action that "shocks the conscience" in a case involving illegal drugs also "shock the conscience" in a case involving terrorism? What if, for example, a suspected terrorist swallowed capsules containing small bits of paper on which appeared code numbers required to deactivate a bomb? Would it "shock the conscience," then, to pump his stomach?

---

338 *Cf.* Florida v. J.L., 529 U.S. 266, 273–74 (2000) (addressing the requirements of the Fourth Amendment) ("The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."); Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) ("if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me that they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and searches every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.").

339 342 U.S. 165 (1952).

340 *Id.* at 172.

Alan Dershowitz has argued that "the process that an alleged terrorist who was planning to kill thousands of people may be due is very different than the process that an ordinary criminal may be due" and has even advocated the use of "torture warrants" in extreme circumstances.[341] Under clearly established law, torture violates due process.[342] I would also argue that to admit into a trial a statement induced by torture would be a violation of the Fifth Amendment's prohibition on compelled self-incrimination, under virtually any definition of "compulsion." But surely Dershowitz is right that the "process due" should take account of the nature of the crime. And I do not think stomach-pumping would violate due process in my hypothetical. (Nor would it be possible for such a procedure to result in a "false confession.") Similarly, I do not think that Lindh suffered a due process violation in Afghanistan. Kamisar's suggestions to the contrary[343] may have been more accurate during the era of the Court's pre-*Connelly* due process jurisprudence[344] and, in my view, do not adequately account for the fact that Lindh was a detained during wartime.[345]

E. THOUGHTS FOR THE FUTURE

In the *Lindh* case itself, there was little question that Lindh's confession was "true." In essence, he acknowledged having joined the Taliban,[346] an admission that appeared almost self-evident from the circumstance in which he was discovered. There inevitably will be future terrorism cases, however, in which the veracity of confessions is doubtful, as with the case of the young Egyptian suspect who, after being in-

---

341 Interview by Mike Wallace with Alan M. Dershowitz, Harvard Law School Professor (Transcript, *60 Minutes*, Jan. 20, 2002, *available at* WL 1/20/02 CBS News: 60 Minutes); *see also* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002).

342 *See* Brown v. Mississippi, 297 U.S. 278 (1936); *see also* Cloud, *supra* note 55.

343 *See* Kamisar, *More than* Miranda, *supra* note 241, at 51.

344 *But see* Malinski v. New York, 324 U.S. 401 (1945) (confession held involuntary where, *inter alia*, defendant was stripped of clothing and held in that condition for several hours). The holding of *Malinski* is not affected by *Connelly*.

345 It should also be noted that Kamisar's opinion piece was published based upon a review of Lindh's allegations of his treatment, before the government had responded to those allegations. Furthermore, even had the Court credited Lindh's allegations, I think it highly unlikely that the confession would have been suppressed at the district court level. The district court had consistently ruled against Lindh in pretrial motions, and those rulings largely influenced Lindh's ultimate guilty plea. Had the case gone up on appeal and ultimately to the Supreme Court, I think the higher courts would have affirmed a district court decision to admit the confession, despite the existence of such opinions as *Mincey* and *Malinski*. While the Court may well have done so even without the modification to the due process standards suggested in this article, the confession could be upheld on a more principled basis by explicitly recognizing that terrorist cases should be treated differently than others.

346 The content of Lindh's statements is laid out in some detail in Darmer, *supra* note 10, at 252.

terrogated, claimed ownership of a radio that belonged instead to an American pilot.[347]

Historically, the Supreme Court was concerned with "reliability" in assessing confessions under the Due Process Clause.[348] Indeed, the inherent unreliability of confessions extracted by brute force is one reason why such tactics have been held inadmissible. While the *Connelly* Court de-emphasized reliability, it did so on facts that involved no efforts by the police — or, indeed, by anyone — to obtain information. Connelly literally walked in off the street and told his story. As Laurie Magid has argued, setting limits on police conduct simply will not help prevent false confessions of that sort.[349] Furthermore, she makes a compelling argument that until empirical research suggests that false confessions are a systemic problem, specific limits on tactics such as deception are unwarranted.[350]

Beyond limiting the use of physical force to extract confessions, it is difficult to establish rules, in advance, on the permissible range of tactics when seeking confessions. Different suspects react differently to pressure, and crimes involving threats to national security may call for tactics that would be inappropriate in garden-variety cases. Two groups, however, emerge as being demonstrably vulnerable to making false confessions — juveniles and the mentally ill.[351] In cases involving such defendants, it seems to me that due process demands that courts scrutinize confessions with special care, *Connelly*'s suggestion notwithstanding. And because taking *Connelly* to its logical conclusion means that an American court could admit a confession brutally coerced from a suspect by a foreign agent, the Court should reconsider those aspects of *Connelly* suggesting that reliability plays no role in meeting the demands of due process. Alternatively, the Federal Rules of Evidence should be specifically amended to make clear that reliability should be considered before a confession is admitted.[352]

In addition, although *Connelly* may suggest that confessions extracted by foreign agents using brute force would not be banned by the

---

347 *See supra* note 13 and accompanying text.

348 *See supra* Part I.B. *But see* Colorado v. Connelly, discussed *supra* Part III.D.

349 *See* Magid, supra note 56, at 1191 (asserting that there is no empirical proof that setting limits on police conduct will help prevent false confessions).

350 *See id.* at 1201–10.

351 *Cf. id.* at 1192 ("[J]uveniles and the mentally impaired . . . appear somewhat more likely than the average suspect to give a false confession"); *see also generally* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002) (conducting empirical study and concluding that mentally retarded individuals could not understand the *Miranda* warnings).

352 To the extent that questionable confessions are admitted into evidence in state courts, state evidence rules should likewise be modified. Most terrorism cases, however, would likely end up in federal courts.

Due Process Clause, such confessions should be deemed a violation of the Self-Incrimination Clause. When a suspect has truly been compelled — by any actor exerting force upon him, foreign or domestic — the introduction of the resulting confessions is a violation of the Fifth Amendment. The Court's prior failure to analyze truly compelled statements under the Self-Incrimination Clause has led to theoretically unsound and constitutionally unprincipled results, whereby compelled statements may be admitted whereas "unwarned" statements may not be.

CONCLUSION

Cases involving foreign interrogation inevitably will recur. Such interrogation is limited by both the Self-Incrimination Clause and the Due Process Clause, the goals of which are closely related. The *Miranda* decision presents a flawed analysis of Fifth Amendment "compulsion," but the Court's recent *Dickerson* decision means that courts must continue to reckon with *Miranda*. Consistent with the Constitution, however, the courts can carve out a "foreign interrogation" exception to *Miranda* analogous to the "public safety" exception in *Quarles*. Specifically, the courts should permit into evidence un-Mirandized statements made during investigations of terrorism conducted abroad, so long as such statements were not forcibly extracted. It would be inconsistent with the Constitution, however, to permit into evidence a confession extracted by force, regardless of whether compulsion was applied by foreign or domestic agents.

Notions of due process, however, are sufficiently flexible to allow for substantial leeway in questioning terrorism suspects, and conduct that might "shock the conscience" in other contexts might be tolerable in this one.[353] The *Lindh* court never had to resolve the question whether his statements violated the Due Process Clause; in my view, they did not.

---

353 *Cf.* Yale Kamisar, *The Importance of Being Guilty*, *supra* note 71, at 184 ("Whether or not a Justice can intelligently define 'coercive questioning,' I think he would 'know it when he heard it.'") (citation omitted). Of course, "coercive questioning" under the Due Process Clause has traditionally been a much broader concept than just conduct that "shocks the conscience." *But see* Herman, *The Unexplored Relationship (Part II)*, *supra* note 22, at 523 (suggesting that plausible reading of *Connelly* is that only police conduct that shocks the conscience should be inadmissible under a due process test). Just as the Court appropriately drew a line in *Rochin*, however, I think it could appropriately do so in the terrorist interrogation context — just at a different point.