ARTICLE

Terrorism Prosecutions in U.S. Federal Court: Exceptions to Constitutional Evidence Rules and the Development of a Cabined Exception for Coerced Confessions

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Abstract

This Article examines a series of special constitutional evidence rules that can be used in criminal enforcement against terrorists. Some of these rules already expressly apply to terrorism cases, others contain an exigent circumstance element that can and, it is recommended, should be adapted to terrorism contexts. Finally, building on both of these sets of special rules, it is proposed that a similar new exception should be applied to coerced confession rules. Specifically, in Part I, four existing "exceptions" to constitutional rules of evidentiary admissibility are examined—relating to Fourth Amendment privacy protections, compulsory process, confrontation, and *Miranda*. The first two of these exceptions were originally formulated in the context of terrorism investigations; the second two were developed in situations involving exigent circumstance and public safety concerns. This Article endorses the extension to terrorism investigations of the public safety exception to the requirement of Miranda warnings. (Along the same lines, recently-made-public FBI guidelines have adapted this exception for use in

* Distinguished Professor of Law Emeritus, UCLA Law School. I have benefited from comments on an earlier draft by Professors Susan Klein, Herbert Morris, and Melvin Seeman. I also found very useful a discussion of the earlier draft at the 9/11 Criminal Justice and International Legal Studies Roundtable, held at Vanderbilt Law School, September, 2011. Finally, I learned much regarding the subject of this Article from debating in writing with Professor Christopher Slobogin the idea of the cabined exception. The debate has been published by the ABA Standing Committee on Law and National Security in a volume titled PATRIOTS DEBATE: CONTEMPORARY ISSUES IN NATIONAL SECURITY LAW (Harvey Rishikof et al. eds., 2012). *See also* Richard Brust, *Probing Questions: Experts Debate the Need to Create Exceptions to Rules on Coerced Confessions*, 98 A.B.A. J. 44 (2012).

interrogating suspected terrorists.) It is also proposed that the public safety exception—dealing with confrontation issues—should be extended to terrorism investigations.

Part II, building on the described existing and proposed terrorism investigation exceptions, makes the case for the creation of a new exception relating to a fifth constitutional admissibility doctrine, one involving a hallowed area of constitutional criminal procedure—coerced confessions. A cabined exception is proposed that would, in exigent circumstances and to gather intelligence relevant to terrorism prevention, allow government agents to utilize non-extreme police interrogation methods, the use of which, under existing Supreme Court precedents, might otherwise have been ruled to violate the Constitution.

Introduction

It is generally assumed that the rules of evidentiary admissibility applied in civilian court prosecutions do not differ, and should not differ, depending on the type of matter being prosecuted.[1] There are, however, some judicial decisions, including a United States Supreme Court opinion,[2] and federal legislation,[3] that expressly support taking into account, in ruling on certain issues of evidentiary admissibility, whether the matter involves terrorism. Thus, the notion that the application of evidentiary rules does not differ depending on the type of matter being prosecuted is not correct.

The purpose of this Article is to explore the potential for using some different rules in civilian court terrorism prosecutions by examining the exceptions applied, or potentially applicable, to five major sets of constitutional rules of evidentiary admissibility: (1) search and seizure, (2) compulsory process, (3) confrontation, (4) *Miranda*, and (5) coerced confessions. Ultimately, recognition and adoption of these kinds of

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[1] *See, e.g.*, Emanuel Gross, *Trying Terrorists—Justification for Differing Trial Rules: The Balance between Security Considerations and Human Rights*, 13 IND. INT'L & COMP. L. REV. 777 (2003).

[2] *See* United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972); United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005). This Article characterizes these as "exceptions" although they could be viewed simply as applications of the relevant constitutional formula that take into account the fact of a terrorism investigation.

[3] *See* The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801–1871 (2006).

exceptions to the usual rules of evidentiary admissibility strengthens the case for using civilian, rather than military, criminal trials in prosecuting terrorism cases.

Part I examines the existing exceptions that the federal courts have developed and applied in the first four of the abovementioned contexts.[4] These exceptions permit evidence to be admitted that would normally be inadmissible because it was obtained in violation of the otherwise applicable constitutional rule. Two of these exceptions originated in and have been utilized in terrorism cases, while the other two arose in non-terrorism contexts but lend themselves to extension in the terrorism arena. One of the existing terrorism exceptions is also reflected in a comprehensive federal statute, three of the exceptions were initiated by the Supreme Court, and the Court of Appeals for the Fourth Circuit originated one of the exceptions. Appreciating the reach of these exceptions, and proposals to extend two of them into the terrorism arena are important in themselves. Study of all of these exceptions is also of special value insofar as it helps to lay the legal foundation and support the case for the proposal discussed in Part II.

Part II is devoted to an examination of the proposal to introduce an important, new exception into terrorism prosecutions: a cabined exception to existing coerced confession/involuntariness evidentiary admissibility doctrine. The proposed exception would, under exigent circumstances, permit the admission into evidence of statements in terrorism investigations obtained by interrogation methods, which under current law might make such statements inadmissible.

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[4] *Keith*, 407 U.S. at 320 (allowing Congress to legislate different standards for electronic surveillance aimed at obtaining domestic security intelligence); *Moussaoui*, 382 F.3d at 456–57 (permitting the government to use substitutions in lieu of producing witnesses in terrorism prosecution, including reports of statements obtained from putative witnesses through interrogation where the requisite reliability of the statements has been established by the fact that the interrogations were conducted by skilled interrogators to obtain terrorism intelligence); Davis v. Washington, 547 U.S. 813 (2006); Michigan v. Bryant, 131 S. Ct. 1143, 1166–67 (2011) (asserting that statements obtained through questioning in order to resolve an urgent public safety issue are non-testimonial, and introducing them into evidence against the defendant does not violate the confrontation clause); New York v. Quarles, 467 U.S. 649, 653 (1984) (asserting that public safety circumstance may warrant dispensing with *Miranda* warnings and allowing statements thereby obtained to be introduced into evidence).

The doctrinal package discussed here is relatively narrow and focused. It does not rely on the idea that special rules are generally applicable in terrorism prosecutions. There are, however, Supreme Court dicta that may open the door to the application of rather extreme special rules relating to dangerous terrorists. For example, in *Zadvydas v. Davis*,[5] decided just prior to 9/11, Justice Stephen Breyer, speaking for a five justice majority, in a suggestive statement, excepted cases involving terrorism from his discussion about detention based on dangerousness: "Neither do we consider terrorism . . . where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[6] Similarly, in *Rumsfeld v. Padilla*[7] decided by the Supreme Court a few years after *Zadvydas*, Justice John Paul Stevens in dissent, speaking for himself and Justices Breyer, Ruth Bader Ginsburg, and David Souter, indicated grave concerns about protracted executive detention, but he also acknowledged the possibility of a kind of preventive detention for dangerous terrorists. He noted that "[e]xecutive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction."[8] Neither of these dicta deals directly with the issues addressed in this Article, but they are important background insofar as they reveal a willingness of some Justices to support special rules where instances of dangerous terrorism are involved.

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[5] 533 U.S. 678 (2001).

[6] *Id.* at 696.

[7] 542 U.S. 426 (2004).

[8] *Id.* at 465. Of course, the exact meaning of this sentence is far from clear. Almost every word presents some ambiguity. It combines the subjunctive "may" with the qualifying word "sometimes." What it means to launch missiles of destruction or to become missiles of destruction is unclear. May such detention continue as long as the detained person is likely to launch such missiles? And the sentence speaks of "executive detention," not military detention nor judicially-authorized detention. It also refers to "subversive . . . citizens." Finally, it uses as a simile the detention of enemy soldiers to keep them off the battlefield, a justification that the Court had just applied in a companion case, *Hamdi v. Rumsfeld*. 542 U.S. 507, 519 (2004).

I. Exceptions to Constitutional Evidence Rules: Existing Precedents

A. Search and Seizure: Keith *and a Domestic Intelligence Investigative Purpose*

In *United States v. U.S. District Court* (*Keith*),[9] a seminal and foundational Supreme Court opinion for the purposes of this Article, the Court dealt with admissibility under Fourth Amendment search and seizure standards where the evidence in question was obtained in the course of gathering intelligence about domestic terrorist activities. Decided in 1972, *Keith* established the basis for a new rule of admissibility in connection with terrorism intelligence investigations. An important question is whether and how far the principle underlying *Keith* may be extended to other areas of constitutional admissibility.

The relevant proposition underlying *Keith* can be characterized as follows: Where government agents are seeking intelligence about future terrorist acts, that is, attempting to prevent them rather than seeking evidence to use in a prosecution, the applicable constitutional search and seizure standards for obtaining a warrant may be different.

The facts in *Keith* involved charges of domestic terrorism. One of the defendants was charged with the dynamite bombing of a Central Intelligence Agency office, and all three defendants were charged with conspiring to destroy government property.[10] The government claimed that the President, in exercise of his inherent authority over national security, could conduct electronic surveillance without a warrant or judicial approval.[11] The Court rephrased the Government's argument:

> [T]he special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement . . . that [because] these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions . . . this type of surveillance should not be subject to traditional warrant requirements which were established to

[9] 407 U.S. 297 (1972).
[10] *Id.* at 299.
[11] *Id.* at 303.

> govern investigation of criminal activity, not ongoing intelligence gathering.[12]

The Supreme Court rejected this claim of presidential authority to bypass the requirement that a warrant must be obtained in domestic security cases,[13] and the case is usually cited for that proposition.[14] The *Keith* Court went on to state that Congress could establish different Fourth Amendment warrant standards for searches and seizures relating to intelligence in domestic security cases.[15] While the Court had rejected the Government's argument for exempting police searches and surveillance from the warrant requirement simply because it involved intelligence gathering rather than

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[12] *Id.* at 318–19.

[13] While the Court did not precisely define "domestic security," it did assert that "[t]he Attorney General's affidavit in this case states that the surveillances were 'deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of Government.'" *Id.* at 300.
In a footnote, the Court also stated:

> Section 2511(3) [of Title 18 of the U.S. Code] refers to the "constitutional power of the President" in two types of situations: (i) where necessary to protect against attack, or other hostile acts or intelligence activities of a "foreign power;" or (ii) where necessary to protect against the overthrow of the Government or other clear and present danger to the structure or existence of the Government. Although both of the specified situations are sometimes referred to as "national security" threats, the term "national security" is used only in the first sentence of §2511(3) with respect to the activities of foreign powers. This case involves only the second sentence of §2511(3), with the threat emanating—according to the Attorney General's affidavit—from "domestic organizations." Although we attempt no precise definition, we use the term 'domestic organization' in this opinion to mean a group or organization . . . composed of citizens of the United States and which has no significant connection to a foreign power, its agents or agencies.

Id. at 309 n. 8.

[14] The Court declined to opine on the question of whether such authority existed in national security cases involving foreign agents: "We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents." *Id.* at 321–322. Six years later, Congress enacted the Foreign Intelligence Surveillance Act, in effect adopting special standards that the Court had suggested could be promulgated for domestic terrorism investigations, but doing so only for foreign intelligence matters. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

[15] *Keith*, 407 U.S. at 322–323.

seeking evidence "for specific criminal prosecutions,"[16] it proceeded to apply the same distinction as the ground for recognition of the possibility of establishing warrant standards different from those used in ordinary criminal cases. The Court stated:

> [W]e do not hold that the same type of standards and procedures prescribed . . . [for ordinary criminal cases] are necessarily applicable in this case. We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of [ordinary] crime . . . . Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
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> Given these potential distinctions between . . . [ordinary] criminal surveillances and those involving the domestic security, Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified [ordinary] crimes . . . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens . . . [f]or the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.[17]

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[16] *Id.* at 318–320.

[17] *Id.* at 322–323. The Court also quoted from *Camara v. Mun. Court* as follows: "In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.* at 323 (quoting Camara v. Mun. Court, 387 U.S. 523, 534–535 (1967)). It is not surprising

The Court's distinction between searches or surveillance conducted to obtain intelligence rather than evidence of specific crimes is based, as the Court indicated, on the fact that an intelligence search or surveillance has a different kind of purpose than a specific crime investigation. There is a difference in the nature and scope of what is being sought: "often long range";[18] targets "more difficult to identify" than in ordinary crime cases;[19] an emphasis on "prevention," or preparing for a "crisis or emergency";[20] a focus that is "less precise" than one seeking evidence of a specific crime.[21]

Notably, Congress has not yet exercised the authority suggested by the Court in *Keith* to establish different search and seizure, and electronic surveillance standards for domestic intelligence matters.[22]

While *Keith* differs from some of the other exceptions discussed in this Article insofar as the Government did not invoke a claim of exigent circumstances, its articulation of the distinction between a non-prosecution purpose—in this instance, intelligence gathering—and the pursuit of evidence for criminal prosecution is a fundamental element which surfaces in or can be applied to each of the other exceptions discussed in this Article. As will be shown, however, the logic of the intelligence purpose/criminal prosecution purpose dichotomy is applied in different ways in connection with each of the constitutional evidentiary rules discussed in this Article.

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that the Court cited and relied on *Camara* in this connection. The administrative search precedent of *Camara* defines a general category of search that has a different kind of justification from ordinary criminal investigations; hence what is reasonable for purposes of such a search is different. Similarly, so the Court reasoned, in domestic terrorism intelligence gathering such as was involved in the case before the Court, what is reasonable differs from the ordinary criminal investigation.

[18] *Keith*, 407 U.S. at 322.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Congress, however, did make use of the constitutional authorization for different standards provided by *Keith* in enacting in 1978 the Foreign Intelligence Surveillance Act, which deals with electronic surveillances.

B. Compulsory Process: Another Application of the Terrorism Intelligence Investigative Purpose

1. The Constitutional Issue: *United States v. Moussaoui*

A second Constitutional context in which the judiciary has distinguished gathering evidence for intelligence purposes from seeking evidence for criminal prosecution involved a compulsory process issue. Compulsory process doctrine requires, *inter alia*, that a defendant should ordinarily be able to obtain the testimony of a witness in the custody of the government if the witness has material evidence necessary for the accused to make his or her defenses. Where the government declines to produce the witnesses claiming national security reasons, the applicable standard is whether material offered by the government as a substitute for producing the witnesses provides the defendant with enough evidence to enable the making of a defense. If the court concludes that this standard has not been met, and the government still declines to produce the witnesses, the court may dismiss the prosecution.

In *United States v. Moussaoui*,[23] the defendant, accused of terrorist offenses, sought the testimony of several individuals who apparently had been detained by the government, had been interrogated by government agents, and had made statements. The government declined to produce the witnesses, claiming that national security was involved, and everything connected to these putative witnesses was classified information. Eventually, the government offered as a substitute reports containing a redacted record of the putative witnesses' statements made in the course of the interrogations, the purpose of which (as determined by the court) was to obtain terrorism intelligence.

The issue was whether those proposed substitutions (involving multi-level hearsay statements obtained from three detainees through interrogations that were reported in documents which had been summarized and then reported in still another set of documents) were reliable and trustworthy enough to be used as a substitute for the testimony or depositions of the detainees.[24] The court stated:

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[23] 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

[24] The issue is similar to that which can arise under the Classified Information Procedures Act (CIPA). Because witnesses were involved, not documents, the CIPA was not strictly

> The answer to the concerns of the district court regarding the accuracy of the [Redacted] reports is that those who are [Redacted] the witnesses have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to prevent acts of terrorism and to capture other al Qaeda operatives. These considerations provide sufficient indicia of reliability to alleviate the concerns of the district court.[25]

The court thus found the required reliability in the nature of the process of conducting interrogations aimed at ferreting out intelligence about terrorists. The necessary reliability arose from the fact that the agents who had conducted the interrogations and those who had prepared the resulting documents were motivated to obtain and record accurate information so that it could be relied upon by other government agents in the field in their efforts to prevent terrorist acts and apprehend terrorists. By implication, the court drew a contrast with law enforcement interrogations where the motivation is to obtain evidence for use in the prosecution of specific crimes, which may affect the direction and, ultimately, the accuracy and reliability of the information obtained.[26]

2. The Hearsay Issue

The *Moussaoui* Court only briefly mentioned the weakest part of the claim that the hearsay statements at issue were reliable—the fact that the originating declarants, the detainees who had been interrogated, did not themselves have a motive to be accurate. The court responded to this concern by stating, "we are even more persuaded that the [Redacted] process is carefully designed to elicit truthful and accurate information from the witnesses."[27] In other words, the interrogators engaged in a process of interrogation that was "carefully designed" to produce reliable, trustworthy

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applicable, but the Court of Appeals appropriately relied on the CIPA in formulating its approach to the question before it.

[25] *Moussaoui*, 382 F.3d at 478. Note that substantial redactions appeared in the original opinion, some of which are rather easily decipherable.

[26] *See infra* Part I.C.2 for further discussion of this issue.

[27] *Moussaoui*, 382 F.3d at 478–79.

information. The court did not further explain, and one can only speculate about what the judges had in mind.[28]

But the court's rationale and its decision on the issue should also be read in light of the context. In this case, although the evidence would actually be produced by the prosecution, the formal proponent of the evidence was the defendant. Ordinarily, a party cannot object to hearsay he or she offers into evidence. Nor was the prosecutor going to object to the documentary evidence that had been produced; he had a strong motive to try to resolve the Sixth Amendment issue posed by the defendant's subpoena to produce these individuals.[29]

Accordingly, the Sixth Amendment compulsory process issue in the case was satisfied by the fact that the evidence was gathered for intelligence purposes and the fact that the government agents involved had strong incentives to be accurate in reporting the information thus obtained.

3. Implications of *Moussaoui*

In *Moussaoui*, as in *Keith*, a court focused on the nature of seeking intelligence about terrorist activities, identified a characteristic of the information obtained—as perceived by the court—and related it to the constitutional issue under consideration.

Moussaoui stands for the proposition that a special reliability rationale can be used to address the Sixth Amendment compulsory process challenge posed when the government declines to produce witnesses on grounds of

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[28] *See* Norman Abrams, *Confrontation and Hearsay Issues in Federal Court Terrorism Prosecutions of Gitmo Detainees:* Moussaoui *and* Paracha *as Harbingers*, 75 BROOK. L. REV. 1067 (2010) [hereinafter *Gitmo Detainees*], where the concerns of reliability and the hearsay, at issue in *Moussaoui*, are more fully addressed, concluding that in a confrontation (as opposed to compulsory process context), the hearsay weaknesses of the evidence would probably be a barrier to its admissibility under the Federal Rules of Evidence, even though it would likely survive a constitutional confrontation challenge. Please note, however, that this paper was written prior to the Court's decision in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). *See infra* Part I.C.2 for a discussion of *Bryant*. *Gitmo Detainees*, contains a footnote, n. 74 at 109, suggesting that concern about releasing dangerous terrorists could influence some judges in how they respond to this issue.

[29] As suggested in the previous footnote, if the evidence were being offered by the prosecution against a defendant, it would present a confrontation issue, and the hearsay issues would also need to be addressed more fully. *See infra* Part I.C.2.

national security and offers as a substitute hearsay records of the statements that the witnesses made to interrogators who had been seeking terrorism intelligence rather than gathering evidence for prosecution.[30]

C. The Exception to the Crawford *Confrontation Doctrine and Terrorism Investigations*

1. *Crawford v. Washington* Confrontation and the *Davis v. Washington* Exception

Keith and *Moussaoui* both expressly take into account the special nature of terrorism intelligence searches and interrogations in applying relevant constitutional rules regarding search and seizure and compulsory process. Might the intelligence-gathering/seeking-evidence-for-prosecution dichotomy be applied in other constitutional areas, specifically, in a confrontation context?

In *Crawford v. Washington*,[31] Justice Antonin Scalia, writing for the Court, dramatically remade Confrontation Clause doctrine. Several years later, in *Davis v. Washington*,[32] writing for the Court again, Justice Scalia carved out an exception to the *Crawford* confrontation requirements for police questioning in an emergency situation. Subsequently, in *Michigan v. Bryant*,[33] the Court's opinion by Justice Sonia Sotomayor further elaborated and developed the nature and extent of the *Davis* exception.

Crawford changed the constitutional confrontation approach, which had previously been articulated as conditioning the admissibility of all hearsay evidence on whether it falls under a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."[34]

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[30] It is believed that this use of the seeking-terrorism-intelligence rationale by the Court of Appeals in *Moussaoui* in response to a compulsory process issue was the first instance of its kind. This Fourth Circuit decision by the *Moussaoui* Court was not subsequently directly reviewed or even immediately followed up and applied below since after the Supreme Court denied certiorari, Moussaoui pled guilty. The same general rationale, however, was cited and followed by a district court in another circuit—*United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. 2006), *aff'd*, 313 Fed. Appx. 347 (2d Cir. 2008)—and it was also affirmed by another panel of the Fourth Circuit in connection with Moussaoui's subsequent motion to withdraw his plea of guilty. *See United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010).

[31] 541 U.S. 36 (2004).

[32] 547 U.S. 813 (2006).

[33] 131 S. Ct. 1143 (2011).

[34] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Crawford ruled instead that constitutional confrontation issues are only raised by hearsay statements obtained by government agents that are "testimonial," thereby removing the trustworthiness element from Confrontation Clause consideration. Under *Crawford*, testimonial statements are inadmissible unless the declarant is available and has been subject to cross-examination. Without formulating a precise definition, the Court described testimonial statements as those obtained by government agents "that declarants would reasonably expect to be used prosecutorially."[35]

The Court's subsequent decision in *Davis* qualified the *Crawford* rule in situations where the primary reason the questions were asked was to deal with an ongoing emergency and not to obtain evidence for use in prosecuting a crime. In both *Davis* and its companion case, *Hammon v. Indiana*, the statements made to government agents arose out of domestic disturbance situations. In *Davis*, the statements at issue were made over the telephone to a 911 operator;[36] in *Hammon*, the statements were made to police officers on the scene.[37] The Court found in *Davis* that "the primary purpose" of the questions from the 911 operator was "to enable police assistance to meet an ongoing emergency. In responding to these questions, the declarant was not acting as a witness; she was not testifying."[38] The Court held that the introduction into evidence of a statement resulting from questioning under that kind of exigent circumstance does not violate the Confrontation Clause. The Court also indicated, however, that the decision regarding the confrontation issue did not prevent the state from also considering whether the statements at issue were admissible under the jurisdiction's evidence rules, presumably, the hearsay rules.

Based on the particular circumstances in *Hammon*, the Court reached a contrary conclusion: "When the officer questioned . . . [the victim-declarant] and elicited the challenged statements, he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime . . . ."[39]

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[35] *Crawford*, 541 U.S. at 51.
[36] *Davis*, 547 U.S. at 817.
[37] *Id.* at 819.
[38] *Id.* at 828 (emphasis omitted).
[39] *Id.* at 830.

In characterizing the facts in *Davis*, Justice Scalia seemed to emphasize the immediacy of the situation. He noted that the declarant "was speaking about events as they were actually happening."[40] The Court went on to say that "[t]he statements in *Davis* were taken when . . . [the declarant] was alone . . . apparently in immediate danger,"[41] and that her "present-tense statements showed immediacy."[42] But in dealing with the substance of the emergency requirement, Justice Scalia did not provide any rationale or otherwise explain why immediacy or even an emergency might be specially required. Given the testimonial/non-testimonial rationale that Justice Scalia used in *Davis*, so long as the purpose of the questioning—that is to resolve the emergency—was not to obtain evidence for a prosecution, the answers would seem to be removed from the category of being testimonial.[43] Given this explanation for the relevance of the emergency, why should it make a difference whether it is associated with a strict immediacy requirement?

One can speculate about possible explanations underlying Justice Scalia's invocation of the immediacy element: the immediacy of the emergency (a) was part and parcel of the alternate purpose of the questioning or (b) tended to corroborate the claim of an alternate, non-testimonial purpose for the questioning and to ensure that the alternate purpose claim was limited and not simply a subterfuge designed to gain admissibility for the statements. If either of these closely-related explanations for Justice Scalia's application of an immediate emergency requirement is correct, it would not seem necessary that the emergency have a true immediacy, that is, as "of the moment" in order for it to be part and parcel of the alternate purpose explanation, or corroborative of the alternate purpose. It would seem sufficient that the emergency be an "ongoing risk."[44]

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[40] *Id.* at 827.
[41] *Id.* at 815.
[42] *Id.* at 831. In concluding that the questioning in *Hammon* was similar to *Crawford*, and that statements obtained in such manner are inadmissible under the confrontation clause, the Court found the fact that the statements in *Crawford* were tape-recorded and made at the station house "strengthened the statements' testimonial aspect." *Id.* at 830.
[43] Justice Sotomayor in *Bryant* goes further and makes the point that not even an emergency is required. *See infra* Part I.C.2.
[44] Speculation about the possible rationale underlying Justice Scalia's approach to the immediate emergency element is warranted even though Justice Sotomayor in *Bryant*, *infra* Part I.C.2 adopts a different rationale for this element. Because it is possible that the majority of the Court may shift again on this issue, it is worthwhile to examine it under both approaches.

2. *Michigan v. Bryant*'s Further Elaboration of the Exception to Confrontation Requirements

Subsequently, in *Michigan v. Bryant*,[45] Justice Sotomayor's majority opinion (with Justice Scalia dissenting) again addressed the emergency exception to the *Crawford* doctrine. A shooting victim lay on the ground; the police arrived and asked the victim numerous questions about what happened and who shot him. At issue was the admissibility of the victim's responses to those questions.

Unlike the questions in *Davis*, the questions posed by the officer in *Bryant* were historical, pointing toward the past. The question addressed by the Court was whether, nevertheless, the primary purpose of this police questioning was to address an emergency situation; whether the police needed this information to protect the public in what could be a volatile situation—"not only [to] aid . . . a wounded victim, but also [for] the prompt identification and apprehension of an apparently violent and dangerous individual."[46] The majority answered these questions in the affirmative, and elaborated on the criteria to be applied in making that determination. Justice Sotomayor's opinion characterized the situation thusly: "[W]e confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large."[47] In a dramatic addition to, and change from, *Crawford* and *Davis*, Justice Sotomayor reintroduced the idea that the trustworthiness of the statements is relevant in determining the admissibility of the hearsay statements insofar as the Confrontation Clause is concerned: "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross examination."[48] Justice Sotomayor in Bryant thus added a trustworthiness/reliability element to the Confrontation Clause exception inquiry. She also provided a different rationale for the emergency element in the exception-to-confrontation determination than the one suggested above—that statements "given for the primary purpose of resolving . . .

[45] 131 S. Ct. 1143 (2011).
[46] Petition for Writ of Certiorari at 1, Michigan v. Bryant, 131 S. Ct. 1143 (2009) (No. 09-150).
[47] *Bryant*, 131 S. Ct. at 1156.
[48] *Id.* at 1157.

[the] emergency," are less likely to be fabricated, that is, that they are relatively trustworthy.[49]

What is the premise underlying this conclusion regarding the trustworthiness of the statements made? Is it the fact that the statements were made under conditions of excitement and spontaneity, and so, similar to the excited utterance hearsay exception, are not likely to be fabricated because of the emotional state of the declarant? Or is it because the declarant made the statements for a purpose unrelated to the ultimate guilt or innocence determination, and therefore the declarant was unlikely to have had in mind a purpose to falsify regarding the guilt-innocence issue?[50]

As to this last question, that the statement was alleged to have been given for an alternative purpose would not ordinarily be deemed sufficient to assure that there was no purpose to falsify. It may be assumed that there would need to be something more to provide such assurance, in this case because the statement was made "for the primary purpose of resolving that emergency." The emergency in this case involved a seriously wounded victim-declarant lying on the ground shortly after he had been shot. As Justice Sotomayor stated, "[T]he severe injuries of the victim would undoubtedly also weigh on the credibility and reliability that the trier of fact would afford to the statements."[51] She also stated, "An ongoing emergency has a[n] . . . effect of focusing an individual's attention on responding to the emergency."[52] Here it seems that she was leaning toward a spontaneity/excited utterance rationale for the relative reliability of the statement.

It makes no difference, however, which of these premises Justice Sotomayor was relying upon since there is language earlier in her opinion

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[49] *Id.* Note that because Justice Scalia had not provided a rationale for the immediacy or emergency requirement in *Davis,* Justice Sotomayor here was writing on a clean slate insofar as that aspect of the *Davis* decision is concerned. However, by grafting on to the *Crawford-Davis* doctrine a notion of trustworthiness of the statements, she seemed to be at least partially returning to the pre-*Crawford* confrontation doctrine reflected in decisions such as *Ohio v. Roberts,* 448 U.S. 56 (1980). *See supra* text accompanying note 43.

[50] Justice Sotomayor refers to both of these explanations. *See Bryant*, 131 S. Ct. at 1157–1158 n. 9.

[51] *Id.* at 1161 n.12.

[52] *Id.* at 1157.

that seems to lay the foundation for applying an exception to confrontation without any requirement that it arise out of an emergency situation:

> But there may be other circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out of court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause.[53]

Justice Sotomayor thus broadens and essentially rewrites the "exception" to confrontation so that it no longer appears to be limited to emergency situations, apparently expanding it to apply to all situations involving questioning for a non-testimonial, that is, a non-prosecutorial, purpose. She also drives home again a point that she had made earlier in the opinion, that is, that inquiring into the reliability of the statement is part of the confrontation exception determination, and she reiterates the proposition that a hearsay statement which otherwise falls under the exception to confrontation requirements must still pass through the admissibility filter of the particular jurisdiction's rules of evidence.[54]

Elsewhere in the Court's opinion, other features to be applied in making the confrontation inquiry are highlighted. First, an "objective" approach should be used to make an assessment of the primary purpose of the interrogation:[55]

> The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but

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[53] *Id.* at 1155.

[54] Of course, in reinserting the notion of reliability into confrontation doctrine, Justice Sotomayor's opinion also serves to revive the familiar question of how the constitutional reliability notion interfaces with the hearsay rules and their underlying reliability foundation. *See supra* notes 27, 37.

[55] *Bryant*, 131 S. Ct. at 1160 ("In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and the interrogators provide objective evidence of the primary purpose of the interrogation.") (citation omitted). Justice Sotomayor also indicated that one must look to the contents of both the questions and answers. *Id.*

> rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.[56]

Second, the Court indicated that the degree of formality in the encounter between the police and victim is a relevant consideration:

> Formality is not the sole touchstone of our primary purpose inquiry because, although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to "establish or prove past events potentially relevant to later criminal prosecution," . . . informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent.[57]

Finally, the *Bryant* opinion calls attention to elements in the notion of "emergency," not previously highlighted, that the nature and extent of the threat and degree of danger posed by the emergency are to be taken into account:

> We now face a new context: a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim. Thus, we confront for the first time circumstances in which the "ongoing emergency" . . . extends beyond an initial victim to a potential threat to the responding police and the public at large . . . . The Michigan Supreme Court also did not appreciate that the duration and scope of an emergency may depend in part on the type of weapon employed.[58]

Why should the nature and extent of the threat and degree of danger posed by the emergency be relevant? Insofar as the questions relating to the emergency are deemed not for the purpose of acquiring evidence for a

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[56] *Id.* In rejecting a subjective approach, Justice Sotomayor noted that the police often have mixed motives and the victim whose statements are in issue may also have mixed motives. *See id.*

[57] *Id.*

[58] *Id.* at 1158.

prosecution, it is useful to know how widespread the emergency is and how long it is likely to continue. Only armed with that knowledge can one be certain whether the questioning is indeed for the purpose of dealing with the emergency.

3. A Proposed Extension of the *Davis* and *Bryant* Exception to a Terrorism Interrogation Context

Does the "exception" to confrontation, as developed in *Bryant*, have a potential value for application in terrorism cases?

Bryant introduces the notion that to avoid the Confrontation Clause's normally applicable requirement that statements be tested "in the crucible of cross examination,"[59] they must have some reliability. *Bryant* also clarifies the objective nature of the inquiry: "[T]he purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred,"[60] and the fact that the formality of the interrogation is relevant.

Finally, *Bryant* also makes clear that the nature of the emergency depends on the type and scope of the danger, that even in a non-emergency situation, if the primary purpose of the questioning is not to gather evidence for prosecution, a sufficiently reliable statement obtained thereby may be admissible under the Confrontation Clause. Both of these factors lend themselves to being utilized in extending the exception to a terrorism/intelligence context. Indeed, one wonders whether Justice Sotomayor, in opening the door to application of an exception to confrontation even in non-emergency situations, may have been laying the groundwork for the use of such an exception in terrorism investigation contexts.

In *Keith*, the Court recognized the difference between intelligence-gathering and seeking evidence to prosecute in a terrorism context.[61] *Bryant* lays the foundation for a parallel development, relying on the different constitutional doctrine at issue. Namely, it can be argued that where the primary purpose of an interrogation is to obtain intelligence about future

[59] *Id.* at 1157.
[60] *Id.* at 1156.
[61] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 322 (1972).

terrorism acts or planning, the interrogation qualifies as not gathering evidence for purposes of prosecution. Accordingly, it would be non-testimonial under confrontation doctrine. Adding a requirement of an emergency/public safety element to buttress the terrorism investigation purpose strengthens the case for not imposing a Confrontation Clause barrier to admissibility.

Nevertheless, statements obtained for intelligence purposes and in emergency situations are unlikely to be admitted very often if offered against third persons.[62] Answers obtained from extended questioning of detained terrorists would ordinarily not meet hearsay reliability standards, and the setting would also usually run head-on into the formality objection articulated by the *Bryant* Court. Perhaps because the typical terrorism-intelligence situation often presents a much greater emergency than the *Davis* or *Bryant* facts, it outweighs the formality concern. It would involve a danger to human life many orders of magnitude greater and, sometimes, involve elements of imminence and immediacy. Recall that under *Bryant*, the Court will consider the type and scope of the danger. But it seems unlikely that the need for relative trustworthiness of the statements in a Confrontation Clause context would also give way because of the kind of danger to human life involved in the typical terrorism intelligence interrogation situation.

Of course, in some terrorism intelligence situations, the particular circumstances might satisfy the reliability concern. Suppose, for example, a terrorist suspect in the field is lying wounded and is questioned there by the police or the FBI.[63] The legal aspects of the situation could be essentially similar to the circumstances in *Bryant* where the Court majority found sufficient trustworthiness. Or suppose that in an in-custody interrogation in the stationhouse or its equivalent, the terrorism suspect makes a statement that otherwise meets hearsay and reliability standards. Or finally, suppose a court were inclined to find sufficient reliability attaching to a terrorist suspect's answers to questioning based on the rationale, admittedly problematic when invoked in a Confrontation Clause context, utilized by

[62] Of course, introducing interrogation statements as an admission or confession against the person who made the statement does not run afoul of the Confrontation Clause.

[63] *Cf.* United States v. Khalil, 214 F.3d 111 (2d Cir. 2000) (co-defendant questioned in hospital without first being given *Miranda* warning). *Khalil* is further discussed *infra* note 81.

the Fourth Circuit in *Moussaoui*.[64] While these hypothetical cases do sometimes arise in real life, in an ordinary terrorism intelligence interrogation, the reliability requirement is not likely to be met. Whether reliability concerns are applied as part of confrontation doctrine, or by using the jurisdiction's hearsay rules in addition to confrontation doctrine analysis, the reliability/trustworthiness requirement will often, but not always, present an obstacle to introducing into evidence against a terrorist defendant statements obtained in the course of interrogating other terrorist suspects.

This Confrontation Clause analysis also helps to illuminate many issues relating to our subject: (1) recognition of the different reasons why an emergency requirement may be relevant; (2) consideration of the significance of the type and extent of the danger posed in an emergency situation; and (3) the reliance by the Court on the core notion that interrogations, where the primary purpose is not to gather evidence for prosecution, are to be treated differently for constitutional purposes. Shedding additional light on these issues helps to broaden and strengthen the foundation for applying related exceptions in other areas of constitutional protection.

D. New York v. Quarles: An Exception to the Miranda Rules and Interrogation for Terrorism Intelligence Purposes

1. The *Quarles* Public Safety Exception

A public safety/exigency justification for dispensing with the warnings normally required under *Miranda v. Arizona*[65] was established in *New York v. Quarles*[66]: The Supreme Court recognized an exception to the *Miranda* requirements in a situation where there was immediate urgency for the police to learn where the suspect, apprehended shortly after allegedly perpetrating a rape, had gotten rid of a gun. The police pursued and apprehended the suspect in a supermarket; without first giving him Miranda warnings, they asked him where the gun was (the suspect was wearing an empty shoulder holster), and the suspect responded, "The gun is over there," nodding toward some empty cartons.[67]

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[64] *See supra* Part I.B.
[65] 384 U.S. 436 (1966).
[66] New York v. Quarles, 467 U.S. 649 (1984).
[67] *Id.* at 674–75.

The Court noted that there was an exigent circumstances exception to the warrant requirement of the Fourth Amendment and concluded that there were limited circumstances where a similar exception to *Miranda* should be recognized, stating, "[T]he Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness."[68] The Court further wrote, "[W]e believe 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*."[69]

In explaining what was meant by the "prophylactic rules" characterization, then-Justice William Rehnquist noted that the *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[70] He went on:

> [I]f the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the Miranda majority was willing to bear that cost. Here, had

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[68] *Id.* at 653 n.3 (citing Fisher v. United States, 425 U.S. 391, 400 (1976)).

[69] *Quarles*, 467 U.S. at 653. The Court also indicated "that the availability of that exception does not depend upon the motivation of the individual officers involved." *Id.* at 656. Justice Thurgood Marshall, in a dissent joined by Justices Brennan and Stevens, drew an even sharper contrast between the Fourth and Fifth Amendment. Marshall characterized the latter as an "absolute prohibition" and argued that "[t]he policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety. The majority should not be permitted to elude the Amendment's absolute prohibition simply by calculating special costs that arise when the public's safety is at issue." *Id.* at 688 (Marshall, J., dissenting). egarding the absoluteness of the Fifth Amendment prohibition, see *infra* note 141.
Justice Marshall also argued that the police could adequately protect the public safety by asking questions without providing *Miranda* warnings as long as the resulting statements were not admitted against the defendant. *Quarles*, 467 U.S. at 686 (Marshall, J., dissenting) ("[T]he public's safety can be perfectly well protected without abridging the Fifth Amendment. . . . All the Fifth Amendment forbids is the introduction of coerced statements at trial."); *see also infra* note 88.

[70] *Quarles*, 467 U.S. at 654 (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

> Miranda warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, *the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.*[71]

As in *Davis*, there was also language in *Quarles* that can be viewed as narrowing and limiting the decision to immediately exigent circumstances.[72]

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[71] *Id.* at 657. In a footnote, the Court also addressed an argument made by the dissent:

> The dissent curiously takes us to task for endorsing the introduction of coerced self-incriminating statements in criminal prosecutions, and for sanctioning *sub silentio* criminal prosecutions based on compelled self-incriminating statements. Of course our decision today does nothing of the kind. As the *Miranda* Court itself recognized, the failure to provide *Miranda* warnings in and out of itself does not render a confession involuntary, and respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards. Today we merely reject the only argument that respondent has raised to support the exclusion of his statement, that the statement must be *presumed* compelled because of Officer Kraft's failure to read him his *Miranda* warnings.

Id. at 655 n.5 (citations omitted) (internal marks omitted). *See infra* Part II.B.2 for a discussion of the significance of the Court's statement that, upon remand, the respondent was free to argue that his statement was coerced under traditional due process standards.

[72] The *Quarles* Court stated:

> In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our *Miranda* holding . . . . As we have in other contexts, we recognize here the importance of a workable rule "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." But as we have pointed out, we believe that the exception which we recognize today lessens the necessity of that on-the-scene balancing process. The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public

In *Quarles*, again as in *Davis* and *Bryant*, the same public safety circumstance that established exigency could be viewed as indicating that the purpose of the questions asked was not to obtain evidence for prosecution. The Court did not highlight this issue in *Quarles* but clearly referred to it, using the same term, "testimonial," that it used in *Crawford v. Washington*.[73] That the questioning had some purpose other than to obtain evidence for prosecution undoubtedly added to the public safety/social cost justification and made it more comfortable for the Justices to carve out an exception to the Fifth Amendment's privilege against self-incrimination.[74]

Unlike in *Keith*, *Davis*, and *Bryant*, the *Quarles* exception is not rooted in the specific terms of the relevant constitutional formula. Rather, the Court was at pains to say that a constitutional rule was not involved and cast its decision in terms that identified the potential social cost of not recognizing an exception, namely, the danger to human life if the *Miranda* warnings deterred the suspect from telling the police where the gun was hidden.[75]

> and questions designed solely to elicit testimonial evidence from a suspect.

467 U.S. at 658 (quoting Dunaway v. New York, 442 U.S. 200, 213–214 (1979)).

[73] *See Quarles*, 467 U.S.. at 659.

[74] *See infra* note 141 (discussing the required records exception to the privilege against self-incrimination).

[75] *Quarles* has been at issue in literally hundreds of cases in the lower courts. *See, e.g.*, Jim Weller, *The Legacy of* Quarles*: A Summary of the Public Safety Exception to Miranda in the Federal Courts*, 49 BAYLOR L. REV. 1107 (1997); Elizabeth Williams, Annotation, *What Circumstances Fall Within Public Safety Exception to General Requirement, Pursuant to or as Aid in Enforcement of Federal Constitution's Fifth Amendment Privilege Against Self-Incrimination, to Give Miranda Warnings Before Conducting Custodial Interrogation—post-*Quarles *Cases*, 142 A.L.R. FED. 229 (1997). Most of the cases are of the "where is the gun?" variety, though the resolution of the immediate danger issue varies depending on the particular facts. *See, e.g.*, United States v. Estrada, 430 F.3d 606 (2d Cir. 2005); United States v. Reyes, 353 F.3d 148 (2d Cir. 2003); United States v. Duncan, 308 Fed. Appx. 601 (3d Cir. 2009). Reyes surveys the treatment of Quarles in the different circuits. For a somewhat different type of factual context, see *Howard v. Garvin*, 844 F. Supp 173, 175 (S.D.N.Y. 1994) ("Police were confronted with an alleged robbery at a social club involving holding of hostagesmany patrons were inside the club and a large crowd was outside. . . . . Witnesses at the scene identified petitioner as a perpetrator. Police did not ask petitioner questions relating to what petitioner had done, but focused on who

2. Extending the *Quarles* Public Safety Exception to Terrorism Interrogations

a. Grounds for the Extension

Given a weighing-of-social-cost approach, a case can readily be made for extending the *Quarles* exception to the interrogation of terrorism suspects where the purpose of the interrogation is to seek intelligence in order to prevent terrorist acts. Thus, it can be argued that in a terrorism intelligence interrogation, the social cost of giving the *Miranda* warnings, if as a result the suspects were thereby "deterred from responding,"[76] might be "something more,"[77] significantly more, than "merely the failure to obtain evidence useful in convicting."[78] Unlike the constitutional doctrines previously reviewed, the rationale for taking account of the emergency in *Quarles* is not that it somehow bears on the application of the terms of the particular constitutional formula, but rather that it is directly a measure of the social cost being weighed—specifically, the magnitude of the danger to human life.

Similar to the cases establishing the other exceptions, an argument against extending *Quarles* to a terrorism-intelligence context might emphasize how the facts in *Quarles* were quite different from a terrorism-exigency situation, and the exception was described in *Quarles* as "narrow."[79] The case involved a spur-of-the-moment brief questioning motivated by public safety in a still-active crime scene where the Court held that *Miranda* warnings were not required.[80] There was immediacy to the situation—act now, or incur the risk of the weapon being used by someone who might do serious harm or cause death.

Accordingly, relying on *Quarles* might be somewhat problematic where a terrorism-intelligence interrogation occurred over a period of time,

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else was present who might threaten police or others at the scene . . . . Petitioner replied that there were two more men that were with him inside the club.").

[76] *Quarles*, 467 U.S. at 657.

[77] *Id.* at 657.

[78] *Id.*

[79] *Id.* at 658.

[80] *Id.* at 659–60.

even if there were some indication of the impending danger of a significant terrorism event. The circumstances of such an interrogation, arguably, might be viewed as more similar to ordinary station house interrogations of persons in custody. Even in such circumstances, however, the case can be made for extending the exigent circumstance exception and applying a more specialized version of a public safety exception to *Miranda*. The key social cost element to be weighed in such a situation would be the potential magnitude of the danger to human life inherent in terrorist acts. Where the purpose of the interrogation is to obtain intelligence regarding ongoing terrorist planning or possible terrorist acts in the near future, depending on the particular facts, the risk may not appear to have the same kind of immediacy as in *Quarles*, but the magnitude of the potential risk to human lives may be huge, given specific information that al Qaeda or similar groups are actively seeking to perpetrate major terrorism events. If the measure of exigency is a product of the magnitude of the danger, the likelihood of its occurring and the immediacy of the danger multiplied together, the exigency in the terrorism intelligence situation can readily be viewed as much greater than that which was relied upon by the Supreme Court in *Quarles*.

b. The FBI Guidelines

The extension of *Quarles* to terrorism intelligence has already begun. A Second Circuit panel in *United States v. Odeh*[81] expressly acknowledged in dictum the possibility of a terrorism intelligence application of the *Quarles* exception: "When exigent circumstances compel an un-warned interrogation in order to protect the public, *Miranda* would not impair the government's ability to obtain that information."[82] In March 2011, it was revealed that FBI guidelines, adopted six months earlier, provide that in terrorism cases, public safety concerns or obtaining terrorism intelligence might warrant interrogation without giving *Miranda* warnings.[83] These

[81] 552 F. 3d 177 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2765 (2009); *see also* United States v. Khalil, 214 F.3d 111, 115 (2d Cir. 2000) (where suspect's statements were admitted even though *Miranda* warnings were not given due to the officers' concern "that the [suspect's] bomb would explode before they could disarm it").

[82] *Odeh*, 552 F.3d at 203 n.19.

[83] The guidelines were promulgated on October 21, 2010. Their existence was revealed by the New York Times in December 2010, but it was not until March 24, 2011, that the Wall Street Journal was able to examine a copy. *See* Federal Bureau of Investigation, *Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Arrested Inside the United States*, N.Y. TIMES, October 21, 2010, *available at*

guidelines have not yet been tested in the courts and only represent the judgment of the Department of Justice as to how the *Quarles* exception can be applied in a terrorism-interrogation context.

The guidelines are artfully crafted to cover two categories of unwarned interrogations. First, "without advising the arrestee of his *Miranda* rights," FBI agents could ask "any and all questions" prompted by public safety concerns. The guidelines then indicate that "although all relevant public safety questions have been asked," agents are authorized to continue with "unwarned interrogation . . . [where it is] necessary to collect valuable and timely intelligence not related to any immediate threat, and . . . [where] the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation." It is also provided that normally, approval of higher authority must be sought before proceeding with this non-public-safety interrogation to obtain terrorism intelligence.

In a terrorism context, public safety interrogation also relates to terrorism intelligence. The guidelines make this clear by stating that:

> [S]uch [public safety] interrogation might include, for example, questions about possible impending or coordinated terrorist attacks; the location, nature, and threat posed by weapons that might post [sic] an imminent danger to the public; and the identities, locations, and activities or intentions of accomplices who may be plotting additional imminent attacks.[84]

The guidelines thus authorize two kinds of terrorism interrogation without first giving *Miranda* warnings: (1) interrogation in a danger to public safety terrorism intelligence context; and (2) interrogation to obtain terrorism intelligence where there is no immediate threat to public safety. Based on the citations to authority in the guidelines memo, the implication seems to be that, in the former case, the statements of the suspect will be admissible under *Quarles*, and in the latter context, no Fifth Amendment violation will

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http://www.nytimes.com/2011/03/25/us/25miranda-text.html [hereinafter *F.B.I Memorandum*]; Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES, March 24, 2011, at A17.

[84] F.B.I. Memorandum, *supra* note 83.

have occurred as a result of the questioning; such a violation only occurs when the statements made are introduced into evidence.[85] The assumption appears to be that in the non-public safety, interrogation-to-obtain-intelligence context, the information obtained will not be usable in court.

Where the non-public safety interrogation is a continuation of an interrogation began as a public safety interrogation, the issue of admissibility of the statements obtained will likely turn on the point at which the interrogation stopped being for public safety purposes. How broadly the public safety exception will apply will turn on where the courts draw the line between a "public safety interrogation" and an "intelligence interrogation" not related to any immediate threat.[86] These guidelines thus reflect a specific Department of Justice implementation of the type of application of the *Quarles* exception in a terrorism interrogation context proposed in this Article.

The primary effect of the guidelines is to instruct agents that the *Quarles* public safety exception is usable in a terrorism interrogation context, but they also suggest that agents may go beyond the exception and engage in terrorism intelligence interrogation even in the absence of public safety concerns, implying that it will be at a cost of not being able to introduce the statements obtained into evidence in a subsequent prosecution. We assume that federal agents are aware of the latter possibility even without an instruction to this effect; however, this part of the instruction seems to be intended to encourage agents to continue questioning, without worrying very much about whether public safety concerns are still involved, leaving it to the courts later to sort through the facts and draw the line of admissibility.[87]

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[85] *Id.* (citing Chavez v. Martinez, 538 U.S. 760, 769 (2003)).

[86] F.B.I. Memorandum, *supra* note 83.

[87] In future cases that will require similar line drawing by the courts—in terrorism interrogations that begin with, but eventually lose, a public safety justification—will the courts' interpretation of the public safety element be influenced by the need to address the loss of the public safety justification? If so, will the resulting interpretation broaden the notion of what constitutes the public safety, or narrow it? Moreover, is there a possibility that the courts may be inclined to extend the exception beyond the definition of public safety articulated in *Quarles*—where there is an "immediate threat "—to encompass situations where the primary purpose of the interrogation is not to obtain information for use in subsequent prosecutions, but rather, to obtain prospective intelligence that could

c. Issues not Addressed by the FBI Guidelines

The guidelines—and this Article—do not address a number of related issues that may be presented in connection with an interrogation conducted without having given *Miranda* warnings. Where there is a concern about public safety, can federal agents continue with the interrogation if the suspect, without having been informed of his/her right to have counsel present, is anyway aware of that right and asks to have counsel provided? If the suspect is not given *Miranda* warnings, declines to speak, and requests that the interrogation cease? Or suppose the suspect has been given *Miranda* warnings and asks for counsel;[88] Does the public safety exception permit the interrogation to continue, while delaying the bringing of the suspect before a magistrate, for a longer period than is otherwise mandated in an ordinary criminal case? Finally, during the course of the public safety interrogation, should the usual rules regarding coerced confessions apply? This question is the subject of Part II.[89]

To sum up: The four exceptions which have been described in Part I, *Keith*, *Moussaoui*, *Davis* and *Bryant*, and *Quarles*, have in common a fact situation that is subject to the characterization that governmental agents were gathering evidence not for the purpose of prosecution but rather for some other purpose. In three of the four situations, that aspect has important legal significance under the applicable constitutional formula. In two instances, *Keith* and *Moussaoui*, the purpose was to obtain terrorist

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prevent future terrorist acts? In drafting the guidelines in this way, perhaps that is what the drafters are hoping for.

[88] The issue of whether the public safety exception applies to a situation where the arrestee asks to see his lawyer first arose in *United States v. DeSantis*, 870 F.2d 536 (9th Cir. 1989). There the Court held that "[the *Quarles*] reasoning would apply with equal force to the procedural safeguards established when the accused asks for the aid of counsel . . . . The inspectors lawfully were entitled to question [the defendant] for the purpose of securing their safety, even after he had asserted his desire to speak with counsel." *Id.* at 541. *See also* United States v. Mobley, 40 F.3d 688 (4th Cir. 1994) (accord). For commentary on this issue, see M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L .REV. 241 (2002); M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003).

[89] The additional questions listed in the text, as well as others, present important issues that will need to be addressed by judges, scholars, and possibly legislators. The remaining portion of this Article is limited to the possible application of a public safety/terrorism intelligence exception in the coerced confession arena, a possibility that presents a sufficient array of complex issues to warrant, by itself, extended treatment.

intelligence with a view to preventing future terrorist acts. In the other cases, *Davis* and *Bryant*, and *Quarles*, the government agent's questions occurred under circumstances where time was of the essence: the primary purpose was deemed to be to protect the public safety in an exigent set of circumstances. *Keith* and *Moussaoui*, by contrast, did not involve an express exigency element.

Whereas *Keith* and *Moussaoui* directly apply to terrorism-intelligence contexts, invocation of either *Davis* and *Bryant* or *Quarles* in terrorism exigency contexts requires some extension of the application of the public safety/exigency principles underlying those decisions. Further, in *Keith*, *Moussaoui*, and *Davis* and *Bryant*, the so-called "exceptions"[90] are each rooted in an application of the doctrinal formula of the relevant constitutional rule. Each relies generally on the fact that the purpose of the investigation was not to obtain evidence for prosecution: *Keith* suggests that terrorism prevention surveillance requires application of different standards under the Fourth Amendment's reasonableness approach; *Moussaoui* applies the notion of reliability as it is relevant in the compulsory process-hearsay context; *Davis* and *Bryant* apply the testimonial/non-testimonial distinction along with the notion of emergency for purposes of the confrontation clause; *Bryant* also reintroduces the notion of trustworthiness as relevant to confrontation, relying on the notion that the emergency element ensures relative trustworthiness. Indeed, *Bryant* even goes a step further in suggesting that an emergency may not be a requirement if the reliability of the statements is otherwise assured. Given the *Bryant* opinion, the reliability element presents a serious obstacle to the application of a terrorism exception to confrontation requirements, unless circumstances are present that support the relative reliability of the statements at issue.

Quarles, however, is different. The Court minimized the extent to which a constitutional rule was involved.[91] *Miranda* was characterized as a prophylactic rule, demeaning its constitutional status, in order to be able to

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[90] *See supra* note 4.

[91] In this aspect, the majority opinion in *Quarles* may have found common cause with Justice Marshall's dissenting opinion, which characterized the Fifth Amendment as an "absolute prohibition." 467 U.S. at 688 (Marshall, J., dissenting). Note that Justice Scalia in *Dickerson v. United States*, 530 U.S. 428 (2000), discussed *infra* at note 135, also characterized the privilege against self-incrimination as an absolute.

apply an approach involving a weighing of social costs.[92] The social cost determination should take into account the emergency circumstances and the nature of the danger. The use of social cost analysis, including the nature and extent of the danger, lends itself to recognition of an exception and, arguably, makes it easy to extend the exception to the terrorism intelligence interrogation field.[93]

Review of the exceptions to each of these four different constitutional admissibility rules also helps to lay a foundation and provide useful background for consideration of a proposal for a related kind of exception in an important fifth area of constitutional criminal procedure: coerced confessions. Recognition of an exception to coerced confession rules would make an inroad on an area of constitutional law that has hardly changed at the Supreme Court level in more than a half century. It would be a significant and novel development that raises many new issues and complexities. Part II is devoted to an in-depth discussion of this proposal.

II Assessing a Proposal for a Cabined Exception to Coerced Confession/Involuntariness Rules

A. Justifying Extension of a Quarles*-Type Exception to Coerced Confession Doctrine*

1. The Basic Justification

Examination of the exceptions discussed in Part I, especially the *Quarles* doctrine, leads one to think about the possibility of developing an exception for a closely-related arena of constitutional admissibility—traditional coerced confessions rules. There has not, as yet, been even a whiff of a judicial move in that direction.[94] The case for developing some

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[92] For detailed discussion of the issues raised by the way in which the Fifth Amendment and *Miranda* are characterized, see *infra* Part II.B.2.

[93] Whether *Quarles* established an exception to a constitutional rule is discussed in Part II.

[94] The four exceptions, which have been judicially recognized, are all of fairly recent vintage. By contrast, the exigent circumstance/alternative purpose exception to constitutional rules is an area of the law still under development. Accordingly, it is possible that the development of a public safety-coerced confession exception has just not happened yet. The more likely explanation, however, is that the courts perceive coerced confession law to be different from the other four exceptions. They may, for example, view constitutional rules in this area as protecting against a more intrusive kind of trespass upon individual liberty, and thus, as ill-suited for recognition of any exception.

type of limited exception to normal coerced confession rules can be derived from the same type of considerations that led to recognition of the *Quarles* exception to the *Miranda* warning requirements.

Thus, if the police are in a public safety/exigent circumstance situation and are able therefore to ask the suspect questions without giving *Miranda* warnings, and do not obtain the needed information, should they be able to go a step further and use interrogation techniques including some that may violate prevailing coerced confession constitutional norms, in order to be able to obtain the relevant information quickly? The fact that in *Quarles* itself the Court did not proceed down this path and that the doctrinal rationale relied upon in *Quarles* does not lend itself to this type of proposal will need to be addressed.[95]

Apart from doctrinal concerns, upon an initial consideration of the issue, if the necessity is similar to that relied upon in *Quarles*, in principle, it would seem that the same social cost argument, which in *Quarles* was endorsed by a majority of the Court, might be advanced to support recognition of such an exception. Further, if a *Quarles*-type exception can be invoked where there is a danger to life, to increase the chances of obtaining the needed information about the location of a weapon, the same reasons that support an extension of *Quarles* to a terrorism interrogation might be used to support an extension of a limited exception to coerced confession doctrine in an appropriate terrorism context.[96] The fact that the terrorism questioning does not occur on the scene in a spur of the moment fashion is a concern, but one that may be outweighed by the sheer magnitude of the social cost of not being able to obtain the information and the possibility that a great many lives may be lost.[97]

Undoubtedly, the opportunity to carve out a *Quarles*-like exception for coerced confessions has arisen in the cases. Indeed, every time, the *Quarles* exception has been successfully invoked by the prosecution, the further issue of whether the statements were obtained voluntarily or through coercions normally are addressed. *See, e.g.*, United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989) (determining that when public safety concerns warranted asking the questions without adhering to the usual protocols, "the focus should be on whether, under the circumstances, the statements were obtained coercively."). *See also Quarles*, 467 U.S. at 684 (indicating that the defendant on remand could raise the issue of coercion).

[95] *See supra* Part I.D.1, and *infra* Part II.B.2.

[96] *See supra* Part I.D.2.

[97] *See supra* Part I.D.1.

Thus, apart from concerns about the relevant constitutional doctrines and the extent of such an exception, there seems to be no reason why, as a general proposition, a public safety/intelligence purpose exception should be recognized for the *Miranda* warnings requirement and not also be provided for the coerced confession arena: Both involve the privilege against self-incrimination and both are aimed at protecting against abusive police interrogation practices. If a social cost approach warrants an extension in the Miranda arena of confession doctrines, why should it not also be applied in the coerced confession arena, which is obviously closely-related and even intertwined? There are, of course, some differences between the two doctrinal areas: Whether and how these differences may bear on the question of extending an exception to the coerced confession arena suggests an important set of issues which are examined in the next Subsection.

2. A Cabined Exception

This Article consistently refers to a limited or "cabined" exception in characterizing the type of exception to coerced confession rules that might be developed. This is a brand new notion, not found generally in existing constitutional doctrine or in the scholarly literature. What is meant by a "cabined exception," as that phase is utilized here, and what is the justification for limiting or cabining the exception rather than recognizing an exception without limitation? The expression, "cabined", is meant to signify not extending all the way up the ladder of police interrogation methods, but only applying to a limited, non-extreme set of interrogation methods, albeit methods that under current law might lead to a determination of involuntariness.

A cabined exception is one that would, under the appropriate circumstances, authorize the FBI, or other police agencies, to use interrogation methods that exceed existing constitutional limits as established by the Supreme Court,[98] but only up to a point, and not to the point where the methods used are extreme.[99] The following paragraphs explain the reasoning that supports this conclusion and, further along in this Article additional content is put into the notion of interrogation methods that are not extreme.

[98] *See infra* Part II.B (discussing the uncertainty regarding the current state of the law).
[99] While this Article uses the term "extreme" here, it attempts to flesh out this characterization a bit more below.

An approach that weighs the potential social cost of not getting the sought-after information against the intrusion suffered by the individual subjected to an interrogation process that is permitted to exceed normally-applicable constitutional standards might be argued to permit even torture or other extreme methods, if the danger of catastrophic consequences is great enough. This is one of the ways in which there is an obvious distinction between the carving-out of an exception to the requirements of *Miranda* and doing the same in regard to coerced confession rules. Application of the exception to *Miranda* developed in *Quarles* simply means that in certain limited circumstances the Miranda warnings need not be given. If an exception is to be applied to the coerced confession area, however, by definition, it would permit some police intrusion on a person being questioned that under current law is not permitted, and the further issue would need to be faced: How far does it extend?

If there are limits to be imposed, they are not derivable from social cost analysis. Rather, the limits flow from basic ethical values of our society, from the fact that the use of extreme methods of interrogation—namely, torture and similarly unacceptable methods of questioning—violates basic moral precepts, which should trump any assessment of social cost.[100]

A possible explanation why such an exception has thus far not been judicially recognized is that it may appear to carry with it an implication that, given urgent circumstances, such as concern about a major terrorism event, it may be seen as opening the door to the use of torture, or at least leading to further debate about our willingness to use torture in cases of extreme exigency. Stating the matter somewhat differently, if the purpose of an interrogation is to obtain information to prevent a risk of very great harm to public safety, the justification on one side of the scale will be very strong. In the case of the other exceptions discussed in this Article, including *Quarles*, such justification trumps concerns about interfering with the type of constitutional interests protected by the particular rule in question. Where, however, the constitutional interests being protected reflect concern about individuals being subjected to extreme physical abuse and related kinds of abhorrent practices, the balance shifts. Is it worth sacrificing our deep-

[100] It can be argued, for example, that unless we retain and apply precepts of basic morality, the essential nature of our society will be lost and not worth preserving.

seated revulsion against torture and other extremely cruel methods in these kinds of circumstances?[101]

The answer is no. Torture should not be viewed as a lawful interrogation method in any circumstance.[102] It is a morally repugnant interrogation practice. A society that gives lawful status to torture, no matter what the circumstances, severs an important link between its legal system and the moral foundation upon which it rests, and, inevitably, forfeits recognition among the nations of the world as a society with a just and moral legal system. Accordingly, the exception under consideration here should not be allowed to open the door to the possibility of legalizing, on public safety grounds, the use of torture or other extreme police interrogation methods.[103]

Notably, however, the coerced confession doctrine developed by the Supreme Court appears to sweep more broadly[104] than simply outlawing extreme and abhorrent interrogation techniques.[105] It appears to bar the

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[101] *See generally*, CHARLES FRIED & GREGORY FRIED, BECAUSE IT IS WRONG: TORTURE, PRIVACY AND PRESIDENTIAL POWER IN THE AGE OF TERROR (2010).

[102] *See infra* note 122 (commenting on Professor Alan Dershowitz's torture warrant proposal and Judge Richard Posner's rejoinder).

[103] Interrogation methods used by government agents and surrogates in the aftermath of 9/11 focused considerable attention on the issue of torture. Viewed from the overall perspective of traditional U.S. coerced confession doctrine under the Constitution, this focus seems somewhat unusual. To be sure, the development of modern coerced confession doctrine under the Constitution began with the facts and decision in *Brown v. Mississippi*, 297 U.S. 278 (1936), which did involve extreme police interrogation methods that may fairly be described as having involved torture. In many of the subsequent cases reviewed by the Supreme Court, however, the police interrogation misbehaviors that warranted the application of an exclusionary rule were not so extreme as to fall into the category of torture.

[104] There is some disagreement among scholars about how far existing law extends in outlawing certain police interrogation techniques. Examining existing Supreme Court coerced confession case law, though dated, leads to one set of conclusions. There is more recent lower court case law that arguably supports a different conclusion, but this body of law is far from unanimous. The subject is further discussed below in Part II.B.3.b.

[105] *See, e.g.*, Spano v. New York, 360 U.S. 315, 320–321 (1959) ("[A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made."). Once the Court began to declare some confessions obtained through non-violent methods involuntary, its decisions became more controversial and tended further to divide the

police from using a number of techniques and practices in ordinary crime cases that do not approach an "extremely cruel" standard, or even a cruel method. The use of such non-extreme techniques to ferret out information, while violating standards of how we want the police to behave in ordinary criminal cases, should not be prohibited when there is exigency and the interrogation is directed to obtaining intelligence to prevent terrorism actions. Of course, existing constitutional principles would need to be modified to achieve this result.

To repeat, the argument in support of a cabined exception is that given the nature and degree of the police intrusion and the harm done to the individuals being interrogated, the use of such non-extreme techniques does not warrant a rule of exclusion where there would be a significant risk to public safety if relevant information is not obtained quickly. Additional justification for recognizing an exception can be found in the fact that the purpose of the questions is not to obtain evidence for prosecution but rather to obtain intelligence useful in preventing future terrorist acts. Hence, the proposed exception is consistent with the other exceptions discussed in Part I.

3. A Need for an Exception?

The question of whether there is a need for an exception to coerced confession rules has two aspects. First, does the FBI need additional

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Court. See Justice Jackson, for example, dissenting in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944):

> Actual or threatened violence have no place in eliciting truth . . . .
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> When, however, we consider a confession obtained by questioning, even if persistent and prolonged, we are in a different field. Interrogation per se is not, while violence per se is, an outlaw. Questioning is an indispensable instrumentality of justice. It may be abused, of course, … but the principles by which we may adjudge when it passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply. And they call for a more responsible and cautious exercise of our office. For we may err on the side of hostility to violence without doing injury to legitimate prosecution of crime; we cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.

Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting).

flexibility and certainty regarding the interrogation methods that it may lawfully use in order to accomplish its mission? Second, does the existing coerced confession doctrine make unlawful non-extreme techniques?

Giving FBI agents additional flexibility regarding the interrogation methods that may be used in terrorism investigations undoubtedly will make it easier for them to do their job successfully. Also, decreasing the uncertainty that attaches regarding the applicable law of coerced confessions should reduce the incidence of inadmissible confessions.[106] While there is no empirical evidence to support these two observations, they are reasonable and matters of common sense.

The second issue, that is, the extent to which existing coerced confession doctrine makes non-extreme interrogation techniques unlawful, requires more detailed discussion.

a. Illustrative pre-Miranda Coerced Confession Case Law in the Supreme Court Involving Non-Extreme Interrogation Methods

The following are some examples of a broader category of interrogation techniques which police often use, and which in particular Supreme Court cases, pre-Miranda, significantly contributed to the conclusion that the statements obtained were involuntary, or at least served to raise an involuntariness issue. These cases, though dated, have not been overruled or repudiated by the Supreme Court, and, insofar as Supreme Court doctrine is concerned, still seem to be good precedential authority[107]:

1. In *Rogers v. Richmond*,[108] a sheriff threatened to bring the suspect's arthritic wife in for questioning.
2. In *Lynumn v. Illinois*,[109] the police told defendant that unless she cooperated, she would get ten years, state financial aid for her children would be cut off, and the children would be taken from her.

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[106] *See infra*, text accompanying note 122.
[107] *See generally* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195 (1996).
[108] 365 U.S. 534 (1961) (holding that the state courts had applied the wrong constitutional standard to determine whether the defendant's confession, which was obtained after the police threatened to bring in his wife, was involuntary). *See also* Harris v. South Carolina, 338 U.S. 68, 70–72 (1949) (reversing a conviction where police threatened to arrest the defendant's mother for unrelated charges unless the defendant confessed).
[109] 372 U.S. 528 (1963).

3. In *Haynes v. Washington*,[110] in connection with a lengthy interrogation, the police refused to permit defendant to call his wife and told him that he would not be able to call her until he gave a statement.
4. In *Spano v. New York*,[111] police persistently questioned defendant at length. Additionally, they used a young police officer and childhood friend of defendant who was instructed to falsely tell him that defendant got the young officer in trouble by calling him and put the officer at risk of losing his job. These lies were repeated by the false friend in four different questioning sessions until the defendant confessed.
5. In *Leyra v. Denno*,[112] a psychiatrist used suggestive questioning, threats, and promises of leniency while interrogating the defendant, who believed that he was talking to a regular physician for treatment of his sinus condition. The Court characterized the psychiatrist's methods:

> Time and time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given.[113]

The use of these kinds of police interrogation methods may and should properly be a ground for excluding statements in ordinary criminal cases because they involve the use of deception[114] and various kinds of psychological pressures and stratagems. But when the stakes are much

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[110] 373 U.S. 503 (1963).
[111] 360 U.S. 315 (1959).
[112] 347 U.S. 556 (1954).
[113] *Id.* at 559–560.
[114] *But see* Frazier v. Cupp, 394 U.S. 731 (1969) (police lie was deemed to be insufficient on its own to render the statement coerced). Note that the literature addressing the costs of lying by the police generally leans against the practice. *See, e.g.*, Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police* 76 OR. L. REV. 775 (1997); Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275 (2007).

higher, constitutional doctrine should not prevent their use in order to obtain vital information regarding future terrorist activity.

b. Is the Pre-Miranda Supreme Court Case Law Still Good Law? Uncertainty in the Law and Why the Status of Current Law is Not a Barrier to the Development of the Exception.

Some scholars have opined that lower courts have adopted a less restrictive voluntariness test post-*Miranda*, than is reflected in the older Supreme Court decisions described above.[115] And meanwhile, the Supreme Court itself has rarely addressed coerced confession issues directly.[116] If the

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[115] *See* Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1220 (2001) ("'[S]ilence at the top' has undoubtedly led some lower courts to believe that claims of involuntary confessions need not be treated seriously.") *See also* Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612–13 (2006); Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 745–746 (1992*). Cf.* Welsh S. White, *What is an Involuntary Confession Now?* 50 RUTGERS L. REV. 2001, 2009 (1998).

[116] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 400 (1978) (holding a confession to be involuntary because, *inter alia*, "the statements at issue were . . . the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness."). *See also* Arizona v. Fulminante, 499 U.S. 279, 287 (1991) ("Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient."). Note that the Court also referred to numerous additional facts in support of its finding that the Fulminante confession was coerced. Fulminante, 499 U.S. 279 at 286 n.2. Frazier v. Cupp, 394 U.S. 731 (1969) is not inconsistent with the observations made in the text. The main thrust of the decision was that the admission of the suspect's confession made after he had, among other things, said, "I think I had better get a lawyer before I talk anymore," did not violate *Escobedo v. Illinois*, 378 U.S 478 (1964) (Miranda was not applicable to the case). But the Court also ruled that where the suspect had been partially warned of his rights, the questioning was of short duration, and the suspect was a mature individual of normal intelligence, "[t]he fact that the police misrepresented the statements that [his suspected accomplice had made admitting the crime] is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible." Frazier, 394 U.S. 731 at 739.

There have also been other Supreme Court decisions post-Miranda, which, while not involving rulings on the coerced confession issue, did involve circumstances which could have been deemed relevant to a coercion issue, and the Court did not reach out to declare the confession inadmissible based on these circumstances. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 291 (1980) (where police obtained a statement after police warning that there were a lot of handicapped children running around in the area and "God forbid one of them might find a weapon with shells and they might hurt themselves"); Brewer v. Williams, 430 U.S. 387 (1977); Mathiason v. Oregon, 429 U.S. 492, 495–96 (1977) (noting, but finding irrelevant, in a Miranda-custodial interrogation context, that officer made a false statement about having discovered Mathiason's fingerprints at the scene). It would be

case law has indeed evolved so that the type of non-extreme interrogation techniques condemned in the pre-*Miranda* Supreme Court case law would now be legally permissible, arguably there would be less need for a cabined exception to coerced confession doctrine in terrorism cases. For a variety of reasons, however, the development of a cabined exception is needed.[117]

First, as noted, the Supreme Court has not spoken clearly on the relevant issues since the pre-*Miranda* coerced confession decisions.[118] Second, the coerced confession doctrine applied by the lower courts in the last few decades is far from clear or consistent. There are surely a significant

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a stretch to read cases like Innis and Mathiason as signposts suggesting that the Court has departed from the pre-Miranda case law previously described and, instead, has come to adopt a more indulgent view of what the police may do. The fact is that the pre-Miranda group of cases remains unrepudiated in any subsequent Supreme Court law.

There are various explanations for the change in the pattern of Supreme Court review of confessions cases. The Supreme Court instead has been focusing attention on the application and interpretation of the Miranda requirements, not surprising in the context. Perhaps the Court's failure to review more of the cases involving allegedly coerced confessions may be allowing the lower courts to loosen up restrictions on what is deemed coercion in obtaining confessions, but that also depends on what the lower courts are actually deciding. *See* Seidman, *supra* note 115, at 745–746. Further, the very existence of and adherence to the Miranda requirements is likely to have had an impact on the lower courts' treatment of coerced confession issues. Professor White has argued that "lower courts conflate the test for determining a valid Miranda waiver with the test for determining a voluntary confession because the tests are so similar [thereby] minimizing or eliminating the scrutiny applied to post-waiver interrogation practices." Welsh White, Miranda's *Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1219–1220 (2001). To the extent that the mixing of the issues of *Miranda*/waiver and the voluntariness of the confession is the explanation for less restrictive applications of the coerced confession rule in the lower courts post-Miranda, the less restrictive cases are not especially relevant in our discussion of a cabined exception approach. In the cabined exception setting, we assume *Miranda* warnings will not be given; no waiver will be involved. In such settings, there are unlikely to be concerns about a mixing up of the issues of the voluntariness of the waiver and voluntariness of the confession.

[117] The Article focuses here only on the coerced confession doctrine and police interrogation practices in situations of exigency. As mentioned toward the end of Part I.D.2.c, there are other specific rules applicable to interrogations, such as the right to cut off questioning and the right to have counsel present. While this Article does not specifically address these rules, it generally assumes that the same justification for a modification of, or exception to, the normally applicable rules discussed in the text might apply to these other specific rules. To the extent that they present different issues or concerns, they warrant treatment in another article.

[118] *See supra* note 115.

number of post-*Miranda* decisions adopting rather broad applications of the voluntariness doctrine,[119] but there are also judicial interpretations that are quite consistent with the approach reflected in the more restrictive pre-*Miranda* Supreme Court case law.[120] However, many lower court decisions support the broader approach—at best one can conclude only that the law of coerced confessions at this level is uncertain.[121]

Beginning from the premise that existing coerced confession doctrine, derived from pre-*Miranda* case law, declares many non-extreme interrogation techniques to be coercive under the Constitution, there is a need for the cabined exception. Similarly, if one's premise is that current law on the subject is somewhat contradictory and therefore uncertain, there are strong reasons to support adoption of the exception: (1) if the constitutional doctrine is restrictive, there is a need to give the FBI more flexibility in interrogating terrorism suspects in exigent circumstances; (2) if the doctrine is uncertain, there is a need to give the FBI both more flexibility *and* clarity as to which methods are permissible. The FBI needs reasonably clear guidance regarding coerced confession rules and permissible interrogation techniques, and, properly formulated, the cabined exception approach can provide that type of guidance.

The need for such an exception is also greater today because FBI agents following the FBI guidelines, in exigent circumstances, may now proceed to interrogate terrorism suspects without Miranda warnings, and

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[119] *See, e.g.*, Purvis v. Dugger, 932 F.2d 1413 (11th Cir. 1991), *cited as an example in* Seidman, *supra* note 116, at 746 n.241 (1992).

[120] *See, e.g.*, United States v. Pichardo, No. 92 CR. 354 (RPP), 1992 WL 249964, at *8–*10 (S.D.N.Y. Sept. 22, 1992) (concluding that suspect's statements were coerced in part because the interrogator made misleading statements about the lie detector test and because the suspect was unfamiliar with the U.S. justice system); United States v. Anderson, 929 F.2d 96, 98 (2d Cir. 1991) (concluding that suspect's statements were coerced where "the agent told defendant that if he asked for a lawyer it would permanently preclude him from cooperating with the police"); United States v. Tingle, 658 F.2d 1332, 1335–37 (9th Cir. 1981) (concluding that suspect's statements were coerced where suspect had been warned by interrogating police that a lengthy prison term could be imposed, that whether or not she cooperated would be communicated to prosecutor, and that she might not see her two-year-old child for some time).

[121] The FBI certainly thinks so. *See* FEDERAL BUREAU OF INVESTIGATION, LEGAL HANDBOOK FOR SPECIAL AGENTS § 7-2.2 (2003), *available at* http://fbiexpert.com/FBI_Manuals/Legal_Handbook_for_Special_Agents/FBI_Agents_Legal_Handbook.pdf.

the issue of whether coercion was used in the interrogation is likely to arise more frequently.[122]

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[122] While thus far there has been no judicial recognition of an exigent circumstances exception to coerced confession doctrine, some scholars have proposed exceptions. *See, e.g.*, William T. Pizzi, T*he Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 603–06 (1985) (arguing for *Quarles* application to coerced confession doctrine in life-saving contexts). While he made a general acknowledgement that there should be some limits on the methods the police can use in such situations, he did not delve into the question of what they might be, merely stating: "Obviously, there are limits on the conduct of the police in their treatment of suspects even in an emergency situation where life is at stake. In determining those limits, however, the traditional scope of police conduct permitted in a purely investigative context is only a starting point." *Id.* at 606.

In writing about the type of emergency circumstance where the police are trying to obtain information in order to save the life of a kidnap victim, Professor Pizzi criticized Justice Marshall's suggested resolution of the conflict between Fifth Amendment requirements and the need to save a life, as expressed in his *Quarles* dissent (viz., conduct the interrogation without giving the Miranda warnings but treat the statements obtained thereby as inadmissible against the defendant):

> This approach to the Constitution and the privilege treats the victim very badly. By placing sound and reasonable measures aimed at saving the life of the victim in conflict with what should be a concurrent police objective, enforcement of the criminal law, the victim's life now turns on a choice that an officer will have to make between pressing forward in an effort to save the victim while possibly jeopardizing the prosecution of the kidnapper and trying to balance both concerns and thereby increasing the risk to the victim's life.

Id. at 587–88.

A different approach has been proposed by Professor Dershowitz who has famously argued for a so-called judge-authorized torture warrant in a ticking bomb situation. *See* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y. L. SCH. L. REV. 275, 277 (2004). The proposal under discussion in this Article differs markedly from the Dershowitz terrorism warrant procedure. Whereas the Dershowitz approach requires the most extreme exigency—the ticking bomb scenario—the instant proposal would not require exigent circumstances as extreme. More importantly, the proposal being discussed would permit the use of non-extreme police methods only at the lower end of the spectrum of police interrogation methods and without the need to seek judicial authorization. Applying a judicial authorization procedure in connection with the cabined exception proposal would introduce into confessions law a procedure borrowed from the search and seizure area, without adequate justification, given time constraints inherent in exigency situations and the nature of the additional authority that would be exercised. Judge Posner responds to the Dershowitz proposal by noting that "[i]f rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Better to leave in place the formal and customary

B. Do the Doctrinal Underpinnings of the Law of Coerced Confessions Pose an Obstacle to a Cabined Exception?

1. Introduction

Can a cabined exception fit within existing constitutional doctrine, especially within self-incrimination doctrine?[123] The Supreme Court at various times has used either the self-incrimination privilege or the Due Process Clause, or both, as the basis for its coerced confession and compelled-statement rulings. Judicial statements have vacillated on whether, in dealing with allegedly coerced or compelled statements, the relevant constitutional provision is the privilege against self-incrimination or the Due Process Clause. In *Dickerson v. United States*,[124] Chief Justice Rehnquist stated, "our cases recognized two constitutional bases for the requirement that a confession be voluntary . . . the Fifth Amendment . . . and the Due Process Clause of the Fourteenth Amendment."[125] For present purposes, however, it

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prohibitions, but with the understanding that they will not be enforced in extreme circumstances." Richard A. Posner, *The Best Offense*, THE NEW REPUBLIC, Sept. 2, 2002, at 28. The Posner approach can, however, be articulated differently and with a different rationale. Better to leave in place the customary prohibitions, which make torture a crime, thus warning the police that if they torture they open themselves up to criminal penalties. Despite this warning, in the most extreme emergency, the police are highly likely to disregard the warning and do what they think is necessary, taking the risk of criminal sanctions later. This approach helps to ensure that the narrowest possible interpretation will be given to the emergency that leads the police to engage in torture; that is, where the police instinct for self-preservation overcomes the fear of criminal sanctions that might be imposed later. Compare the previous academic discussions with the judicial unwillingness to accord legal justification or excuse to cannibalism in the famous lifeboat case of *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884). See Edward H. Levi, *The Natural Law, Precedent and Thurman Arnold*, 24 VA. L. REV. 587, 595-96 (1938) ("And the perfection of the *[Dudley and Stephens*] opinion lies in the fact that henceforth the world and England might know that such conduct was reprehensible for Englishmen, but at the same time the actual result was the Englishmen who committed the crime went free because all other Englishmen would have acted just as they had.") (iIn *Dudley and Stephens*, the death sentence imposed by the court was commuted by the Crown to six months imprisonment).

[123] One can imagine devoting an entire article to this issue that examines in depth the nature and origins of the privilege against self-incrimination and the Due Process Clause. For the purposes of this Article, however, it is sufficient to examine the implications of a few relevant and relatively recent decisions of the Supreme Court.

[124] 530 U.S. 428 (2000).

[125] *Id.* at 433 (citing Bram v. United States, 168 U.S. 532, 542 (1897)).

is unnecessary to resolve questions about the choice between the clauses.[126] There is a need to examine the extent to which existing constitutional doctrine and the constitutional formula under either heading poses an obstacle to the development of the cabined exception proposal.

2. The Privilege Against Self-Incrimination

a. The Language of the Privilege

The privilege against self-incrimination does not appear to have much linguistic flexibility. It lacks, for example, a malleable term like the Fourth Amendment's "unreasonable searches and seizures,"[127] into which the Court may read an exception as in *Camara* and in *Keith*. Conceivably, the Court could have interpreted "incrimination" narrowly, but that option has been foreclosed by history: Courts have interpreted the notion of "statements which tend to incriminate" expansively.[128] The privilege against self-incrimination also lacks the type of constitutional interpretive history that supports an exigency or alternative-purpose-of-the-interrogation gloss.[129] Accordingly, if a new exception to the requirements of the privilege is to be recognized, it is likely to be accomplished in the same way that an exception was added to the privilege in *Quarles*, as a gloss added on top of the constitutional requirements. In this instance, the Court would most likely weigh the social cost of the potential loss of information that the

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[126] Scholars have variously characterized the relationship between the privilege against self-incrimination and the due process voluntariness approach. For example, Professor Godsey writes: "[T]he Court in Miranda seemingly abandoned the voluntariness rubric and recognized that the correct test for confession admissibility under the Bill of Rights is compulsion as the text of the self-incrimination clause dictates." Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-incrimination*, 93 CALIF. L. REV. 465, 501 (2005). "In adhering to the voluntariness test, the Court has betrayed the text, historical origins, and policies of the self-incrimination clause." *Id.* at 540. Professor Schulhofer states the relationship differently: "Absent a valid waiver, the Fifth Amendment prohibits the use of a compelled statement against the person compelled, even where the compelled statement is not involuntary within the meaning of the Fourteenth Amendment. The premise that compulsion means voluntariness is simply incoherent." Stephen J. Schulhofer, Miranda, Dickerson, a*nd the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 946 (2001).

[127] U.S. CONST. art. IV.

[128] *See, e.g.*, Charles Hobson, *The Minimalist Privilege*, 1 N.Y.U. J.L. & LIBERTY 712 (2005) (discussing the expansion of the privilege against self-incrimination).

[129] *But see supra* note 103 (describing existing exceptions to the privilege against self-incrimination).

suspect might otherwise provide against the nature of the intrusion on the individual caused by the interrogation techniques.[130]

b. The Paradox of *New York v. Quarles*

Quarles appears to be the most directly applicable constitutional precedent to support an exception to the rule against compelled self-incrimination. Initially, *Quarles* appears to support an exception by establishing a public-safety exception to the *Miranda* requirements, and *Miranda* is based on the privilege against self-incrimination.[131] It is not a far leap from carving an exception to the warning requirements that are seen as a protection against coercion to developing an exception to the coercion doctrine itself, especially if the exception in question reflects a cabined approach.

Upon closer examination, however, *Quarles* recognized an exception to the *Miranda* warning requirements, yet paradoxically, also constitutes direct Supreme Court authority *against* applying a similar exception in the coerced confession area. First, as discussed in Part I, the *Quarles* Court treated *Miranda* as a prophylactic decision not of constitutional dimension. It can certainly be argued that the implication of the heavy reliance in *Quarles* on the prophylactic nature of the *Miranda* rules was that had *Quarles* relied on a constitutional rule, the Court could not have found an exception. Coerced confession doctrine does involve direct application of a constitutional provision: Either the privilege against self-incrimination or the Due Process Clause, or both. Accordingly, the heavy reliance by the Court in *Quarles* on the prophylactic nature of *Miranda* undermines the support that the *Quarles* might otherwise seem to provide.

The second reason *Quarles* could be a precedent against the extension of a public-safety exception to the coerced confession area is that by suggesting that the voluntariness of the suspect's statement might be raised on remand of the case, the Court impliedly rejected, or at least did not consider the possibility of applying, a public-safety exception for coerced confessions. Having decided that the failure to give the usual warnings in a public safety circumstance was not a violation of *Miranda*, the *Quarles* Court

[130] It may be thought that such an approach would run headlong into the notion that the privilege against self-incrimination is absolute and admits no exceptions. This potential conflict is addressed *infra* Part II.C.

[131] *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

wrote, "respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards."[132] Hence, while the urgency in this case was sufficient to negate the need for *Miranda* warnings, the Court apparently did not view the same exigency as having any impact on the application of the coerced confession doctrine.

Thus, in two different ways, the same decision that established an exigency exception with respect to *Miranda*'s warning requirements also impliedly rejected the application of a similar exception in the coerced confession context.

c. The Significance of Dickerson

The precedential effect of *Quarles* as a case that stands against the development of a public safety/terrorism intelligence exception to coerced confession rules was, however, largely negated by the Court's decision in *Dickerson v. United States*.[133] In addition to the clear statement in the text of the *Quarles* opinion that *Miranda* was a prophylactic decision not of constitutional dimension, there was a related sub-text in the majority opinion that Justice Marshall expressly stated in his dissent,[134] and that Justice Scalia stated in his *Dickerson* dissent[135]: The Fifth Amendment privilege against self-incrimination is absolute, that is, not subject to exceptions.

The Court in *Dickerson* can be viewed as having responded to both the textual and subtextual elements of *Quarles*. As to the textual element,

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[132] *Quarles*, 467 U.S. at 655, n.5.
[133] 530 U.S. 428 (2000).
[134] *See supra* note 69.
[135] *Dickerson*, 530 U.S. at 453 (Scalia, J., dissenting) ("[The Court in *Quarles*] explicitly acknowledged that if the Miranda warnings were an imperative of the Fifth Amendment itself, such an exigency exception would be impossible, since the Fifth Amendment's bar on compelled self-incrimination is absolute, and its 'strictures, unlike the Fourth's are not removed by showing reasonableness.'") (quoting *Quarles*, 467 U.S. at 653 n.3). Justice Scalia's reference here suggests that the *Quarles* majority "explicitly acknowledged that . . . the Fifth Amendment's bar on compelled self-incrimination is absolute." *Id.* But this is an overstatement. While the *Quarles* majority contrasted the strictures of the Fifth Amendment with those of the Fourth, insofar as the former "are not removed by showing reasonableness," *this* is not the same thing as declaring that the privilege against self-incrimination is an absolute. *Quarles*, 467 U.S. at 653 n.3. Justice Marshall's dissent in *Quarles* did, however, refer to the Fifth Amendment as an "absolute prohibition." *Id.* at 687 (Marshall, J., dissenting).

Chief Justice Rehnquist expressly stated "that Miranda is a constitutional decision,"[136] and that "Miranda announced a constitutional rule,"[137] thus seemingly re-characterizing his own statement in *Quarles* that the *Miranda* warnings were only "prophylactic."[138] The *Dickerson* majority also responded to the subtextual element—that the privilege against self-incrimination is absolute—when it stated "that no constitutional rule is immutable."[139] Moreover, despite these straightforward changes in the characterizations of *Miranda* and the nature of a constitutional rule, the *Dickerson* court did nothing to undermine *Quarles*'s status as a decision establishing a public-safety exception to Miranda's warning requirements. Rather, the *Dickerson* opinion was at pains to reaffirm the *Quarles* result by twice referring to that decision as setting forth an exception to Miranda.[140]

Putting together these several elements, it is fair to conclude that *Dickerson* makes clear that the privilege against self-incrimination is not an absolute and is subject to exceptions;[141] that *Miranda* is a constitutional rule

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[136] *Dickerson*, 530 U.S. at 438.
[137] *Id.* at 444.
[138] *Quarles*, 467 U.S. at 653.
[139] *Dickerson*, 530 U.S. at 441.
[140] *Id.* at 429, 437.
[141] It is argued in the text that the application of the privilege against self-incrimination may be subject to exceptions. Indeed, further authority is available if it is needed to support that proposition—since *Dickerson* may be viewed as somewhat suspect because it represents only one of the Court's most recent swings in self-incrimination jurisprudence, and the Court has had a tendency to swing back and forth *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010) ("In [*Miranda*], the Court adopted a set of prophylactic measures . . . .").

There is a well-established legal context where the Supreme Court has applied an approach that can be characterized as establishing an exception to the normal requirements of the privilege against self-incrimination. The Court has upheld requiring information to be provided by an individual even though her specific answers might tend to incriminate—under the required records exception to the privilege against self-incrimination. For example, in *California v. Byers*, 402 U.S. 424 (1971) the Court stated that: This case presents the narrow but important question of whether the constitutional privilege against compulsory self-incrimination is infringed by California's so-called 'hit and run' statute which requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. *Id.* at 425.

> [T]here is some possibility of prosecution-often a very real one-for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be 'a link in the chain' of evidence leading to prosecution and conviction. But under our holdings

based in the self-incrimination privilege;[142] and that the *Quarles* exception to *Miranda* is still good law.[143] Of course, none of these conclusions provide

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> the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.

Id. at 428.

> In all of these cases [where the Court had upheld application of the privilege to defeat the reporting requirement] the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities' and the privilege was applied only in 'an area permeated with criminal statutes"- not in "an essentially noncriminal and regulatory area of inquiry."

Id. at 430 (quoting Albertson v. SACB, 382 U.S. 70, 79 (1965)).

> Although the California Vehicle Code defines some criminal offenses, the statute is essentially regulatory, not criminal. The California Supreme Court noted that § 20002(a)(1) was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents . . . . [Section] (a)(1), like income tax laws, is directed at all persons-here all persons who drive automobiles in California . . . . Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.

Id. at 430–31.

While the doctrine applied in the required records area has little direct relevance to the carving out of an exception to the privilege for exigent circumstance/intelligence interrogations, the doctrine illustrates a legal context in which the courts have taken into account, inter alia, the justification for requiring an individual to answer questions.

In the required records context, for example, one of the factors taken into account is whether the information is sought in aid of a regulatory scheme. If the Court sees fit to recognize an exception to the privilege against self-incrimination grounded in the notion that the government was seeking terrorism intelligence, not evidence to prosecute, one can imagine that *California v. Byers*, a leading required records decision might be cited as a reference point: the justification for seeking the information in the required records cases is reminiscent of the doctrine of *Camara. See supra* note 20. It will be recalled that in *Keith*, *Camara* was an important precedent cited by the Court in support of its conclusion that different search and seizure standards might be applied where the government was seeking terrorism intelligence rather than prosecution information. Indeed, one might say that *Byers* may be to the privilege against self-incrimination as *Camara* was to the search and seizure warrant requirement. *See generally*, Bernard D. Meltzer, *Required Records, the McCarran Act and the Privilege against Self-incrimination*, 18 U. CHI. L. REV. 687 (1951); John H. Mansfield, *The Albertson Case: Conflict between the Privilege against Self-incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103; Stephen Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege against Self-incrimination* 53 U. CHI .L. REV. 6 (1986).

[142] Miranda v. Arizona, 384 U.S. 436, 476–77 (1966).

affirmative judicial authority for recognition of a cabined terrorism exception to the coerced confession doctrine, insofar as it is based on the privilege against self-incrimination. But the effect of Dickerson is largely to negate the possibility that Quarles might be viewed as a precedent against the development of the cabined exception proposal. Dickerson makes clear that there is no doctrinal impediment flowing from Quarles to recognition of an exception to coerced confession doctrine, insofar as it is based in the privilege against self-incrimination.

What about the fact that the Court in Quarles, having had the opportunity, failed to apply an exigency exception to the coerced confession issue? There are three reasons why this should not count significantly against adoption of the exception today. First, whether to apply an exception to coerced confession rules was not at issue in Quarles. Second, the Court addressed the matter only in a footnote. Third, without the benefit of an argument and analysis in support of a cabined exception, the Court would have been likely to conclude that recognition of an exigency exception would have implications for the subject of torture, a slippery slope down which the Court would have been unlikely to want to travel. All things

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[143] While it is clear that the *Quarles* exception survives *Dickerson*, the doctrinal puzzle remains: How do we reconcile the *Dickerson* decision with the line of cases treating *Miranda* as a prophylactic rule. For some scholars' views on how to resolve this puzzle, compare Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567 (2001) with George C. Thomas III, *Separated At Birth But Siblings Nonetheless: Miranda And The Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001). Professor Klein characterized how her approach differs from that of Professor Thomas:

> Professor George Thomas and I . . . reach the same general conclusions regarding both the justification of *Miranda* (it can be satisfactorily explained), and the fate of the pre- *Dickerson* exceptions to *Miranda* (they healthily survive). However, we reach these conclusions by radically different routes: Professor Thomas utilizes the malleable Due Process Clause, while I rely upon the flexibility of constitutional prophylactic rules.

Id. at 568. *See also* Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1076 (2001) ("[H]ad the Dickerson Court both followed my approach and been entirely frank, it might have admitted that Miranda's prophylactic rule post-Dickerson is different from the prophylactic rule originally created in Miranda."); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. REV. 100, 105 (1985).

considered, the failure in *Quarles* to mention the possibility of applying an exigency exception to coerced confessions should not be seen as an obstacle to recognition of such an exception.

3. Due Process as Applied to Coerced Confessions

a. In General

Like the privilege against self-incrimination, the Due Process Clause also seems to present no doctrinal barrier to the proposed exception. Indeed, one can derive limited support for such an exception from some Supreme Court Due Process Clause decisions. Like the standard of reasonableness in the Fourth Amendment, the due process formula contains the seeds of flexible application that should permit consideration of justifying circumstances established by exigency and a non-prosecution purpose for the interrogation.

Applying Fourteenth Amendment Due Process confessions doctrine, the Court has used a "totality of circumstances" test,[144] that "barred the use of confessions . . . which were produced by offensive [police] methods even though the reliability of the confession was not in question."[145] The courts have long considered in this area whether the police behavior in question violated accepted norms. Further, on a few occasions, in the course of the due process inquiry the question of whether the police did something wrong has led the courts to question whether the police methods were justified—that is, whether they had good reasons for what they did. Examination of whether the exigency of an impending terrorist event can legally justify the use of specific interrogation methods involves a similar type of weighing that might be implicated in the due process inquiry.

A few Supreme Court cases in the 1940s addressed whether the police were justified in departing from normal practice in the course of interrogating a suspect. Thus, for example, in *Ward v. Texas*,[146] after his arrest, the suspect was transported by the sheriff to a town in another county, 110 miles away.[147] Texas claimed that there was concern about a lynch mob forming and Ward was moved to ensure his safety, that is, there

[144] KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (12th ed. 2008).
[145] *Id.* at 544.
[146] 316 U.S. 547 (1942).
[147] *Id.* at 549.

was an exigent circumstance justifying the sheriff's action.[148] In response, Ward contended that he had been moved to prevent a local judge who was acting on his behalf from obtaining a writ of *habeas corpus* to free him, "and because they would be able to obtain the confession from him more easily in a strange place."[149] Rejecting the state's explanation, the Court first briefly noted that the sheriff did not follow legal removal procedures and "[i]n the second place the evidence of threatened mob violence [was] extremely vague and by no means adequately explain[ed] the course of the officers' activities."[150] *Ward* does not allow the claimed exigency to justify otherwise improper police conduct. Rather, its significance is that the Court considered the issue and weighed the factual circumstances relevant to its disposition and, in the end, rejected the state's claim on the ground that it was factually not well-founded.[151]

Similarly, in *Malinski v. New York*,[152] the suspect had been stripped naked upon his arrival at the stationhouse and kept that way for three hours until he was given back his underwear, shoes, socks, and a blanket in which to wrap himself and kept that way for another seven hours.[153] The claimed justification for stripping him was to examine him for bullet wounds, but the Court noted that he was kept naked for much longer than was required for that purpose.[154] And the Court rejected out of hand the "dubious" claim that the additional seven hours without allowing him to dress was to prevent him from escaping.[155] Once more, the Court weighed the claimed justifications for the particular police tactics, thin as they were, and found them wanting.[156]

These cases dealt only with a claim of justification for specific police actions, which were otherwise improper police behavior. Neither case involved a direct consideration of whether the standards of due process were met because the interrogation methods used by the police were warranted

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[148] *Id.* at 552.
[149] *Id.* at 553.
[150] *Id.*
[151] *Id.*
[152] 324 U.S. 401 (1945).
[153] *Id.* at 403.
[154] *Id.* at 405.
[155] *Id.*
[156] *See also* Chambers v. Florida, 309 U.S. 227, 240 (1940) (rejecting a more general claim of justification).

by exigent circumstances.[157] In assessing whether the police have behaved properly, the Court has not usually been faced with having to evaluate reasons for the interrogation other than to obtain evidence for purposes of prosecution.[158] In *Chavez v. Martinez,*[159] three Justices briefly addressed, in a due process-fourteenth amendment confessions context, the justification for police interrogation actions other than a purpose to obtain evidence for prosecution. The suspect, who had been shot by one police officer, was lying wounded in the hospital emergency room when he was questioned by another officer.[160] The suspect filed a § 1983 civil rights action against the officer who questioned him, alleging that the questioning violated his constitutional rights.[161] Justice Clarence Thomas, joined by Chief Justice Rehnquist and Justice Scalia stated:

> We are satisfied that Chavez's questioning did not violate Martinez's due process rights . . . . Moreover, the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.[162]

Justice Thomas recognized a purpose for the questioning distinct from the desire to determine whether the suspect had committed a crime—namely, to investigate whether there had been police misconduct. He also identifies a kind of exigency, that is, the need to obtain the evidence before the suspect might die. Justice Thomas viewed these elements as relevant, though perhaps only a makeweight, on the issue of whether the suspect's due process rights had been violated. The specifics of what this non-prosecution purpose and exigency justified were not made entirely clear—for example, allowing the police to persist in the questioning despite the fact that the suspect was in physical pain and mental anguish. The quoted sentence

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[157] In both *Ward* and *Malinkski*, however, the alleged police misbehavior arguably was relevant to the interrogations that took place. In *Ward*, it was alleged to have made it easier to obtain a confession "in a strange place." 316 U.S. at 553. While in *Malinkski*, leaving the suspect naked and then undressed for a long period could be viewed as a "softening up" process prior to interrogation.

[158] Justification concerns, for example, have also arisen in regard to the issueof whether the delay was necessary under the "without unnecessary delay" rubric.

[159] 538 U.S. 760 (2003).

[160] *Id.* at 764.

[161] *Id.* at 765.

[162] *Id.* at 774–775.

nevertheless is a taking into account, albeit by some members of the Court, and in a civil context,[163] of exigency and a non-prosecution purpose in applying coerced confession doctrine under the Due Process Clause.[164]

If under the due process rubric, an exigent circumstance (the risk that the suspect might soon die) justifies questioning practices beyond what would normally be permitted to determine whether a police officer had earlier engaged in misconduct, the door is ajar (for three Justices, at least) to the type of argument advanced here in support of a cabined exception. Thus, it can be argued that where a different kind of exigent circumstance (the risk that terrorist acts might soon be committed) and a different non-prosecution purpose (to gain terrorism intelligence) are both present, they should be weighed in the due process scale in determining the propriety of the government conduct—either through an express exception, or as the outcome of a due process balancing.

Of course, this Article does not contend that the case analysis developed under either the privilege against self-incrimination or the due process rubric, constitutes strong affirmative judicial precedent for recognition of a terrorism exception to confessions rules. But some of these precedents do provide limited support for such recognition and serve as a reasonably clear indication that such an exception is not foreclosed by doctrines applied by the Supreme Court in interpreting those two constitutional provisions.

b. Application of the Legal Concepts and Terms of the Doctrine

An obstacle to carving out an exception to the coerced confession or involuntariness doctrine might flow from the legal concepts and terms used by the Court in determining that confessions were obtained in violation of the Due Process Clause. Thus, if a confession would normally be ruled to be involuntary, or the product of a process whereby the will of the defendant was overborne, how could it be concluded that such a flawed confession

[163] Query whether it should make a difference that the context was not a criminal prosecution but a civil suit under 42 U.S.C. § 1983 (2006).

[164] It is not clear whether Justice Thomas was suggesting the application of an exception rather than the taking into account of the exigent circumstance as one of the factors to be weighed in applying the due process formula. Under either approach, the issue of the justification for the police action and the exigency would be relevant in determining whether the police acted lawfully.

should be deemed admissible simply because exigent circumstances or public safety concerns are present? In other words, does not the very language in which the Court typically casts its due process and involuntariness decisions stand against the recognition of the exception?

Either of two approaches can be used to respond to this contention. First, due process is flexible enough to account for public safety concerns and justification for the police to use certain interrogation methods. Second, the "involuntary," "coerced," "overborne will," and any similar terms are arguably legal terms of art that express certain legal conclusions. These are general terms that are applied to describe the result when certain types of prohibited police conduct have taken place. Sometimes, however, one needs to look behind the legal labels at the specific practices under scrutiny, and consider whether additional factors might also be taken into account in applying the labels. It would not be unheard of for the Court to read into those terms of art a modification of doctrine that would enable the incorporation of a public safety/terrorism intelligence exception into coerced confession doctrine.[165]

C. Other considerations supporting adoption of a cabined exception—makeweight factors

1. Will a Cabined Exception Capture Interrogation Practices that Many Courts Would Likely Approve on an Ad Hoc Basis?

In addition to the general exigency and social costs justification for developing a cabined exception (similar to that adopted or proposed for other areas of constitutional protection, as addressed in Part I), there is a

[165] In carving out a cabined exception, the Court would also be faced with the strong language used by some members of the Court regarding involuntary confessions, language that was sometimes used in cases involving a restrictive application of the coerced confession doctrine. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320–321 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . ."). Describing as "abhorrent to society" the type of practices in the cases described in the text at notes seems today to be somewhat stronger than warranted by the police methods being utilized, though labeling such practices as illegal and improper would seem to be appropriate. If an exception for use in terrorism and other significant public safety situations is to be carved out, it might thus declare as "not unlawful in the circumstances" categories of police conduct that members of the Court had once upon a time labeled "abhorrent."

danger of an insidious erosion of constitutional standards that the proposed exception may help to limit. Given the increasing number of terrorism cases being investigated and prosecuted, erosion of constitutional standards from this source[166] may be expected and may already be underway. Assume that current constitutional doctrine is applicable, and that a cabined exception has not been adopted. Assume further, an investigation of a person suspected of plotting to plant a bomb in a subway. In interrogating him, FBI agents do not use extreme physical methods of interrogation, but they do use psychological stratagems designed to encourage the suspect to reveal crucial specific information regarding the extent of the danger. Presumptively, the government agents in such situations are likely to push the envelope somewhat in their use of interrogation methods, both because of the strong desire to get useful information to prevent terrorist acts and the sincere hope of an indulgent judicial response. Assume that the agents are successful in obtaining the information. The individual is prosecuted, the suspect's statements are offered into evidence, and his counsel argues that the stratagems used violate current coerced confession doctrine. In such a case, possibly depending on the stratagems at issue, the district judge may be inclined to admit the evidence in order to avoid setting free a dangerous terrorist, even though in an ordinary criminal case the stratagems used might have resulted in the statements being held to be involuntary and inadmissible.[167]

This simple hypothetical illustrates a more general observation: In exigent circumstances, where terrorism is afoot and the police are in an investigatory mode, if no exception is recognized, many courts are likely to opt for an expansive interpretation of the relevant constitutional doctrines, to enable the police to carry on their investigation and prevent serious terrorist acts. Viewed against the backdrop of the Supreme Court decisions from the 1950's, decisions by many judges on coerced confession issues in terrorism cases would likely stretch the doctrine. Even in comparison with those lower court decisions that in ordinary crime cases have been more expansive than the earlier Supreme Court cases, some judges in terrorism cases would still be more permissive regarding interrogation methods that

[166] Ironically, the adoption of the exception may serve to limit the erosion of one type of constitutional standard, while it may create a risk of erosion of another such standard. *See infra* Part II.D.

[167] *But see* the discussion of the uncertainty regarding the current state of the law *infra* Part II.B.

can be used. Not all courts will do this, but many will. At a minimum, the result will be a loosening of constitutional doctrine by some, and an increasing number of conflicting judicial decisions. Such an erosion of constitutional principles will likely create confusion and conflict in coerced confession doctrine. Without the limiting framework of an express exception, the doctrine reflected in such decisions could even begin to bleed into ordinary criminal cases. By recognizing an express exception for certain non-extreme police interrogation methods—those that might violate constitutional standards applied in ordinary crime investigations—the courts will not find it necessary to stretch the applicable constitutional rules.

There is thus an important jurisprudential justification for carving out a cabined exception: It reflects a choice between two different methods for responding to the pressures felt by the judiciary because of the ongoing risk of terrorism events. Either allow the courts to deal with those pressures on an ad hoc basis insofar as they relate to police interrogation techniques, or recognize a categorical exception specifically designed to respond to those pressures. An express exception is a better method to prevent an erosion of constitutional interrogation standards.

2. The Reliability Factor: Reducing an Element in the Interrogation Process that Tends to Increase the Risk of Unreliable Statements

Because there is always a risk that statements obtained through interrogation may lack trustworthiness or reliability, whether or not as a result of the police methods used, the cabined exception should include a requirement that such interrogation statements must meet a trustworthiness and reliability threshold. Untrustworthy or unreliable statements should not be admitted under this exception. The possible unreliability of a suspect's statements made in response to interrogation may stem from one or more of several sources. There may be a question about the suspect's sincerity and propensity to lie or conceal information, for any of a variety of reasons: to protect against disclosing information about future plots; to avoid implicating himself; to avoid implicating or disclosing the whereabouts of others; or to avoid disclosing the location of terrorism-related materials, for example, explosives. Reliability concerns may also arise because of the suspect's infirmities, mental condition, or susceptibility to influence in the course of the interrogation. The actions of the questioner and the methods of interrogation can also affect the reliability of the suspect's responses. The interrogating officer can have a great deal of influence on the substance of the suspect's responses to questions through the questions asked, the

interrogating methods and stratagems used, and other factors.[168] Even the use of ordinary methods of interrogation can affect the reliability of the responses.

Where the questioning officer is trying to obtain a confession to use in prosecuting the suspect, the questions asked and the techniques used will all be directed toward that goal. While the interrogator is also concerned about reliability, where the primary purpose is to obtain incriminating statements, namely a confession or admissions, for use in prosecution, that purpose is likely to dominate. Where, however, the sole or primary purpose of the interrogator is to obtain intelligence to prevent terrorism crimes, the interrogator's dominant motive will be to obtain correct information that can be used by agents in the field to prevent acts of terrorism.[169] Where the interrogator has such a purpose, it does not ensure that the responses obtained from the suspect will be reliable, but it does remove a particular source of unreliability,[170] namely, the influence of the interrogator's methods and questions where the interrogator is trying to obtain incriminating information. This reduction in the risk of unreliability—where the purpose of the interrogation is to obtain intelligence useful to prevent terrorist acts—may be a makeweight factor supportive of the adoption of the proposed exception.

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[168] Of course, the most extreme way to influence statements is to use torture, which essentially makes them unreliable. *See, e.g.*, Richard A. Serrano, *U.S. Revives Guantanamo Tribunal; Saudi Is Charged*, LOS ANGELES TIMES, April 21, 2011, *available at* http://articles.latimes.com/2011/apr/21/nation/la-na-cole-bomber-20110421 (reporting that a suspect said he would "'invent' stories, even saying Bin Laden had a nuclear bomb" to stop interrogators from waterboarding him).

[169] *But see supra* Part I.B.2.

[170] Compare and contrast the somewhat related argument made by the Fourth Circuit in the *Moussaoui* case discussed in Part I.B.2 *supra*. The court there tried to make the case for a "strong" reliability theory, arguing that the profound interest of the interrogators in obtaining and reporting accurate information provides sufficient indicia of reliability, but the case that was made was in fact relatively weak. The analysis in the text articulates the case for a different "weak" reliability theory—that is, removing a source of unreliability—which, of course, does not guarantee reliability. Also to be compared and contrasted is the reliability concern underlying the *Bryant* opinion, *supra* Part I.C.2. In the confrontation context, much stronger guarantees of reliability are required, which Justice Sotomayor finds in classic hearsay exception considerations. Note that these arise from the characteristics, conditions, and circumstances of the person being interrogated and not from the motivation of the interrogators.

D. Counter Considerations: Is a Cabined Exception to Coerced Confession Rules Likely to Lead to an Erosion of Constitutional Standards?

1. Introduction

A general objection to the development of a new exception, such as the one under consideration, is that it will inevitably be a precedent for other applications, and numerous and expanding applications of the exception will undermine the relevant constitutional protection.[171] More specifically, such erosion could take different forms. It might involve extension beyond terrorism into other crime categories, and erosion could conceivably occur through expansive interpretation of the terms in which the exception is cast.

2. The Risk that a Terrorism-Based Exception Will be Extended to Other Crimes or Criminal Areas

Inevitably, it will be argued that if a cabined exception to coerced confession doctrine is recognized for terrorism interrogations,[172] it should also be recognized for interrogations relating to other types of serious crimes—for example, organized crime cases or large scale drug ring.

The case for limiting the cabined exception to serious terrorism investigations is strong and principled. The difference between each of the instances of "ordinary" criminality and the terrorism category is that the latter will generally pose a threat not just to a handful of people but to hundreds and maybe even thousands, as in the horrors of 9/11. As a general matter, it is hard to see how organized crime or drug rings present the same kind and magnitude of direct risk to human life as a single serious terrorism event. True, viewed cumulatively, the impact on human life of organized crime or drug offenses is very large,[173] but viewed as single

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[171] Compare the somewhat different erosion argument arising from a failure to develop a cabined exception, *supra* Part II.D.

[172] It is important to note that it is contemplated that the exception will apply to interrogations relating to terrorism investigations and not be cast in terms of the kinds of crimes that will be prosecuted. The nature of the crimes charged in the indictment will not be relevant in determining whether the exception is applicable.

[173] Perhaps an argument can be made that a great many people are becoming addicted by illicit drugs and there is urgency in the need to apprehend the leaders, but as bad as this circumstance is, it does not compare to the magnitude of the danger to the use of a weapon of mass destruction in a large urban area.

instances and more generally, terrorism creates risks of enormous losses to human life and a threat to our way of life and the government itself, which thus far in this country mafia gangs and drug dealers have not presented.[174] In the modern world, terrorism is a *sui generis* category of crime that justifies special treatment.[175]

3. Extension of a Cabined Exception for Coerced Confession Rules to Public Safety Situations Where Human Life is at Risk?

The judicially-recognized exceptions to confrontation and *Miranda* requirements, as described in Part I, are not linked to the kinds of crimes under investigation, but rather based on specific circumstances that reflect, in the particular case, an imminent risk to human life. If a cabined exception to coerced confession rules is to be recognized in terrorism cases, should the exception also be applied, irrespective of the type of matter under investigation, to situations where there is specific evidence that human life is imminently at risk, for example, where the exception is invoked to apprehend a serial killer likely to kill within 24 hours? Stating the issue more generally, in addition to recognition of a categorical exception for terrorism interrogations, are there grounds for adopting a cabined exception to coerced confession rules in urgent individual public safety situations comparable to those covered by the judicially-crafted exceptions to confrontation and *Miranda*, discussed in Part I?

Recognition of such an exception to coerced confession doctrine would involve a judgment that obtaining information that, for example,

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[174] One can imagine a type of non-terrorism criminality that might be grounds for extending this exception to another area. For example, in Mexico today, drug cartels are murdering people at will, fomenting internecine warfare and posing a basic threat to the rule of law in the Mexican society, especially in those areas of the country where they appear to be more effective than the government. When organized and rampant criminality threatens a government's effective control of its own territory, it begins to acquire some attributes of terrorism, although it still lacks the potential to kill thousands of victims in a single event. Were this type of criminality ever to occur in this country, there would be time enough to think about the extension of the cabined exception to other substantive areas of the law.

[175] Note that this exception would also be limited to cases where the primary purpose of the interrogation was not to obtain evidence to prosecute and there was sufficient exigency. In the nature of terrorism prevention, the incidence of exigency situations involving significant risk to human life is likely to be high, much higher than in connection with crimes like drug offenses or organized crime situations.

could lead to recovery of a kidnap victim alive outweighs the intrusion on normally-protected liberty that a cabined exception permits. But would not recognition of a cabined exception in such cases conflict with the previously discussed conclusion that only a risk of the occurrence of a crime that may involve the loss of hundreds or thousands of lives can justify application of the exception to terrorism interrogations? The answer is no.

As discussed in the previous Section, beyond terrorism, there is no principled line between offenses. Thus, extension of a categorical exception to other entire categories of crime would involve an expanded application that would undermine the constitutional principles at issue. Because of this factor, the categorical exception should be delimited to the only category of criminal investigation that poses a risk of catastrophic loss of life. Further, while many imminent terrorist events will involve a risk of a major loss of human life, application of this categorical exception should not require a showing in the individual case of the risk of loss of life..

Extension of the exception to instances involving a specific individualized showing of human-life-imminently-at-risk, will not expand application of the exception to anywhere near the extent that expansion, for example, to drug or organized crime would present. Application to the human-life-at-risk category is inherently limited by the fact that, in each individual instance, specific and imminent life-threatening factual circumstances would need to be shown to warrant application of the exception.

Express recognition of such a limited exception would be consistent with the precedents from the other areas of constitutional admissibility rules and would not lend itself to an undue erosion of constitutional principles any more than did the recognition of such exceptions in *Quarles* and *Davis/Bryant*. It also would not establish a precedent for other kinds of extensions of a cabined exception to coerced confession doctrine.[176]

[176] But if exigency is required in applying the exception in terrorism cases and exigency is involved in regard to saving human life, is the terrorism exception really needed? Would not the exigency/saving human life principle swallow the terrorism exception? Once again, the answer is no. The terrorism exception would apply to investigations involving imminent terrorism events; it is a categorical exception based on the type of investigation, where a showing of the imminence of a terrorism event is sufficient simply because in many such cases there will be a risk of large scale loss of human life; in the terrorism context, a specific

4. The Risk of a General Weakening of the Protections Afforded by the Coerced Confession Doctrine

It can be argued that any exception to existing coerced confession doctrine may be an opening wedge for a general narrowing or overturning of existing doctrinal protections. The concern is that if an exception is established and lines are drawn reflecting permissible conduct by the police in exigent circumstances or other exceptions, this could lead to a judicial watering down of what is ruled to be legally permissible, even absent exigent circumstances, in ordinary criminal cases.[177] By the same token, if the police are permitted to engage in certain types of conduct in exigent circumstances and in a certain category of investigation, there is a concern that it could lead the police themselves to begin to apply those same standards of conduct absent exigency and in other categories of investigation. While these are not frivolous concerns, if the lines are clearly enough drawn, and if the exception is properly interpreted and administered by the judiciary, and the police are properly trained, the possibility of such informal erosion and "mission creep" can be largely forestalled. Recognition and implementation of the type of exception described herein need not lead to a general weakening of coerced confession doctrine.

5. The Risk of Erosion Through Expansive Interpretation of the Terms of the Exception

The risk of erosion through expansive interpretation of the terms of the exception depends both on how the terms of the exception are cast and the way in which the judiciary handles issues of interpretation and application. Part II.E provides some preliminary thoughts on the categories and terms that might be used. Ultimately, it will be up to the federal judiciary to ensure that as a result of adopting a cabined exception approach, erosion of constitutional coerced confession doctrine does not occur through judicial interpretation.

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showing of that kind of risk in the individual case would not be required. In the exigency/risk of loss of human life cases, a specific showing in the particular case of risk to human life justifies application of the exception.

[177] Compare the argument made *supra*, in Part II.C.1 regarding the likelihood that the courts would, in ad hoc fashion, begin to favor the government on these issues and that these decisions might begin to influence the handling of issues in ordinary criminal cases.

E. Preliminary Thoughts About How a Cabined Exception May be Implemented and the Terms in Which the Exception Might be Delineated

1. Is Legislation Needed or Appropriate for the Development of a Cabined Exception?

One can imagine that initial recognition of a cabined exception might come through a judicial holding or a dictum. The other exigency exceptions were all initiated in this way. It would be desirable, however, at an early point, for the proposal to be detailed in legislative form. This is more likely to occur if some courts first register support for this type of exception. Judicial support for extension of special standards for search warrants in domestic terrorism cases, for example, was first expressed in *Keith*.[178] Acting partially on that suggestion, Congress legislated special rules for foreign intelligence matters in the Foreign Intelligence Surveillance Act (FISA).[179] This does not necessarily mean that Congress should be the first to act after some judicial support surfaces. The politics of Congress may make it difficult to get legislation on this subject through the legislative process. A legislative formulation of the terms of the exception could also be accomplished through formal regulations or an executive order, or through informal policy or guidelines prepared by the Department of Justice or another government department or agency.

Action by the Executive Branch, through informal policy or guidelines, could be the preferred route after a judicial expression of support for the subject. The FBI guidelines relating to a terrorism-related exception to the *Miranda* rules provide a useful model.[180] Similar internal guidelines might be developed regarding a cabined exception to the coerced confession doctrine. On occasion, Congress follows up on such executive branch action, fleshing out the details and providing a stronger legal statement for consideration by the courts.[181] Ultimately, the courts will determine whether

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[178] United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297, 322 (1972).

[179] Foreign Intelligence Surveillance Act of 1978 50 U.S.C. §§ 1801–1871 (2006).

[180] Action promulgating the FBI Guidelines was preceded by *Quarles*, *Khalil*, and by the dictum in In re Terrorist Bombings of U.S. Embassies in East Africa (Odeh), 552 F. 3d 177, n.6 (2d Cir. 2008).

[181] Compare, for example, how, in connection with the subject of continuing detention of detainees at Guantanamo Bay, the Obama administration issued an Executive Order providing for procedures and standards to be applied in a periodic review process of each detainee's status. *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). Congress then followed up with provisions in the National Defense Authorization Act

what has been promulgated in legislative form is consistent with constitutional requirements. Thus, one can envisage a process of implementation of a cabined exception that involves actions by all three branches of the government.

2. The General Scope of the Exception, its Basic Elements, and the Purpose of the Interrogation

Some ideas about how the exception might be delineated are set forth in this Section. These ideas are intended to be preliminary. While particular terms of coverage are suggested, *the identification of the issues to be addressed is more important than the particular substantive suggestions that are made here.* Assuming a legislative approach is used, as suggested, the legislative language will need to be reasonably clear and precise. It is important to provide guidance to FBI interrogators and to courts before which issues regarding application of the exception will come. The goal is to provide enough guidance to make reasonably clear which interrogation methods are impermissible under all circumstances and which are impermissible in ordinary criminal cases, but which may be usable in exigent circumstance/terrorism intelligence interrogations.

a. The Definition of Terrorism

The exception would apply where the interrogation relates to a terrorism investigation. One approach to defining terrorism might be to use the general federal statutory definition that requires violent acts intended "to intimidate or coerce a civilian population" or "influence the policy of a government by intimidation or coercion."[182] The element that FBI policy adds to that definition might also be included—the idea that the terrorist acts must be "in furtherance of political or social objectives." The definition should include the idea that the activities intended or planned must involve serious violence, by which is meant a threat or potential threat to large numbers of human beings, major public structures, or a threat of assassination of a major governmental official.

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adding legislative backing for certain of these provisions and requiring reports to Congress regarding implementing procedures. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–1024, 125 Stat 1298, 1562–1565 (2011)).

[182] 18 U.S.C. § 2331(1)(B) (2006).

Justification for application of an exception to normal rules governing the obtaining of statements from a suspect should be grounded in concerns about preventing, at a minimum, acts of terrorism that involve serious violence. Anything less would be insufficient to provide such justification. The exception should not distinguish between international and domestic terrorism.[183] The exception under consideration should apply equally to U.S. citizen suspects as well as aliens, and its application should not depend on where the suspect was apprehended, abroad or in the U.S., though some would disagree on both counts. The exception would apply in instances where civilian law enforcement authorities are handling the case. Rules for the handling of terrorism cases by military authorities are provided for in the Military Commissions Act and military law legal sources.

b. Requisite Involvement with Terrorism

Suppose the defendant is arrested for contributing funds to a terrorist organization such as Hamas. While Hamas engages in violent terrorist acts, in order to fall within the exception a suspect must be more directly involved than simply supplying funds. He or she must be directly involved or have demonstrated a willingness to become directly involved in terrorist actions of a type that meets the applicable standards,[184] or must have information about such terrorist actions. Indeed, what is most important is that the suspect has information about the type of terrorism that is of concern. Normally, the fact that the suspect is directly involved is an indication of the fact that he or she has information about terrorist planning and preparations. Sometimes, however, there may be sufficient

[183] Timothy McVeigh and the Oklahoma City bombing naturally come to mind as examples of very serious, even catastrophic, terrorism perpetrated by a domestic terrorist. While the investigation of international terrorism may provide a basis for the Executive Branch to claim a range of greater powers (as the Bush administration did post-9/11), this Article does not rely on such claims of enlarged executive powers as warrant for the cabined exception. Recall, for example, that the Supreme Court in *Keith* authorized the use of somewhat broader search and seizure standards in a domestic security context without relying on an expansive notion of executive power.

[184] The FBI guidelines discussed in Part I.D.2.b. are generally consistent with the approach adopted in the text. They permit, without Miranda warnings, public safety interrogations of "operational terrorists" who are defined as "an arrestee who reasonably believed to be either a high-level member of an international terrorist group; or an operative who has personally conducted or attempted to conduct a terrorist operation that involved risk to life; or an individual knowledgeable about operational details of a pending terrorist operation." *F.B.I Memorandum*, *supra* note 83.

other evidence that someone not directly involved has such information. The exception should also be applicable in such a case.

c. The Requisite Amount of Evidence of Involvement in Terrorism

A dilemma exists about the basis on which the government can invoke application of the exception. Is the mere fact that government agents are investigating a possible terrorism matter enough to trigger application of the exception, or is there some specific factual predicate that the government must have? And if so, to what elements must the factual predicate relate? It would reasonable to require probable cause that the requisite level of terrorist acts is present and that the suspect has the requisite degree of involvement, or that the suspect has information about such terrorist planning or preparations. It is a familiar standard for government agents to apply. Some might argue for less—reasonable suspicion—or more—a preponderance of the evidence. Probable cause strikes a balance, but is also imposes a reasonably stringent standard before the exception can be invoked.

d. A Purpose to Gather Terrorism Intelligence

Each of the terrorism based exceptions, existing or proposed in this Article, applies the test first used by the Supreme Court in *Keith* of having a purpose to gather intelligence with a view to preventing future terrorist acts rather than to obtain information that can be used in the criminal prosecution of individuals. The proposed cabined exception to coerced confession rules should use this same test. The exception applies where the purpose of the interrogation is to obtain terrorism intelligence, with a view to preventing future terrorist acts. Limiting application of the cabined exception to instances where the purpose of the interrogation is to obtain terrorism intelligence may be explained in part on the ground that having such a purpose removes, in some limited degree, concerns about a likely source of unreliability of the statements obtained from the terrorism suspect.[185]

e. The Multiple Purpose Issue

If a purpose to obtain terrorism intelligence is required, what happens when there are multiple purposes underlying the investigation and

[185] *See supra* Part II.C.2.

interrogation? This same issue has arisen and been addressed in connection with implementation of FISA, and similar questions would be likely to arise in administering a new coerced confession cabined exception.[186] Two propositions that can be derived from earlier case law and under FISA are summarized here. They may be applied in connection with the contemplated exception:

1. The fact that, in the course of an interrogation, information was obtained for an intelligence purpose, and not for a prosecution purpose, does not mean that it cannot be introduced into evidence in a subsequent criminal prosecution.[187]
2. The intelligence purpose of an interrogation may be legally controlling even if the interrogation also has another purpose.[188] Originally under FISA, for the intelligence purpose to be legally controlling, it must have been the primary purpose of the investigation.[189] Congress, however, subsequently amended the FISA to provide that it was sufficient if the intelligence purpose was a significant purpose of the investigation.[190] A return to the primary purpose standard is recommended; this is the formula utilized by Justice Scalia in *Davis*, and by Justice Sotomayor in *Bryant*.[191]

f. The Exigency Requirement

Evidence of the requisite type of terrorism and plans therefore and of the suspect's connections to, or knowledge of, the activity or its planning may be viewed as carrying with it inherent or general exigency, even without any showing of the immediacy of the threat. Additionally, however,

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[186] Compare Justice Sotomayor's mention in *Bryant* of the "mixed motives" that the police may have in asking questions, *supra* Part I.C.2.
[187] *See, e.g.*, United States v. Duggan, 743 F.2d 59 (2d Cir. 1984).
[188] *In re Sealed Case*, 310 F.3d 717 (FISA Rev. 2002).
[189] *Id.* at 723.
[190] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 50 U.S.C. § 1804(a)(6)(B) (2010)).
[191] *See supra* Part I.C.2. Whether an interrogation has an intelligence purpose will be clearer if the agency conducting the investigation does not also have a criminal prosecution function. If, for example, the investigation is being conducted by the CIA, its intelligence-purpose is undeniable, as in the case of the interrogations of terrorism suspects conducted by that agency. Where interrogations are conducted by the FBI, the conclusion may be less clear since the FBI carries on both functions.

a separate showing of exigency in the particular case should be required in order to narrow somewhat the application of the exception. It is not suggested that a showing of an "immediately" imminent terrorism event (like the familiar "ticking bomb" test)[192] should be required. Rather, a showing should be required of a reasonable belief that there is ongoing planning for terrorist acts.[193]

3. Drawing the Cabining Line: What Kind or Categories of Interrogation Methods Will be Permitted Under the Exception?

A key drafting question in formulating the exception is how and in what terms to draw the cabining line. Because the exception must be cast in terms that provide a reasonable amount of guidance, an approach that only uses a general standard will not suffice.[194] Instead, developing a specific list

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[192] *See supra* Part II.A.3.b.

[193] Compare the "threat to public safety" element in the FBI guidelines, extending *Quarles to* terrorism interrogations. *See supra* Part I.D.2.b.

[194] Examples of a type of general standard that might be used to define methods that would, under all circumstances, be impermissible include: those methods "flouting the 'decencies of civilized conduct,'" *Rochin v. California*, 342 U.S. 165, 179 (1952) (Douglas, J., concurring), or "the community's sense of fair play and decency," *id.* at 173 (majority opinion), violate basic standards of western civilization, or "shock the conscience," or violate basic moral norms of a civilized society.

Such a single general standard, no matter in what terms phrased, would not provide sufficient guidance for drawing the cabining line. The problem of properly calibrating the line between the always-impermissible and the sometimes-permissible would under a single general standard approach also be especially challenging.

A second general standard approach would derive the determination of the interrogation methods that are unlawful under all circumstances from the federal statute that defines "torture," and supplement the torture definition with the related standard, "cruel, inhuman or degrading treatment"; the latter is less precisely defined under current law.

Torture is defined and prohibited by treaty to which the United States is a signatory and by statute under U.S. law. *See* 18 U.S.C. § 2340 (2006). Cruel, inhuman, and degrading treatment also came into U.S. law through the ratification of the Convention Against Torture, but was prohibited (but not made criminal) in U.S. statutory law through enactment of the Detainees Treatment Act of 2005. *See* 42 U.S.C.A. § 2000dd (2006).

As contemplated here, if these two general standards were used, it would mean that any interrogation methods that amount to torture *or* involved cruel, inhuman, or degrading treatment would be deemed unlawful under any and all circumstances. Under this approach, the line that defines cruel, inhuman, or degrading treatment would be likely to become the more important criterion, since it would define the threshold for the police conduct which would fall outside the cabined exception and therefore be deemed impermissible under all circumstances.

of interrogation techniques has a number of advantages: it can provide more guidance than other approaches; it can fix the line more precisely between the always-impermissible and the sometimes-permissible; and most importantly, it is not as much subject to expansive interpretations and consequent erosion of constitutional standards. Each list can be supplemented with a catchall, such as "and all interrogation techniques of a comparable degree of severity," which, because it has an immediate reference point, that is, the listed methods, should not introduce too broad a criterion.

The goal of this Article is not to draft a precise list of the always impermissible and sometimes permissible interrogation techniques, but rather to suggest and make some comments on different categories that might be used. Once a decision is made to adopt the kind of cabined exception proposed, it would be necessary to begin to delineate and refine the descriptions of the different categories of interrogation techniques.

Drafting a list of techniques that may be used under a cabined exception approach is not an easy task. By way of illustration, and only as a starting point for the development of such a list, it is useful to look to sources describing different kinds of interrogation techniques. An example of a general typology of interrogation techniques, both the permissible and the impermissible, is found in the Army Field Manual on Interrogation (AFM),[195] which lists, *inter alia*, prohibited interrogation methods. While certainly not exhaustive, the following list can be viewed as a starting point for the development of a listing of techniques that are impermissible under all circumstances:

Were these standards used for this purpose, it would, for the first time, begin to draw close terminological links between the rules currently applicable in military commission proceedings and those applied in the civilian federal courts. Another advantage in using these concepts is that there is some definitional material that can be used as a starting point in fleshing out the standards. The use of these standards would graft onto U.S. jurisprudence concepts that have not previously been part of the U.S. judicial constitutional discourse.

To an extent, however, the use of general standards like torture or cruel, inhuman, or degrading treatment suffers from some of the same disadvantages as the other general standards. Overall, their generality would leave the lines to be drawn up in the air and uncertain.

[195] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006) [hereinafter FM 2-22.3].

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
- Exposing an individual to outrageously lewd and sexually provocative behavior.
- Intentionally damaging or destroying an individual's religious articles.
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
- Using military working dogs.
- Inducing hypothermia or heat injury.
- Conducting mock executions.[196]

What about other problematic techniques? For example, under the AFM, sleep deprivation may not be used as an interrogation technique, but as part of permissible physical separation, some limits on the amount of

[196] *Id.* at 5-21. While the AFM list of prohibited methods in the text includes some that involve significant physical or mental discomfort, the AFM does not prohibit all conduct that causes physical discomfort, and some of the methods authorized remain controversial. Thus, the AFM authorizes physical separation, which is designed to "deny the detainee the opportunity to communicate with other detainees in order to keep him from learning counter-resistance techniques or gathering new information to support a cover story, decreasing the detainee's resistance to interrogation." *Id.* at M-8. The AFM went on to state that "[a]s a last resort when physical separation of detainees is not feasible, goggles or blindfolds and earmuffs may be utilized as a field expedient method to generate a perception of separation." *Id.* The AFM stressed that "[s]eparation does not constitute sensory deprivation," which it defines as "an arranged situation causing significant psychological distress due to a prolonged absence, or significant reduction, of the usual external stimuli and perceptual opportunities. Sensory deprivation may result in extreme anxiety, hallucinations, bizarre thoughts, depression, and anti-social behavior. Detainees will not be subjected to sensory deprivation." *Id.* Clearly, separation is viewed as a technique that facilitates the obtaining of intelligence, and some procedural safeguards attach to its use (for example, the need to obtain specific approval and having an overall plan relating to its use), which may suggest that it does involve some problematic methods. Note that it authorizes, under some circumstances where physical separation cannot be accomplished, requiring the suspect to wear blackened goggles and ear muffs (there is also an indication that this can be done for up to 12 hours—even though the use of sensory deprivation as an interrogation technique is expressly and strongly prohibited). In a letter written by fourteen former intelligence officers, the use of separation as a technique, as described in Appendix M of the Army Field Manual, was strongly criticized with special attention paid both to the use of goggles and ear muffs and the limits on sleep. *See* Scott Horton, *Interrogators Call for the Elimination of Appendix M*, HARPERS MAGAZINE, Nov. 16, 2010, *available at* http://harpers.org/blog/2010/11/interrogators-call-for-the-elimination-of-appendix-m/.

sleep are permissible: "Use of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours."[197] Limiting the amount of sleep of a suspect is another area where a line between the always impermissible and the sometime permissible will need to be drawn.[198]

The AFM also lists many standard interrogation techniques that do not involve physical means and appear to be permitted under the AFM with few limitations. Thus the AFM authorizes: playing on the emotions of the detainee—love, hate, fear; offering incentives to provide information; exploiting the detainee's weak self-esteem and ego strength; offering to protect the detainee from things he fears; impressing on him the futility of resisting or inducing the idea that the interrogator knows everything.

The FBI Legal Handbook for Special Agents[199] also highlights the uncertainty of the law in this area by listing a series of factors[200]—"[t]hreats and psychological pressure, . . . [i]solation, incommunicado interrogation; . . . [t]rickery, ruse, deception; . . . [p]romises of leniency or other inducements"[201]—that the courts predictably "will examine in making its determination."[202] The handbook does not indicate whether any of these are lawful or unlawful.

Both of these listings of non-physical methods of interrogation—those under the AFM and in the FBI Handbook—serve to highlight the uncertainty of the law in this area. Whatever the status of these methods under the prevailing constitutional doctrine, consideration should be given to being able to use them in appropriate terrorism investigations under a cabined exception approach. The to-be-drafted guidelines or legislation

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[197] FM 2-22.3, *supra* note 195, at M-10.

[198] The AFM in Appendix M seems to authorize a standard of limiting the suspect to four hours of sleep per twenty-four hour period for up to thirty days. So there are really two issues here: can a person be allowed less than four hours of sleep in each twenty-four hour period and for how long can a person be subjected to the four hour sleep standard. Thirty days seems excessive. So, once more a line will need to be drawn.

[199] *See* Legal Handbook for Special Agents, Factors Affecting Voluntariness, Section 7-2.2 (2003), *available at* http://fbiexpert.com/FBI_Manuals/Legal_Handbook_for_Special_Agents/FBI_Agents_Legal_Handbook.pdf [hereinafter Legal Handbook].

[200] Note that the isolation and incommunicado interrogation factors may be similar to the method of physical separation authorized in Appendix M of the Army Field Manual.

[201] Legal Handbook, *supra* note 201.

[202] *Id.*

should address the question of which of these techniques would be permissible to use under the cabined exception approach.[203]

By loosening the rules of interrogation in exigent circumstance and terrorism intelligence contexts, and generally drawing the line at the use of physical and other comparably extreme methods, which should be prohibited under all circumstances, government interrogators can be given more leeway than they currently have. Moreover, if the lines are drawn with a reasonable degree of clarity, interrogating agents will be given more guidance regarding permissible methods than they receive under current law.

This is intended only as an initial foray into the drafting thicket. Judgments will have to be made in the drafting process that should be made by government officials and legislators, or both, with the appropriate authority. The purpose of this Article is to argue for the principle of a cabined exception and to provide general directions and identify some of the kind of issues that will need to be addressed in the process of drafting the necessary provisions.[204]

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[203] As previously discussed in Part II.C.2, reliability questions are also part of the Supreme Court's involuntary confession jurisprudence. A finding of a sufficient risk of unreliability should trump the cabined exception approach and result in a determination of inadmissibility. Also, as previously discussed, *see supra* Part I.D.3.a, deception is a problematic area under existing judicial precedents. Note that under the AFM, many forms of deception are expressly authorized. An interrogator may use ruses of war to build rapport with interrogation sources, and this may include posing or "passing himself off" as someone other than a military interrogator [or an interrogator from another country]. But the AFM does impose some specific restrictions on deception. The interrogator must not pose as—a "doctor, medic, or any other type of medical personnel," "[a]ny member of the International Committee of the Red Cross (ICRC) or its affiliates," a chaplain or clergyman, journalist, or a member of the US Congress. FM 2-22.3, *supra* note 195, at M-10. There are special policy reasons why these particular deceptions may not be used under the AFM. If the reasons for them are deemed strong and generally applicable, these particular kinds of deceptions should not be permitted even under the cabined exception.

[204] Distinguishing between acceptable and unacceptable practices under the AFM relating to religion further illustrates the sometimes-difficult line drawing that may need to be done regarding acceptable interrogation practices. Thus, the AFM states:

> Although it is acceptable to use religion in all interrogation approaches, even to express doubts about a religion, an interrogator is not permitted to denigrate a religion's symbols (for example, a Koran, prayer rug, icon,

Conclusion

In cases where there is a need to obtain intelligence in urgent circumstances concerning impending terrorism events, it makes sense to give federal interrogators somewhat broader authority to use various interrogation methods and to direct the federal courts to relax the restrictions on governmental interrogation practices. The values reflected in Supreme Court decisions that prohibit police interrogation methods which do not involve physical abuse or serious mental abuse should not be given the same level of priority in exigent circumstance/terrorism intelligence cases as, for example, the prohibitions against torture and cruel, inhuman, or degrading treatment which, under all circumstances, should be treated as unlawful.

A proposal to carve out a hitherto unrecognized, cabined exception in the constitutional firmament of coerced confessions at first may seem to involve a much larger step than simply extending the public safety exception, as in the case of the exceptions to *Miranda* and confrontation doctrine discussed in Part I, but from another vantage point, the coerced confession, cabined exception proposal can be seen as relatively modest, simply providing a structured basis for judicial decisions, which some courts might anyway reach on an *ad hoc* basis.

The cabined exception proposal may also be a capstone highlighting commonalities with the other four exceptions discussed in Part I; it emphasizes the importance of the exigency element found in three of the exceptions and the significance of the fact that the primary purpose of the investigation under all of the existing and proposed exceptions is to obtain terrorism intelligence. It is noteworthy, however, that the analysis and the rationale for the various exceptions is not exactly the same; each, for example, attaches a somewhat different significance to the purpose to obtain terrorism intelligence.[205]

> or religious statue) or violate a religion's tenets, except where appropriate for health, safety, and security reasons.

FM 2-22.3, *supra* note 195, at 8-8.

[205] An argument can be made that for the proposed coerced confessions exception, given a purpose to obtain terrorism intelligence, an additional immediate exigency element is not needed: The terrorism intelligence purpose itself carries with it a degree of exigency; and

Undoubtedly, a cabined exception will not sufficiently respond to the concerns raised by those who believe that it is vital that the legal system should authorize the use of more extreme methods of interrogation when there is a current threat of terrorism. Some will argue that authorizing limited, increased flexibility at the lower end of the spectrum of police interrogation methods used will not be especially helpful in terrorism investigations, that we must be prepared to use more extreme interrogation measures to obtain the necessary evidence when terrorism is afoot.[206] While the proposed cabined exception is not a panacea, it is wrong to say that it will not be of assistance to those who, in an exigent circumstance context, interrogate persons thought to be involved in terrorism plots.

At the lower margin of what is permissible under existing law, the exception will provide the FBI and other interrogating agencies with increased flexibility by authorizing the use of additional methods and techniques of interrogation that otherwise might not be lawful. It will thus give the interrogators additional leeway that will surely be of value in the questioning process. Further, by clarifying the rules at the lower end of the interrogation methods spectrum, the cabined exception will provide needed guidance and a greater degree of certainty about what the interrogators can and cannot do. Even these small steps should significantly advance, without compromising basic societal values, toward a vital goal—the prevention of catastrophic terrorist events.

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the terrorism intelligence purpose by itself, addressed in Part II.C.2, also assures that one particular potential source of unreliability in statements obtained through interrogation is not present. On the other hand, as noted earlier, there is warrant for requiring an immediate exigency element: It tends to corroborate the fact that the primary purpose of the interrogation is indeed to obtain intelligence, and the *Quarles* exception, that is, the precedent from which the coerced confession exception is derived, involved an immediate exigency situation. It also tends to narrow the applicability of the exception. Further, the new FBI guidelines that extend the *Quarles* exception to a terrorism context retain the immediate threat requirement as a precondition for the admissibility of the statements obtained thereby.

[206] Whether torture is an effective way to obtain reliable information is, of course, itself a challenged proposition. *See, e.g.*, THE TORTURE DEBATE IN AMERICA (Karen J. Greenberg, ed.) (2005); Martin Robbins, *Does Torture Work?* THE GUARDIAN, Nov. 4, 2010, *available at* http://www.guardian.co.uk/science/the-lay-scientist/2010/nov/04/2; Robert Creamer, *Does Torture Work?* THE HUFFINGTON POST, Apr. 22, 2009, http://www.huffingtonpost.com/robert-creamer/does-torture-work_b_189954.html.