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

By

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Abstract

In this paper, we examine a series of special constitutional evidence rules that can be used in criminal enforcement against terrorists. Some of these rules expressly apply to terrorism cases; others contain an exigent circumstance element that can be adapted to terrorism contexts, and we so recommend. Building on the foundation provided by these special rules, we also propose a brand new exception in the area of coerced confessions.

Specifically, in the first Part of the paper, four existing "exceptions" to constitutional rules of evidentiary admissibility are examined—relating to fourth amendment protections, compulsory process, confrontation and Miranda. The first two of these exceptions were originally developed in connection with terrorism investigations; the second two apply to situations involving exigent circumstance-public safety concerns. The paper endorses the extension of one of these latter exceptions to terrorism investigations—namely, the public safety exception to the requirement of Miranda warnings. (Consistent with this recommendation, recently-made-public FBI guidelines have adapted this exception for use in interrogating suspected terrorists.) We also propose that the second of these public safety exceptions be extended to apply in terrorism investigations.

The second part of the paper, building on the described existing and proposed terrorism investigation exceptions, proposes and 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 is, one which, in exigent circumstances and to gather intelligence relevant to terrorism prevention, would apply an exception. It would 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.

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**Terrorism Prosecutions in Federal Court: Exceptions to Constitutional Evidence Rules and the Development of a Cabined Exception for Coerced Confessions**[1]

By

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## 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.[3] In fact, however, there are some judicial decisions, including an opinion of the U.S. Supreme Court[4], and also federal legislation[5], which expressly support taking into account, in ruling on certain issues of evidentiary admissibility, the fact that the matter involves terrorism. So the notion that the application of evidentiary rules never differs depending on the type of matter being prosecuted is not correct.

The purpose of this paper is to explore this potential for using some different rules in civilian court terrorism prosecutions, through an examination of exceptions applied to, or potentially applicable to, five sets of major constitutional rules of evidentiary admissibility—search and seizure, compulsory process, confrontation, Miranda, and coerced confessions. Ultimately, recognition and adoption of these kinds of exceptions to rules of evidentiary admissibility bears on and strengthens the case for using civilian criminal trials in prosecuting terrorism cases.

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[2] Distinguished Professor of Law Emeritus, UCLA School of Law. I have been aided by comments on an earlier draft by Professors Susan Klein, Herbert Morris, and Melvin Seeman. I also benefited from 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 the paper from debating in writing with Professor Christopher Slobogin the idea of the cabined exception; the debate is to be published in a volume titled Patriot Debates II: Contemporary Issues in National Security (ed. Stewart Baker, Harvey Rishikof and Bernard Horowitz, 2012).

[3] 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).

[4] See United States v. United States District Court (Keith), 407 U.S. 297 (1972); and United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005). We characterize these as "exceptions" though they could be viewed simply as applications of the relevant constitutional formula.

[5] See the Foreign Intelligence Surveillance Act, 50 U.S.C. §1801 et seq.

In Part One, existing exceptions which have been developed and applied by the federal courts in the first four of these constitutional evidence contexts are examined.[6] These exceptions permit evidence to be admitted that would normally be inadmissible because obtained in violation of the otherwise-applicable constitutional rule. As mentioned, 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 being extended to the terrorism arena. One of the existing terrorism exceptions is also reflected in a comprehensive federal statute. Three of the four exceptions were initiated by the U.S. Supreme Court; the Fourth Circuit U.S. Court of Appeals is the originator of one of the exceptions. Appreciation of 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 a foundation for the proposal discussed in Part Two of the paper.

Part Two is devoted to an examination of the case for introducing an important, new exception into terrorism prosecutions—through the development of a cabined exception to existing coerced confession/involuntariness doctrine. The proposed exception would, under specified circumstances, permit the admission into evidence of interrogation statements obtained in a terrorism investigation, statements which, under current law because of the interrogation method utilized, might be excluded in an ordinary crime prosecution.

It should be emphasized that the doctrinal package discussed here can be derived mostly from existing precedents; it is relatively narrow and focused; it does not rely on the idea that special rules are generally applicable in terrorism prosecutions. In fact, however, one can find some support in dicta in Supreme Court opinions for the application of rather extreme special rules relating to dangerous terrorists. For example, in Zadvydas v. Davis,[7] decided just prior to 9/11, Justice 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 or other special circumstances 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."[8]

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[6] United States v. United States District Court (Keith), 407 U.S. 297 (1972) (Congress may legislate different standards for electronic surveillance aimed at obtaining domestic security intelligence); United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005)(government may use substitutions in lieu of producing witnesses in terrorism prosecution; substitutions may consist of reports of statements obtained from putative witnesses through interrogation, the requisite reliability of the statements having been established by the fact that the interrogations were conducted by skilled interrogators to obtain terrorism intelligence); Davis v. Washington, 54 7 U.S. 813 (2006), Michigan v. Bryant, 131 S.Ct. 1143 (2011) ( 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 (1984) (public safety circumstance may warrant dispensing with Miranda warnings; statements thereby obtained may be introduced into evidence).

[7] 533 U.S. 678 (2001).

[8] Id at . Note that this statement was written some three months before September 11, 2001.

Similarly, in the first Padilla[9] appeal to the Supreme Court, decided a few years later, Justice Stevens in dissent, speaking for himself and Justices Breyer, Ginsburg and Souter, wrote an opinion indicating grave concerns about protracted executive detention, but he also acknowledged the possibility of a kind of preventive detention for dangerous terrorists, stating:

> "Executive 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."[10]

Neither of these dicta deals directly with the issues addressed in this paper, but they are useful background insofar as they reveal an attitude on the part of a number of members of the Supreme Court of special concern where instances of dangerous terrorism are involved.

## Part One—Exceptions to Constitutional Evidence Rules: Existing Precedents

### A. Search and seizure: Keith and a domestic intelligence investigative purpose

A seminal case for purposes of this paper deals with admissibility under fourth amendment search and seizure standards where the evidence in question was obtained in gathering intelligence about domestic terrorist activities. United States v. United States District Court (generally known by the name of the judge in the case, Keith),[11] decided in 1972, is foundational in establishing a theory of admissibility in connection with terrorism intelligence investigations. An important question is whether and how far the principle underlying the Keith decision may be extended to other areas of constitutional admissibility.

The relevant general proposition underlying Keith can be characterized as follows: Where government agents are seeking intelligence about future terrorism acts, i.e. to prevent them from occurring, and not to obtain evidence for 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 an office of the Central Intelligence Agency, and

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[9] Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[10] Id at . Of course, the exact meaning of this sentence is far from clear. Almost every word presents some ambiguity and uncertainty of meaning. It uses the subjunctive "may" combined with the qualifying word "sometimes." What it means to launch missiles of destruction or to become missiles of destruction is far from clear. How long might such detention continue…as long as the detained person(s) is likely to launch such missiles? And the sentence speaks of "executive detention," not military detention nor judicially-authorized detention. And it 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 (2004).

[11] 407 U.S. 297 (1972).

all three defendants were charged with conspiring to destroy government property. 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. The Court rephrased this argument of the government in the following terms:

> "…[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 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[13] cases, and the case is usually cited for that proposition.[14] But the Keith opinion went on also to state that Congress could establish different fourth amendment warrant standards for searches and seizures relating to intelligence in domestic security cases. 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 seeking evidence "for specific criminal prosecutions," it proceeded to apply the same distinction as a ground for recognition of the possibility of establishing warrant standards different from those used in ordinary criminal cases. The Court stated,

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[12] Id at .

[13] While the Court did not define precisely what was meant by "domestic security," it did say the following:

> "The 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.'" [emphasis supplied by the Court.]

In a footnote, the Court also stated:

> "Section 2511(3) [of Title 18, U.S.C.] 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 §2522(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."

[14] The Court declined to opine on the question of whether such authority existed in national security cases involving foreign agents, stating: "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." United States v. United States District Court, 407 U.S. 297, 321-322 (1972). Six years later, Congress enacted the Foreign Intelligence Surveillance Act, in effect adopting the type of special standards that the Court had suggested could be promulgated for domestic terrorism investigations, but doing so for foreign intelligence matters.

> Moreover, we 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….or the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. [citing and quoting from Camara v. Municipal Court, 387 U.S. 523, 534-535 (1967)] [15]

The distinction drawn by the Court between searches or surveillance conducted to obtain intelligence rather than evidence of specific crimes is based, as the Court indicated, in 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"; targets "more difficult to identify" than in ordinary crime cases; an emphasis on "prevention," or preparing for a "crisis or emergency"; a focus that is "less precise" than one seeking evidence of a specific crime.

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[15] The Court also quoted from *Camara* as follows:

> "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . 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." *Camara* v. *Municipal Court*, 387 U.S. 523, 534-535 (1967). It is not surprising 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.

It is noteworthy that Congress has as-yet not exercised the authority suggested by the Court in Keith to establish different search and seizure and electronic surveillance standards for domestic intelligence matters.[16]

While Keith differs from some of the other exceptions discussed in this paper insofar as it did not involve any direct claim of exigent circumstances, its articulation of the distinction between an alternate non-prosecution purpose (in this instance, intelligence gathering) and the pursuit of evidence for criminal prosecution is a foundational element which surfaces in or can be applied to each of the other exceptions discussed in this paper. The logic of the intelligence purpose/criminal prosecution purpose dichotomy, however, is applied in different ways in connection with each of the constitutional evidentiary rules discussed herein.

## B. Compulsory Process—another application of the terrorism intelligence investigative purpose

### 1. The constitutional issue: United States v. Moussaoui[17]

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, inter alia, requires that a defendant should ordinarily be able to obtain the testimony of witnesses in the custody of the government if they have material evidence necessary for the accused to make his/her defenses. Where the government declines to produce the witnesses claiming national security, 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 his or her defense. If the court concludes that this standard has not been met, and the government still declines to produce the witnesses, dismissal of the prosecution may be the result.

In United States v. Moussaoui, the defendant, accused of terrorist offenses, sought the testimony of several individuals who were apparently being detained by the government and who had been interrogated by government agents and had made statements in response to the interrogations. The government declined to produce the witnesses sought by the defendant, 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

[16] 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.

[17] 382 F.3d 453 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005).

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 whose original statements were reflected in the documents.[18] The court stated:

> 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.[19] [emphasis added]

The court thus found the needed reliability in the nature of the process of conducting interrogations aimed at ferreting out intelligence about terrorists: 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.[20]

**2. The hearsay issue**

The Moussaoui court only briefly mentioned the weakest part of the claim that the hearsay statements in 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:

> To the contrary, we are even more persuaded that the [Redacted] process is carefully designed to elicit truthful and accurate information from the witnesses.[21]

In other words, the interrogators engaged in a process of interrogation that is "carefully designed" to produce reliable, trustworthy information, i.e. the methods and techniques of interrogation that were used, tended to insure that outcome. The court did not further explain, and one can only speculate about what the judges had in mind.[22]

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[18] 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 applicable, but the court of appeals appropriately relied on the CIPA in formulating its approach to the question before it.

[19] Id at . Note that substantial redactions appeared in the original opinion, some of which are rather easily decipherable.

[20] See text at infra for further discussion of this issue.

[21] Id at .

[22] See Norman Abrams, Confrontation and Hearsay Issues in Federal Court Terrorism Prosecutions of Gitmo Detainees: Moussaoui and Paracha as Harbingers, 75 Brooklyn Law Review 1067 (2010) where I more fully explore the reliability aspects of the hearsay at issue in Moussaoui, concluding that in a confrontation (as opposed to compulsory process context), the hearsay weaknesses of the evidence would

But the court's rationale and its decision on the issue also should be read in light of the context: In this case, the formal proponent of the evidence was the defendant (although the evidence would actually be produced by the prosecution), and ordinarily, a party cannot object to hearsay he or she offers into evidence. Nor was the prosecutor going to object to the documentary evidence which 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.[23]

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 their reporting of the information obtained thereby.

### 3. Implications of Moussaoui

In Moussaoui, once again, 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 compulsory process-sixth amendment challenge posed when the government declines to produce witnesses on grounds of 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.[24]

## C. The exception to the Crawford confrontation doctrine--application to the terrorism intelligence context

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probably be a barrier to its admissibility under the Federal Rules of Evidence, even though it would likely survive a constitutional confrontation challenge. (Note that this paper was written prior to the decision in Michigan v. Bryant, 131 S.Ct. 1143 (2011)); see the discussion of Bryant, infra. In this earlier paper, I also appended a footnote suggesting that concern about releasing dangerous terrorists could influence some judges in how they respond to this issue.

[23] 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 text at note , infra.

[24] 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 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 by 313 Fed. Appx. (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. United States v. Moussaoui, 591 F.3d 263 (4th Cir. 2010).

## 1. Crawford v. Washington[25] confrontation and the Davis v. Washington[26] exception

Keith and Moussaoui both expressly take into account the special nature of terrorism intelligence searches and interrogations in applying the 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, for example, in a confrontation context?

In Crawford v. Washington, the Supreme Court, Justice Scalia, writing the opinion of the court, dramatically remade confrontation clause doctrine. Several years later, in Davis v. Washington, the Court, again with Justice Scalia writing, carved out an exception to the Crawford confrontation requirements for police questioning in an emergency situation. Subsequently, in its spring, 2011 term, in Michigan v. Bryant,[27] the Court, with Justice Sotomayor writing this time, further elaborated and developed the nature and extent of this 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."[28] Crawford ruled instead that constitutional confrontation issues were 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 that are obtained by government agents and "that declarants would reasonably expect to be used prosecutorially."[29]

The Court's subsequent decision in Davis qualified the Crawford rule in situations where the primary reason why the questions were asked was to deal with an ongoing emergency and not to obtain evidence for use in prosecuting a crime. Both in Davis and in its companion case, Hammon v. Indiana,[30] the statements made to government agents arose out of a domestic disturbance situation. In Davis, the statements at issue were made over the telephone to a 911 operator; in Hammon, the statements were made to police officers on the scene. 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." 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

[25] 541 U.S. 36 (2004).
[26] 547 U.S. 813 (2006).
[27] 131 S.Ct. 1143 (2011).
[28] Ohio v. Roberts, 448 U.S. 56, at (1980)
[29] 541 U.S. at (2004).
[30] No. 05-5705, also decided in the *Davis* opinion.

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 rules relating to hearsay.

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…."

In his characterizing of 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…." [italics in original.] "The statements in Davis were taken when…[the declarant] was alone…apparently in immediate danger…. [Her] present-tense statements showed immediacy."[31]

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 generally utilized in Davis, so long as the purpose of the questioning—i.e. 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.[32] Given this explanation for the relevance of the emergency, why should it even make a difference whether a strict immediacy requirement be associated with it?

We can speculate about possible explanations underlying Justice Scalia's invocation of the immediacy element , that a) the immediacy of the emergency was deemed to be part and parcel of the alternate purpose of the questioning; or b) the immediacy of the emergency 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 (i.e., proof of the facts regarding the immediacy of the emergency provides assurance that the police questioning was indeed not aimed at obtaining evidence to prosecute).

If either of these closely-related explanations for Justice Scalia's application of an immediate emergency requirement is correct, upon closer analysis, it would not seem necessary that the emergency have a true immediacy, i.e. 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."[33]

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[31] And in concluding that the questioning in *Hammon* was similar to *Crawford* and therefore statements thereby obtained are inadmissible under the confrontation clause, the fact that the statements in *Crawford* were tape-recorded and took place at the station house "strengthened the statements' testimonial aspect…."

[32] Justice Sotomayor in *Bryant* goes further and makes the point that not even an emergency is required. See text infra at .

[33] We speculate here about the possible rationale underlying Justice Scalia's approach to the immediate emergency element even though Justice Sotomayor in *Bryant*, infra. adopts a different rationale for this

**2. Michigan v. Bryant's further elaboration of the exception to confrontation**

Subsequently, in Michigan v. Bryant[34], in an opinion written by Justice Sotomayor, the Court (with Justice Scalia this time 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 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 in order to protect the immediate public safety in what could be a volatile situation— "i.e. not only [to] aid …a wounded victim, but also [for] the prompt identification and apprehension of an apparently violent and dangerous individual."[35]

The court majority answered these questions in the affirmative, and along the way, elaborated on the criteria to be applied in making that determination. Justice Sotomayor's opinion characterized the situation thusly:

> 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.[36]

In a dramatic addition to, and change from Crawford and Davis, Justice Sotomayor's opinion re-introduces 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." [37]

Justice Sotomayor in Bryant thus adds a trustworthiness/reliability element to the confrontation exception inquiry, and provides a different rationale for the emergency element in the exception-to-confrontation determination than the one we had suggested

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element. Because it is possible that the majority of the Court may shift again on this issue, it seems worthwhile to examine it under both approaches.

[34] 131 S.Ct. 1143 (2011).

[35] Petition for Certiorari, Michigan v. Bryant, 2009 WL 24020 (2009)

[36] 131 S.Ct. at 1156.

[37] Id at .

above---that is, that statements "given for the primary purpose of resolving…[the] emergency," are less likely to be fabricated, that is, that they are relatively trustworthy.[38]

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 the fact that, because the declarant made the statements for a purpose unrelated to an ultimate guilt or innocence determination, the declarant was unlikely to have had in mind a purpose to falsify regarding the guilt-innocence issue?[39]

With respect to the last-mentioned question, the mere fact 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. We assume 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 ground shortly after he had been shot. As Justice Sotomayer stated, "…[T]the severe injuries of the victim would undoubtedly also weigh on the credibility and reliability that the trier of fact would afford to the statements."[40] She also stated, "An ongoing emergency has a[n]… effect of focusing an individual's attention on responding to the emergency."[41] Here it seems that she was leaning toward a spontaneity/ excited utterance-type of rationale for the relative reliability of the statement.

It turns out, however, that it makes no difference which of these premises Justice Sotomayor was relying upon since there is language earlier in her opinion 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. [emphasis in original] 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.[42]

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[38] 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 text at note 28, supra.

[39] Justice Sotomayor refers to both of these explanations. See Bryant opinion at footnote 9.

[40] Michigan v. Bryant, 131 S.Ct. 1143, , at note 12.

[41] Id at .

[42] Id at .

With these sentences, Justice Sotomayor expressly broadens and essentially rewrites the "exception" to confrontation so that it longer appears to be limited to emergency situations, apparently expanding it to apply to all situations involving questioning for a non-testimonial, i.e. non-prosecution purpose. She also drives home again a point that she had made earlier in the opinion, i.e., that determining the reliability of the statement is part of the confrontation exception inquiry and reiterates the proposition that a hearsay statement which otherwise falls under the exception to confrontation requirements still must pass through the admissibility filter of the jurisdiction's rules of evidence.[43]

Elsewhere in the Court's opinion, other features to be applied in making the confrontation inquiry are highlighted. The opinion tells us that an "objective" approach is to be used in making an assessment of the primary purpose of the interrogation:[44]

> The relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but 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.[45]

The Court also indicates that the formality or informality of 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.[46]

Finally, Bryant 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

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[43] 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 notes 28 and 38, supra.

[44] "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. …" I 131 S.Ct. 1143, at . Justice Sotomayor also indicated that one must look to the contents of both the questions and answers. Ibid.

[45] Id at . 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.

[46] Id at .

> 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….[47]

We may ask why should the nature and extent of the threat and degree of danger posed by the emergency be relevant? The answer must be that insofar as the questions relating to the emergency are deemed not for the purpose of acquiring evidence for a prosecution, it is useful to know how widespread the emergency is and how long it continues. Only armed with that knowledge can one be certain whether the questioning is indeed for the purpose of dealing with the emergency.

**3. 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 in order to avoid the confrontation clause's normally applicable requirement that statements be tested "in the crucible of cross examination," they must have some reliability. Bryant also adds further clarifications regarding the objective nature of the inquiry ("the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred"); 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, and even in a non-emergency situation, if the primary purpose of the questioning is not to gather evidence for prosecution, a statement obtained thereby may be admissible under the Confrontation Clause, provided that it is sufficiently reliable. Both of these last-two-mentioned factors lend themselves to being relied upon 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 consciously laying the groundwork for the use of such an exception in terrorism investigation contexts.

The Supreme Court had previously given recognition in Keith in a search and seizure terrorism case context to the difference between intelligence gathering and seeking evidence to prosecute. Bryant lays the foundation for a parallel development, relying on the different constitutional doctrine at issue—namely, it can certain be argued that where the primary purpose of an interrogation is to obtain intelligence about future terrorism acts or planning, the interrogation qualifies as not gathering evidence for purposes of prosecution and accordingly is non-testimonial under confrontation doctrine.

[47] Id at .

Accordingly, it can be argued that where the purpose of the interrogation, viewed objectively is to obtain terrorist intelligence and not to obtain evidence for prosecution, the Confrontation Clause is not a barrier to admitting the statements in question, even if no emergency is reflected in the circumstances. Imposing an emergency/public safety element as an additional requirement, of course, strengthens the case for not imposing a confrontation barrier to admissibility.

Nevertheless, statements thereby obtained are unlikely to be admitted very often if offered against third persons.[48] 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 the formality concern can be outweighed by the fact that the typical terrorism-intelligence situation often presents a much greater emergency than anything presented under the Davis or Bryant facts: As suggested previously, it would involve a danger to human life many orders of magnitude greater and also, in some situations, involve elements of imminence and immediacy. Recall that under Bryant, the type and scope of the danger are elements to be taken into account. But it seems unlikely that the need for relative trustworthiness of the statements in a confrontation 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 reliability concern might be satisfied. Suppose, for example, a terrorist suspect in the field is lying wounded and is questioned there by the police or the FBI.[49] The legal aspects of the situation could be essentially similar to the circumstances in Bryant where the court majority found sufficient trustworthiness. Or suppose 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 context, utilized by the Fourth Circuit in United States v. Moussaoui.[50]

While these hypothetical cases do sometimes arise in real life situations, in the run of the mill terrorism intelligence interrogation, the reliability requirement is not likely to be met. Whether applied as part of confrontation doctrine, or by applying the jurisdiction's hearsay rules in addition to confrontation doctrine analysis, the reliability/trustworthiness requirement will very 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.

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[48] Of course, introducing interrogations statements as an admission or confession against the person who made the statement does not run afoul of the confrontation clause.

[49] Compare *United States v. Khalil*, discussed infra, note .

[50] See text, supra, at .

This confrontation clause analysis also serves other purposes: It helps to illuminate many issues relating to our subject-- recognition of the different reasons why an emergency requirement may be relevant; consideration of the significance of the type and extent of the danger posed in an emergency situation; and the reliance by the Supreme Court, once again, 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[51]: 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[52]was established in New York v.Quarles: 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, having pursued and apprehended the suspect in a supermarket, without first giving him Miranda warnings 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.

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,

> Although 'the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness.' … we 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.[53]

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[51] 467 U.S. 649 (1984).
[52] 384 U.S. 436 (1966).
[53] Id at fn. 3 and text, at p. 653. The Court also indicated "that the availability of that exception does not depend upon the motivation of the individual officers involved." Justice Marshall in a dissent joined by Justices Brennan and Stevens drew an even sharper contrast between the fourth and fifth amendment characterizing the latter as an "absolute prohibition":

> *The 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. New York v. Quarles, 467 U.S. 649, 688 (1984).

Regarding the absoluteness of the fifth amendment prohibition, see footnote , infra.

In explaining what was meant by the "prophylactic rules" characterization, Chief Justice 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."[54] The Court went on to state:

> … [If the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the Miranda majority was willing to bear that cost. Here, had Miranda warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, *the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.*[55][italics are mine.]

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In his dissent, Justice Marshall also advanced the argument 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:

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> . . . [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."

Regarding this argument of Justice Marshall, see footnote , infra.

[54] Citing *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974).

[55] Id at . In footnote 5, 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," *post*, at 674, and for "[sanctioning] *sub silentio* criminal prosecutions based on compelled self-incriminating statements." *Post*, at 686. Of course our decision today does nothing of the kind. As the *Miranda* Court itself recognized, the failure to provide *Miranda* warnings in and of itself does not render a confession involuntary, *Miranda* v. *Arizona*, 384 U.S., at 457, 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." See text infra , 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.

As in Davis, there was also language in Quarles that can be viewed as narrowing and limiting the decision to immediately exigent circumstances.[56]

Note that 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 in Quarles highlight this issue but clearly referred to it, using the same term, "testimonial," that it used many years later in Crawford v. Washington.[57] The fact 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 in the legal arena of the privilege against self incrimination.[58]

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 loss of not recognizing an exception, namely, the danger to human life if the giving of the warnings deterred the suspect from telling the police where the gun was hidden.[59]

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[56] The 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." [[ *Dunaway* v. *New York*, 442 U.S. 200, 213-214 (1979).]] 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 and questions designed solely to elicit testimonial evidence from a suspect.

[57] See note 55 supra.

[58] See note infra, discussing the required records exception to the privilege against self incrimination.

[59] 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); 142 ALR Fed. 229 ( ). 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 (S.D. N.Y. 1994):("In the present case, at approximately 5 AM on a Saturday morning police were confronted with an alleged robbery at a social club involving holding of hostages; many 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 else was present who might threaten police or others at the scene-how many people were with petitioner and how many people were in the club? Petitioner replied that there were two more men that were with him inside the club.")

## 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," might be "something more…," significantly more, than "merely the failure to obtain evidence useful in convicting." Unlike the constitutional doctrines previously reviewed, the rationale for taking account of the emergency in the Quarles fact situation 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—i.e., 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." 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 to be given. There was a very strong 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 as a precedent might be viewed as somewhat problematic in a situation where a terrorism-intelligence interrogation of a terrorist suspect detention occurred over a period of time, even if there were some indication of the immediate risk of occurrence of a significant terrorism event. The circumstances of such an interrogation, arguably, might be viewed as being 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 the Quarles/gun situation, but the magnitude of the potential risk to human lives may be huge, given knowledge that al Qaeda and 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**

In fact, extension of Quarles to the terrorism intelligence context has already been occurring. A second circuit panel in United States v. Odeh[60] in dictum in a terrorism case expressly acknowledged in a footnote the possibility of a terrorism intelligence application of the Quarles exception: "Where 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," citing Quarles.[61]

More recently, 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.[62]These guidelines have not yet been tested in the courts; at this point in time, they 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 instructing FBI agents that, "without advising the arrestee of his Miranda rights," they could ask "any and all questions" prompted by public safety concerns. A separate paragraph in the same document then indicates "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

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[60] 552 F. 3d 177 (2d Cir. 2008), cert. denied, 2009 WL 535753. See also United States v. Khalil, 214 F.3d 111, (2d Cir. 2000), which also involved a situation where Miranda warnings were not given and which involved the same type of immediacy of the danger as in *Quarles* itself, but a greater danger, namely, a terrorism/bombs situation, and the suspect's statements were admitted:

> The officers peeked into the black bag and saw wiring. Technicians thereafter examined the bag's contents; they found pipe bombs, observed that a switch on one of the bombs had been flipped, and were concerned that the bomb would explode before they could disarm it. Other officers went to the hospital and questioned Abu Mezer that morning as to how many bombs there were, how many switches were on each bomb, which wires should be cut to disarm the bombs, and whether there were any timers. Abu Mezer answered all of these questions, stating that he had made five bombs, that they contained gunpowder, and that each would explode when its four switches were flipped.

[61] 552 F.3d 177 at .

[62] 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, October 21, 2010, available at http://www.nytimes.com/2011/03/25/us/25miranda-text.html. Also see Charlie Savage, Delayed Miranda Warning Ordered for Terror Suspects, NY Times, March 24, 2011.

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.

Of course, in a terrorism context, public safety interrogation also relates to terrorism intelligence. The guidelines make this clear by stating that--

> such [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."[63]

The guidelines thus authorize two kinds of terrorism interrogation without first giving Miranda warnings—interrogation in a danger-to-public-safety terrorism intelligence context, and 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, it is anticipated that the statements of the suspect will be admissible under Quarles. In the latter context, no fifth amendment violation will have occurred as a result of the questioning since such a violation only occurs when the statements made are introduced into evidence.[64] 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 thus will likely turn on at what point 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 intelligence interrogation" and an "intelligence interrogation" not related to any immediate threat. These guidelines thus reflect a specific DOJ implementation of the type of application of the Quarles exception in a terrorism interrogation context proposed in this paper.

Note that the primary effect of the guidelines is to instruct agents that the Quarles public safety exception is usable in a terrorism interrogation context. But the guidelines 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

[63] Id at .
[64] Citing, inter alia, *Chavez v. Martinez*, 538 U.S. 760,769 (2003)(plurality op.).

whether public safety concerns are still involved, leaving it to the courts later to sort through the facts and draw the line of admissibility.[65]

**c. Issues not addressed by the FBI guidelines**

The guidelines (as well as this paper) 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 the federal agents continue with the interrogation in the following situations: 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? 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?[66]

Further, 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?

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[65] In future cases which arise in a context that will require such line drawing by the courts (that is, in a terrorism interrogation that transitioned from one with a public safety justification to one without such a justification), will the fact of having to address that transition be likely to affect the courts' interpretation of the public safety element, and if so, in which direction, that is, will the result be to broaden the notion of what constitutes the public safety, or to narrow it? Further, is there a possibility that the courts may be inclined to extend the exception, beyond the notion of public safety charted by *Quarles*, i.e. instances of an "immediate threat," and apply it more generally to cases where the primary purpose of the interrogation is to obtain terrorism intelligence to prevent future terrorism acts and not for prosecution? Compare Justice Sotomayor's opinion in *Bryant*, discussed supra at , and see note , infra. In drafting the guidelines in this way, perhaps that is what the drafters are hoping for.

[66] The issue of whether the public safety exception applies to a situation where the arrestee asks to see his lawyer (see Edwards v. Arizona , 451 U.S. 477 (1981)) has arisen in the case law. See United States v. DeSantis, 870 F. 2d 536 (9th Cir. 1989):

> …[The Quarles] reasoning would apply with equal force to the procedural safeguards established when the accused asks for the aid of counsel. Society's need to procure the information about the location of a dangerous weapon is as great after, as it was before, the request for counsel. Moreover, the concern for protecting the accused from police "badgering" is lessened in the context of a public safety threat. The police officers' questions generally will be motivated by the necessity "to secure their own safety or the safety of the public" rather than "to elicit testimonial evidence from a suspect." ...
>
> We conclude that the public safety exception applies to the facts of this case. Accordingly, DeSantis' constitutional rights were not violated when the inspectors questioned him about the possibility of weapons located in the bedroom. The inspectors lawfully were entitled to question DeSantis for the purpose of securing their safety, even after he had asserted his desire to speak with counsel. ...

See also United States v. Mobley, 40 F.3d 688 (4th Cir. 1994), and see M.K.B. Darmer, Lessons from the Lindh Case: Public Safety and the Fifth Amendment, 68 Brooklyn L.Rev. 241 (2002); M.K.B. Darmer, Beyond Bin Laden and Lindh,: Confessions Law in an Age of Terrorism, !2 Cornell J. of L. and Pub. Policy 319 (2003).

Finally, during the course of the public safety interrogation, should the usually rules regarding coerced confessions apply? This last-mentioned question is the subject of Part Two of this paper, infra.[67]

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To sum up: The four exceptions which have been described in Part One have in common that each involves 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 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. The former two instances, by contrast, did not involve an express exigency element.

Whereas application of Keith and Moussaoui to terrorism-intelligence contexts thus is straightforward, 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"[68] 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 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.

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67 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, in the future. We mainly limit ourselves in the remaining portion of this paper to the possible application of a public safety/terrorism intelligence exception in the coerced confession arena, a possibility which presents a sufficient array of complex issues to warrant extended treatment by itself.

68 Seee note 6 supra.

Quarles, however, is different from all of the foregoing cases. The court majority minimized the extent to which a constitutional rule was involved.[69] Miranda was characterized as a prophylactic rule, demeaning its constitutional status, in order to be able to apply an approach involving a weighing of social costs.[70] Clearly 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.[71]

What also flows from this examination of four different areas of constitutional admissibility--search and seizure, compulsory process, confrontation and Miranda--is that while there are common elements among them, each has features that are special to the area, the relevant constitutional formula and the constitutional interest at issue; accordingly, although there are advantages in considering them together and things to be learned from comparing them, in the end, each must be adjudged on its own bottom.

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 an extremely significant and novel development that raises many new issues and complexities. Part Two is devoted to an in-depth discussion of this proposal.

## Part Two: Assessing a Proposal for a Cabined Exception to Coerced Confession/Involuntariness Rules[72]

[69] In this aspect, the majority opinion in *Quarles* and that of Justice Marshall in dissent, who characterized the fifth amendment as an "absolute prohibition," may have found common cause. Note that Justice Scalia in Dickerson v. United States, discussed infra, note , also characterized the privilege against self incrimination as an absolute.

[70] For detailed discussion of the issues suggested by how the fifth amendment and Miranda are characterized, see infra, section .

[71] Whether *Quarles* established an exception to a constitutional rule is discussed, infra, section , Part Two.

[72] In Part Two, we discuss in connection with the proposed cabined exception to coerced confession doctrine a series of issues suggested by the proposal, for example, what is the justification for recognition of such an exception; why a cabined exception; concerns about whether a cabined exception fits within and is consistent with existing constitutional doctrine; whether a broadening of coerced confession doctrine would anyway be likely to occur in terrorism cases on an ad hoc basis and how development of a cabined exception might be a way to achieve a similar legal result through a categorical rule-based approach; and whether the proposal is likely to lead to a more general erosion of constitutional standards, etc. Some of these issues may also be relevant in a general way to the suggested terrorism extensions of the constitutional rules discussed in Part One. Accordingly, while some of these issues are only discussed in the coerced confession context in Part Two, parts of this treatment may have general relevance as well to the discussion in Part One.

## A. Justifying extension of a Quarles-type exception to the coerced confession doctrine

### 1. The basic justification

Examination of the exceptions discussed in Part One, especially the Quarles doctrine, leads one to think about the possibility of developing an exception for a closely-related arena of constitutional admissibility—that is, an exception to traditional coerced confessions rules. As far as can be determined, there has not, as yet, been even a whiff of a judicial move in that direction.[73]

The case for developing some type of limited exception to normal coerced confession rules, that is, a cabined exception, 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 (as Quarles permits), 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 quickly to be able to obtain the relevant information? 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. [74] 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 of recognition of such an exception.

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[73] The four exceptions, which have been judicially recognized, are all of fairly recent vintage: Exigent circumstance/alternative purpose exceptions 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 areas. They may, for example, view constitutional rules in this area as protecting against a more intrusive kind of trespassing on individual liberty and thus not a good candidate for recognition of any exception.

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 obtained were voluntary or were coerced should normally be addressed. See, e.g., United States v. DeSantis, 870 F. 2d 536 (9th Cir. 1989)(after determining that 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**.**") And see Quarles, itself, where the Court indicated that the defendant on remand could raise the issue of coercion. See note , supra, and see text infra, at note 91.

[74] See infra, and infra.

Further, if a Quarles-type exception can be invoked where there is a danger to life, in order to increase the chances of obtaining the needed information about the location of the weapon, the same reasons that were invoked, supra, to 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. 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.

Thus, apart from concerns about doctrinal considerations, to be discussed infra, and how far such an exception should extend, 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 section.

**2. A cabined exception**

In characterizing the type of exception to coerced confession rules that might be developed, we have consistently referred to it as a limited or "cabined" exception. This is a brand new notion, not found generally, we believe, in existing constitutional doctrine or in the scholarly literature. What is meant by a "cabined exception," as that phase is utilized here,[75] and what is the justification for limiting or cabining the exception rather than recognizing an exception without limitation?

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,[76] but only up to a point, and not to the point where the methods used are extreme.[77] We explain in the following paragraphs the reasoning that supports this conclusion and further along in the paper, we put additional content into the notion of interrogation methods which are not extreme.

[75] By cabined, we mean 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.

[76] But see the discussion of uncertainty regarding the current state of the law, infra, section .

[77] We use the term, extreme, here; further along in the paper, we try to flesh out this concept a bit more.

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—viz. torture and similarly unacceptable methods of questioning, violate basic moral precepts which should trump any assessment of social cost.[78]

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, e.g. 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 paper, 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-seated revulsion against torture and other extremely cruel methods in these kinds of circumstances?[79]

My answer to this question is, No: Torture should not be viewed as a lawful interrogation method in any circumstance.[80] 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

[78] 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.
[79] See generally, Charles Fried and Gregory Fried, Because It Is Wrong: Torture, Privacy and Presidential Power in the Age of Terror (Norton and Co. 2010).
[80] See note , infra, commenting on Professor Alan Dershowitz's torture warrant proposal and Judge Richard Posner's rejoinder.

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.[81]

Notably, however, the coerced confession doctrine developed by the Supreme Court appears to sweep more broadly [82] than simply outlawing extreme and abhorrent interrogation techniques. [83] It appears to bar the police from using a number of techniques and practices in ordinary crime cases that do not come near to a standard of extremely cruel, or even cruel methods. The use of such non-extreme techniques to ferret out information should not, however, 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.

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[81] 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. Rather, as noted in the text, the coerced confession doctrine developed by the Court came to sweep more broadly. See note 83, infra.

[82] 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 is supportive of a different conclusion, but this body of law is far from unanimous. The subject is further discussed below in section .

[83] See, e.g.: "… [T]he actions of police in obtaining confessions have come under scrutiny in a long series of cases. …The facts of no case recently in this Court have quite approached the brutal beatings in *Brown* v. *Mississippi*, 297 U.S. 278 (1936), or the 36 consecutive hours of questioning present in *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944). But as 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." Spano v. New York, 360 U.S. 315 320-321 (1959). 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 Court. See Justice Jackson, e.g., dissenting in Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944):

> Actual or threatened violence have no place in eliciting truth….
>
> 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.

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, even though they may be unlawful under existing supreme court doctrine, do not warrant a similar rule of exclusion where the stakes are much higher—i.e. where there would be a significant risk to public safety if relevant information is not obtained quickly. Further, the fact that the purpose of the questions asked is not to obtain evidence for prosecution but rather to obtain intelligence useful in preventing future terrorist acts adds to the justification for recognizing an exception. In this last-mentioned respect, the proposed exception would be consistent with the other exceptions discussed in Part One of this paper.

**3. Need for an exception?**

The question of whether there is a need for an exception to coerced confession rules has two aspects. First, as an empirical matter, does the FBI need additional 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, the use of which does not violate basic moral values of our society?

Regarding the empirical issue, we believe that giving FBI agents additional flexibility regarding the interrogation methods that may be used in terrorism investigations cannot help but make it easier for them to do their job successfully. Further, removing the uncertainty that attaches regarding the applicable law of coerced confessions should reduce the incidence of confessions determined to be inadmissible.[84] While there is no empirical evidence to support these two observations, we believe they are reasonable and a matter of common sense.[85]

We address the second issue--namely, to what extent does existing coerced confession doctrine make unlawful non-extreme interrogation techniques-- in the next section.

**a. Illustrative pre-Miranda coerced confession case law in the Supreme Court involving non-extreme interrogation methods**

We describe below 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[86]:

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[84] See infra.

[85] We are not discussing here the use of techniques that are objectionable because they tend to produce unreliable statements.

[86] See generally, Catherine Hancock, Due Process Before Miranda, 70 Tul. L. Rev. 2195 (1996). See also infra.

A sheriff threatened to bring the suspect's wife (who suffered from arthritis) in for questioning. Rogers v. Richmond.[87]

The police told defendant that unless she cooperated, she would get 10 years, state financial aid for her children would be cut off and the children would be taken from her unless she cooperated. Lynumn v. Illinois.[88]

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. Haynes v. Washington.[89]

Lengthy, persistent questioning was combined with the use of a young police officer who was a childhood friend of defendant and who was instructed to falsely tell him that defendant's calling him got him in trouble and put him at risk of losing his job; these lies were repeated by the false friend in four different questioning sessions until the defendant confessed. Spano v. New York.[90]

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. Leyra v. Denno.[91] 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."[92]

The use of these kinds of police interrogation methods may and should properly be a ground for excluding statements in ordinary criminal cases; inter alia, they involve the use of deception[93] and various kinds of psychological pressures and stratagems. But when

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[87] 365 U.S. 534 (1961). The specific ruling of the Court was that the state courts had applied the wrong constitutional standard in determining whether the defendant's confession obtained, in response to the threat to bring in his wife, was involuntary. See also Harris v. South Carolina, 338 U.S. 68 (1949) at 70.

[88] 372 U.S. 528 (1963).

[89] 373 U.S. 503 ((1963).

[90] 360 U.S. 315 (1959).

[91] 347 U.S. 556 (1954).

[92] Id at .

[93] Compare Frazier v. Cupp, infra, note , where a police lie, by itself, was held not to be enough to render the statement coerced. Note that there is a literature which addresses the costs of lying by the police and

the stakes are much higher, constitutional doctrine should not prevent their use in order to obtain vital information regarding future terrorism activity.

**b. Is the pre-Miranda supreme court case law still good law? uncertainty in the law; reasons why the status of current law is not a barrier to the development of the exception.**

A number of 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. [94]And meanwhile, the Supreme Court itself has only sparingly directly[95]addressed coerced confession issues.[96] If the case law has indeed evolved so that

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generally leans against the practice. See the discussions in Christopher Slobogin, Deceit, Pretext and Trickery: Investigative Lies by the Police 76 Ore. L.Rev. 775 (1997); Christopher Slobogin, Lying and Confessing, 39 Tex. Tech L.Rev. 1275 (2007). and see generally, Sissela Bok, Lying: Moral Choice in Public and Private Life (Pantheon Books 1978). Dr. Bok would recognize the possibility in certain types of crisis situations of some narrowly confined exceptions to her general disapproval of lying. Allowing for the possibility of such exceptions can be seen as vaguely reminiscent of some elements of the cabined exception approach, but she would undoubtedly disapprove of the specifics of the approach as applied to police lying in the interrogation process.

[94] See Welsh S. White, Miranda's Failure to Restrain Pernicious Interrogation Practices, 99 Mich. L.Rev. 1211, 1219 (2001); cf. Welsh S. White, What is an Involuntary Confession Now? 50 Rutgers L.Rev. 2001, 2009 (1998). Also see 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 Cal.L.Rev.673, 745-746 (1992*). And see* White, Miranda's Failure… at 1220.:"As Professor Louis Michael Seidman has indicated, this 'silence at the top' has undoubtedly led some lower courts to believe that claims of involuntary confessions need not be treated seriously."

[95] See, e.g., Mincey v. Arizona, 437 U.S. 385 (1978) where the Court did hold a confession to be involuntary, stating, "The statements at issue were … the result of virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness." Also see Arizona v. Fulminante, 499 U.S. 279 (1991):

> The Arizona Supreme Court found a credible threat of physical violence [in the prison where the suspect was confined] unless Fulminante confessed. 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 in a footnote to numerous additional facts in support of its finding that the Fulminante confession was coerced.

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."

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

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

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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 (1980) which involved a statement obtained from a suspect about the location of a missing shotgun; the suspect had been told by the police 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." But the use of that kind of interrogation technique was not at issue in the case before the Court; rather the issue was whether the police-suspect conversation constituted "interrogation" for purposes of the Miranda rules. See also Brewer v. Williams, 430 U.S. 387 (1977); and Mathiason v. Oregon, 429 U.S. 492 (1977) where the issue was whether the police conversing with the suspect in the stationhouse was *custodial* interrogation for Miranda purposes. The Court stated,

> The officer's false statement about having discovered Mathiason's fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the Miranda rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the Miranda rule.

It would be 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 remain un-repudiated in any subsequent supreme court law.

[96] There are various explanations for this 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 as has been suggested (see Seidman, supra, note 94), 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. 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. As Professor Welsh White has written,

> A survey of recent decisions suggests that, when the police have complied with Miranda, it is very difficult for a defendant to establish that a confession obtained after a Miranda waiver violated due process.
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> …
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> …,[L]ower courts conflate the test for determining a valid Miranda waiver with the test for determining a voluntary confession because the tests are so similar. …Although lower courts generally apply the two tests separately, some courts appear to equate a finding that a suspect's Miranda waiver was voluntary with a conclusion that her confession was also voluntary. A finding that the police have properly informed the suspect of his Miranda rights thus often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices. 99 Mich.L.Rev. 1211, 1220.

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.

reasons, however, we are convinced that the development of a cabined exception is needed.[97]

First, as noted, the Supreme Court has not spoken clearly on the relevant issues since the pre-Miranda coerced confession decisions. [98] 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 number of post-Miranda decisions adopting rather broad applications of the voluntariness doctrine [99] but there are also judicial interpretations that are quite consistent with the approach reflected in the more restrictive pre-Miranda Supreme Court case law. [100] However many lower court decisions support the broader approach, at best one can only conclude that the law of coerced confessions at this level is uncertain.[101]

If one starts from the premise that existing coerced confession doctrine (derived from the pre-Miranda case law) declares many non-extreme interrogation techniques to be coercive under the Constitution, there is clearly 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: If the constitutional doctrine is restrictive, there is a need to give the FBI more flexibility in interrogating terrorism suspects in exigent circumstances. It the doctrine is uncertain, there is both a need to give the FBI more flexibility and to clarify 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.

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[97] We focus here only on the coerced confession doctrine and police interrogation practices in situations of exigency. As mentioned toward the end of Part One supra, section , there are other specific rules applicable to interrogations, e.g., the right to cut off questioning and the right to have counsel present. While we do not specifically address them, generally we assume here that the same justification for a modification of or exception to normally applicable rules discussed in the text might apply to those other specific rules. To the extent that they present different issues or concerns, they warrant treatment in another paper.

[98] See note 91 supra.

[99] E*.g. see Purvis v. Dugger, 932 F.2d 1413 (11th Cir. 1991), cited as an example by Professor Seidman, supra, note 91, 80 Cal.L.Rev.673, at note 241*.

[100] See, e.g., U.S. v. Pichardo**,** 1992 WL 249964 (S.D.N.Y.,1992)( The fact that the interrogator made misleading statements about a lie detector test and that the suspect was unfamiliar with the U.S. justice system led the court to conclude that the statements were coerced); *United States v. Anderson, 929 F. 2d 96 (2d Cir. 1991) (" the agent told defendant that if he asked for a lawyer it would permanently preclude him from cooperating with the police"—held to be false and coercive);* United States v. Tingle, 658 F2d 1332 (9th Cir. 1981) (The suspect had been warned by the interrogating police that a lengthy prison term could be imposed, that whether she cooperated would be communicated to the prosecutor, and that she might not see her two-year-old child for a while. Held: the statements were coerced.) S*ee also Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991).*

[101] The FBI certainly thinks so. See 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.

The need for such an exception is greater today because agents in obedience to the FBI Guidelines, in some circumstances, may now proceed to interrogate terrorism suspects without Miranda warnings, and accordingly, the issue of whether coercion was used in the interrogation is likely to be highlighted.[102]

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[102] 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, The Privilege Against Self-Incrimination in a Rescue Situation, 76 J.Crim. L. & Criminology 567 (1985). Professor Pizzi mainly addressed the application of the *Quarles* exception in a kidnapping-to-save-the-life-of-the-victim situation but also argued for a similar 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. In his only comment on the issue, he stated:

> 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. William T. Pizzi, The Privilege Against Self-Incrimination in a Rescue Situation, 76 J.Crim. L. & Criminology 567, 606 (1985).

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 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. William T. Pizzi, The Privilege Against Self Incrimination in a Rescue Situation, 76 J.Crim. L. and Criminology 567, (1985)

A different approach has been proposed by Professor Dershowitz who has famously argued for a so-called torture warrant in a ticking bomb situation. In a situation where the police have information that a major terrorism event is imminent, under the Dershowitz proposal, they would be required to seek from a judge a warrant authorizing the use of extreme interrogation methods up to and including torture. See Alan M. Dershowitz, The Torture Warrant: A Response to Professor Strauss, 48 N.Y. L. Sch. L.Rev. 275 (2003).

The proposal under discussion in this paper 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 require exigent circumstances but nothing as extreme as the ticking bomb standard, More importantly, while Dershowitz would authorize torture under a warrant procedure, the proposal being discussed, in appropriate circumstances, 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, we believe, adequate justification, given time constraints inherent in exigency situations and the nature of the additional authority that would be exercised.

See Judge Posner's response to the Dershowitz proposal:

> If 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 be fitted within existing constitutional doctrine, especially within the doctrine that attaches to the privilege against self incrimination?[103]

It is familiar law that the Supreme Court at various times has used both the self-incrimination privilege and/or the due process clause as the basis for its coerced confession and compelled statements rulings. Judicial statements have gone back and forth on the question of whether in dealing with statements obtained from suspects allegedly through coercion or compulsion the relevant constitutional provision is the privilege against self incrimination or the due process clause. In Dickerson v. United States, Chief Justice Rehnquist stated:

> "…[O]ur 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 …[citing Bram v. United States and Brown v. Mississippi]." [104]

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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 The New Republic, Sept. 2, 2002, 28.

We would articulate the Posner approach somewhat differently and with a slightly different rationale. Better to leave in place the customary prohibitions which make torture a crime (see 18 U.S.C. §§ 2340 and 2340A), 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 with the foregoing, the judicial unwillingness to accord legal justification or excuse to cannibalism in the famous lifeboat case of *Regina v. Dudley and Stephens,* L.R 14 Q.B.D. 273 (1884). See Edward H. Levi, Natural Law, Precedent and Thurman Arnold, 24 Va. L. Rev. 587, 599-596 (1938): "And the perfection of …[the *Regina v. 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." [In *Dudley and Stephens,* the death sentence imposed by the court was commuted by the Crown to six months imprisonment.]

[103] One can imagine devoting an entire article to this issue, examining the nature and origins of the privilege against self incrimination and the due process clause in depth. For the purposes of this paper, we believe that it is sufficient to examine the implications of a few relevant, relatively recent, key decisions of the Supreme Court.

[104] 530 U.S. 428, (2000).

For present purposes, however, we do not think it is necessary to resolve questions about the choice between the one approach or the other.[105] Rather, we consider doctrinal difficulties likely to be encountered under both the privilege against self incrimination and the due process clause. We 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 within it much linguistic flexibility—e.g., it lacks a malleable term like "reasonable" as found in the Fourth Amendment, into which an exception to standard requirements can be read, as was done in Camara and in Keith. It also lacks the type of constitutional interpretive history that would lend itself to adding an exigency and alternative-purpose-of-the-interrogation gloss.[106]

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, that is, not through an interpretation of a specific term of the constitutional formula but rather as a gloss added on top of the constitutional requirements, in this instance, most likely through a weighing of the social cost of the potential loss of the information that the suspect might otherwise provide.

More specifically, the privilege applies to statements which are incriminatory. Conceivably, in an earlier time, the incrimination term itself might have been interpreted narrowly, but in modern times, the notion of statements which tend to incriminate has been mostly given an expansive reading by the courts, and it would probably be difficult

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[105] Scholars have variously characterized the relationship between the privilege against self incrimination and the due process voluntariness approach. Thus, 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… [In] adhering to the voluntariness test, the Court has betrayed the text, historical origins, and policies of the self-incrimination clause. Mark A. Godsey, Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-incrimination, 93 Cal.LRev. 465, 502, 540 (2005)

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, and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 Mich.L.Rev. 941, 946 (2001).

[106] But see note 109, infra which describes an existing exception to the privilege against self incrimination.

at this late date to use interpretation of that term as the vehicle through which an exception can be borne into the privilege.

Looking only to the constitutional language in which the privilege against self incrimination is cast, it is hard to see how it provides a peg on which an exception might be hung. Of course, the Supreme Court does not necessarily need such a peg; if there is sufficient justification, the Court can add an exception as a judicial gloss on the existing doctrine.[107]

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

New York v Quarles appears to be the closest constitutional precedent that might be invoked in support of recognizing an exception to the rule against compelled self-incrimination. An initial take on Quarles is that it appears to be a precedent supportive of the development of an exception to the application of the requirements of the fifth amendment privilege against self-incrimination; that is, it establishes an exception to the requirements of Miranda for public safety reasons, and Miranda, after all, is based on the privilege against self-incrimination. As suggested earlier in the paper, the carving out of an exception to the warnings requirements that are seen as a protection against coercion would not seem to be very far from carving out an exception to the coercion doctrine itself, especially if the coercion rule in question reflects a cabined approach.

Upon closer examination, however, Quarles, as it was originally decided, turns out paradoxically to be a decision which, while it recognized an exception to the Miranda warning requirements, nevertheless constitutes direct Supreme Court authority *against* applying a similar exception in the coerced confession area.

The basis for this paradox is first, the fact that, as discussed in Part One, the Court in Quarles 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 directly involved application of a rule based in the Constitution, the Court would not have seen itself able to carve out 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.

There is a second ground for viewing Quarles as a precedent against the extension of a similar exception to the coerced confession area. 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 similar 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 Court in

[107] It may be thought that such an approach would run headlong into the notion that the privilege against self-incrimination is absolute and brooks no exceptions. We address that notion directly, infra, .

Quarles indicated that on remand the accused could raise the question of whether his statement may have been coerced.

> … [R]espondent is certainly free on remand to argue that his statement was coerced under traditional due process standards.[108]

Whereas the circumstances of urgency in the case were held by the majority to be 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, the same decision that established an exigency exception with respect to Miranda's warning requirements seems at the same time, in two different ways, by implication to have 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.[109]

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 Quarles, not expressly mentioned in the majority opinion, though referred to by Justice Marshall in dissent[110] and by Justice Scalia dissenting in Dickerson[111]: that the Fifth Amendment privilege against self-incrimination is an absolute, i.e. not subject to exceptions.

The Court in Dickerson can be viewed as having responded to both the text and subtext elements of Quarles. Chief Justice Rehnquist expressly stated "that Miranda is a constitutional decision," and "Miranda announced a constitutional rule…," thus

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[108] 467 U.S. 649, , at n. 5 (1984).
[109] 530 U.S. 428 (2000).
[110] See note , supra.

[111] Justice Scalia dissenting in Dickerson stated (*Dickerson v. United States*,530 U.S. 428, 453 (2000)) :

> "…[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,', 467 U.S. at 653, n. 3."

Justice Scalia's reference here seems to suggest that the Quarles majority "explicitly acknowledged… that the Fifth Amendment's bar on compelled self-incrimination is absolute." Not quite. 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," that is not quite the same thing as declaring that the privilege against self incrimination is an absolute. Justice Marshall in dissent in *Quarles* did, however, refer to the fifth amendment as an "absolute prohibition." See note , supra.

seemingly re-characterizing his own statement in Quarles that the Miranda warnings were only "prophylactic." Similarly, the Court majority in Dickerson responded to the subtext element—the asserted absoluteness of the privilege against self incrimination—when it stated "that no constitutional rule is immutable."

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' 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.

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;[112] that Miranda is a constitutional rule based in the self-incrimination privilege; and that the Quarles exception to Miranda is still good law.[113]

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[112] We have concluded that the application of the privilege against self incrimination may be subject to exceptions. Indeed, further authority may be 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., Justice Scalia in Maryland v. Shatzer, 130 S.Ct. 1213 (2010): "In *Miranda* ...the Court adopted a set of prophylactic measures….").

There is, however, a well-established legal context where the Supreme Court has applied an approach which 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. See, eg., California v. Byers, 402 U.S. 424 (1971):

> 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….
>
> …
>
> … [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 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.
>
> In all of these cases [ed. 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.' E.g., Albertson v. SACB, 382 U.S., at 79, 86 S.Ct., at 199; Marchetti v. United States, 390 U.S., at 47, 88 S.Ct., at 702.
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> 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. …

…§(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.

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 reasons or 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, discussed earlier in section , supra. 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 as 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 S.Ct. Rev. 103; Stephen Saltzburg, The Required Records Doctrine: Its Lessons for the Privilege against Self-incrimination (In Honor of Bernard D. Meltzer) 53 U.Chi.L.Rev. 6 (1986).

[113] While it is clear that the *Quarles* exception survives *Dickerson,* the doctrinal puzzle remains: how to reconcile the *Dickerson* decision and the line of cases treating *Miranda* as a prophylactic rule. For some scholars' views on how to resolve this puzzle, see, e.g., Susan R. Klein, Miranda's Exceptions in a Post-Dickerson World, 91 J. Crim. L. & Criminology 567 (2001). Compare 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:

> We are left with the same questions burning before Dickerson. If Miranda is required by the Fifth Amendment, how can we admit unwarned statements into evidence in a criminal trial even for impeachment? Conversely, if Miranda is not required by the Fifth Amendment, how can we reverse state court convictions for its violation?
>
> 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):

> Finally, had 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."

See also Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw U. L.Rev. 100, 105 (1985).

Of course, none of these conclusions provide affirmative judicial authority for the proposal under study here—recognizing a cabined 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 afore-mentioned cabined exception. Dickerson makes clear that there is no doctrinal impediment flowing from Quarles to the 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 many reasons why this failure to take advantage of an opportunity should not count significantly against adoption of the exception today. First, the matter of applying an exception to coerced confession rules was not argued or before the Court in Quarles; Second, the matter was touched upon only in a footnote. Third, without having the benefit of an argument and analysis in support of the idea of a cabined exception, the Court would have been likely to conclude that recognizing 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 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**

The due process clause, like the privilege against self-incrimination, as the foundation for the legal rules relating to coerced confessions, also seems to present no doctrinal barrier to the recognition of the proposed exception. Indeed, one can derive some limited support for the development of such an exception in a few supreme court due process decisions. Like the standard of reasonableness in the fourth amendment, the due process formula contains within it 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 which, inter alia, "barred the use of confessions…which were produced by offensive [police] methods even though the reliability of the confession was not in question." [114] The courts have long taken into account in this area of the law whether the police behavior in question violated accepted norms.

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[114] Kamisar, LaFave, et al. Modern Criminal Procedure 544 (12th ed. 2008).

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 into an inquiry as to whether the police methods were justified or whether they had good reasons for what they did. Examination of whether the exigency created by an impending terrorist event can legally justify particular government actions or the use of specific interrogation methods involves a similar type of weighing that might be undertaken as a part of the due process inquiry.

A few supreme court cases in the 1940's addressed the question of whether the police were justified or had good reasons for departing from normal practice in the course of interrogating a suspect. Thus, for example, in Ward v. Texas,[115] after his arrest, the suspect was transported by the sheriff to a town in another county, 110 miles away. The state's claim was that there was concern about a lynch mob forming and the move was done to ensure the suspect's safety. (Note that this amounts to a claim that there was an exigent circumstance justifying the sheriff's action.) The defendant's contention in response was that he had been moved to prevent a local judge who was acting on his behalf from being able to obtain 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." Rejecting the state's explanation, the Court first briefly noted that the sheriff did not follow the legally-required procedures for such a removal and "[i]n the second place the evidence of threatened mob violence is extremely vague and by no means adequately explains the course of the officers' activities."

Ward does not allow the claimed justification to validate what was otherwise seen as improper conduct by the police; its significance is rather 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.[116]

Similarly in Malinski v. New York, the suspect had been stripped naked upon his arrival at the stationhouse and kept that way for three hours and then given back his underwear, shoes, socks and a blanket in which to wrap himself and kept that way for another seven hours. 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. 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. Once more the Court weighed the claimed justifications for the particular police tactics, thin as they were, and found them wanting.[117]

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[115] 316 U.S. 547 (1942).

[116] 324 U.S. 401 (1945).

[117] See also Chambers v. Florida, 309 U.S. 227 (1940), where the Court rejected a more general kind of claim of justification, stating:

> We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws.

These cases dealt only with a claim of justification for very specific police actions which, otherwise, were deemed 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 by exigent circumstances.[118] In making an assessment of 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.[119]

One instance, however, where justices of the Supreme Court did address, albeit very briefly, in a due process-fourteenth amendment confessions context, the issue of the justification for police interrogation actions, other than a purpose to obtain evidence for prosecution, arose in Chavez v. Martinez.[120]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. The suspect filed a § 1983 civil rights action against the officer who had questioned him, alleging that the questioning violated his constitutional rights. Justice Thomas' (joined by Chief Justice Rehnquist and Justice Scalia), inter alia, 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.[121]

Justice Thomas here recognizes 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, and he also identifies a kind of exigency—namely, the need to obtain the evidence before the suspect might die. He viewed these elements in the case 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 pursuing questioning despite the fact that the suspect was in physical pain and mental anguish? The quoted sentence nevertheless is an instance of a taking into account (by some members of the Court, and in a civil suit context[122]) of exigency

[118] In both Ward and Malinkski, however, the alleged police misbehavior arguably was relevant to the interrogations that took place: in the former instance, it was alleged to have made it easier to obtain a confession "in a strange place"; in the latter case, leaving the suspect first naked and then undressed for a long period could viewed as a softening up process prior to interrogation.

[119] Justification concerns, for example, have also arisen in other confessions contexts with regard to such issues as whether the delay was necessary under the "without unnecessary delay" rubric.

[120] 538 U.S. 760 (2003).
[121] Id at 774-775.
[122] 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.

and a non-prosecution purpose, in applying coerced confession doctrine under the due process clause.[123]

If under the due process rubric an exigent circumstance (the risk that the suspect might soon die) warrants engaging in some questioning practices beyond what would normally be permitted, in order to determine whether a police officer had earlier engaged in misconduct, the door may be 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 balance scale in determining whether the government conduct was proper--whether by way of an express exception, or as the outcome of a due process balancing.

Of course, we do not contend that either the case analysis developed under the privilege against self incrimination heading or, under the due process rubric, constitutes strong affirmative judicial precedent for recognition of the type of exception under consideration. But some of these precedents, arguably, do represent some limited support for such recognition, and, we would also argue, serve as reasonably clear indications that such an exception is not foreclosed by doctrines currently being 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 coerced confession/involuntariness doctrine might be argued to flow from the legal concepts and terms used by the Court in determining that confessions were obtained in violation of due process. Thus it can be contended, 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 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/involuntariness decision stand against the recognition of the exception?

Either of two approaches can be used to respond to this type of contention. First, if the ultimate criterion is due process, that legal formula is flexible enough to take account of public safety concerns and justification for the police to use certain interrogation methods.

Second, the "involuntary," "coerced," "overborne will" and any similar terms are, of course, legal concepts which arguably are legal labels, terms of art, which in turn express

[123] 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.

certain legal conclusions. These are general terms which 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—i.e. to look at the specific practices which are 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.[124]

**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/social costs justification for developing a cabined exception (similar to that adopted or proposed for other areas of constitutional protection, as addressed in Part One of this paper), an additional argument can be advanced in support of such an exception. There is a danger of an insidious type of 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 [125] may be expected and may already be underway.

Assume that current constitutional doctrine is applicable; i.e. a cabined exception has not (yet?) 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. It is assumed that often in such situations, the government agents are likely to push the envelope somewhat in their use of interrogation methods, both because of the strong

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[124] 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 as well in cases involving a restricting application of coerced confession doctrine. For example, see 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; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases.

Describing as "abhorrent to society" the type of practices in the cases described in the text at notes 71-75 seems today to be somewhat stronger than warranted by the police methods being utilized, though we have no quarrel with labeling such practices as illegal and improper. 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."

[125] Ironically, the adoption of the exception may serve to limit one type of erosion of constitutional standards, while the adoption creates a risk of another kind of erosion of constitutional standards. See section , infra.

desire to get useful information to prevent terrorist acts and the hope of an indulgent judicial response. Assume that they are successful in obtaining the information.

Subsequently, the individual is prosecuted, the suspect's statements are offered into evidence, and his counsel argues that the stratagems used violated 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.[126]

We use this simple hypothetical to illustrate 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, in order to enable the police successfully to carry on their investigatory mission in trying to 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 be likely to stretch the doctrine. Even in comparison with those lower court decisions which in ordinary crime cases have been more expansive than the earlier supreme court cases, some judges in terrorism cases would be likely to be still more permissive regarding interrogation methods which 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 is likely to 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 (i.e., those which 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 on the judiciary exerted by the ongoing risk of terrorism events—allowing the courts to deal with those pressures on an ad hoc basis insofar as they relate to police interrogation techniques, or recognizing a categorical exception specifically designed to respond to those pressures. The carving out of 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 which tends to increase the risk of unreliable statements**

[126] But see section supra (dealing with uncertainty about the current state of the law of coerced confessions.

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/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 protect, avoid implicating or disclosing the whereabouts of others; to avoid disclosing where terrorism-related materials, for example, explosives, are hidden, etc. 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(s), through the questions asked, the interrogating methods and stratagems used, and other factors, can have a great deal of influence on the substance of the suspect's responses to questions.[127] 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 to that goal. While the interrogator is, of course, also concerned about reliability, where the primary purpose is to obtain incriminating statements, viz. a confession or admissions, for use in prosecution, that purpose is likely to dominate, and less attention may be paid to issues of reliability.

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.[128] Where the interrogator has such a purpose, it, of course, does not ensure that the responses obtained from the suspect will be reliable, but it does remove a particular source of unreliability,[129]namely, the influence of the interrogator's methods and questions where the interrogator is trying to obtain a particular kind of information.

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[127] Of course, the most extreme way to influence statements, essentially making them unreliable, is to use torture. See, e.g., U.S. Revives Guantanamo Tribunal; Saudi Is Charged, Los Angeles Times, April 21, 2011, A8 (Abd al Rahim al Nashiri reported to have stated at a 2007 hearing: "'They used to drown me in water.' To get them to stop, Nashiri said, he would 'invent' stories, even saying Bin Laden had a nuclear bomb.")

[128] Compare text, supra, at n. 19, p. .

[129] Compare and contrast the somewhat related argument made by the Fourth Circuit in the Moussaoui case, see text, supra, at n. 21. The court there tried to make the case for a "strong" reliability theory, namely, that the profound interest of the interrogators in obtaining accurate information and reporting it accurately provides sufficient indicia of reliability, but the case that was made was in fact relatively weak. The analysis in the text here, it is submitted, better spells out the appropriate case for a "weak" reliability theory, that is, removing a source of unreliability—which, of course, does not guarantee or provide

This reduction in the risk of unreliability—where the purpose of the interrogation is to obtain intelligence useful to prevent terrorist acts—may be seen as a make weight factor supportive of the adoption of the proposed exception.

**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 subject to being viewed as a precedent for other applications and, accordingly, the relevant constitutional protection will tend to be undermined by numerous and expanding applications of the exception.[130]

More specifically, such erosion could take different forms: It might, for example, involve extension beyond terrorism into other crime categories. And, of course, 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 to be recognized for terrorism interrogations,[131] it should also be recognized for interrogations relating to other types of serious crimes—e.g., organized crime cases or large scale drug rings, and that multiplication of these kinds of extensions will undermine the basic constitutional protection.

We believe that the case for limiting the cabined exception to serious terrorism investigations, and for not extending it to other crime categories, even serious crimes, is strong; and that there is a principled basis for drawing such a line.

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"sufficient indicia" of reliability. Nor do we believe that such indicia are provided by the motivation of the interrogators to be accurate.

Also, to be compared and contrasted is the reliability concern underlying the *Bryant* opinion, see text, supra, at notes 37 and 41, p. and p. . 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, condition and circumstances of the person being interrogated and not from the motivation of the interrogators.

[130] Compare the somewhat different erosion argument arising from a failure to develop a cabined exception, discussed, supra .

[131] 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. Accordingly, the nature of the crimes charged in the indictment will not be relevant in determining whether the "exception" is applicable.

The difference between each of these instances of "ordinary" criminality and the terrorism category is that the latter will generally pose a threat not just to a number of people but to hundreds and, as in the horrors of 9/11, to thousands. 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.[132] But viewed cumulatively 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.[133] In the present day world, terrorism is a sui generis category of crime which justifies special treatment. [134]

**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 One, supra, 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 specific crime category under investigation, to situations where there is specific evidence that human life is imminently at risk--e.g. where the exception is invoked to apprehend a serial killer whose pattern indicates that he is very likely to kill again very soon, let us say within 24 hours? Stating the issue more generally, in addition to the categorical exception for terrorism interrogations, are there grounds for adopting a cabined exception to coerced confession rules in urgent public safety situations comparable to those covered by the judicially-crafted exceptions to confrontation and Miranda, discussed in Part One, supra.

Recognition of such an exception to coerced confession doctrine would involve a judgment that obtaining information that would lead to recovery of a kidnap victim alive outweighs the intrusion on normally-protected liberty that a cabined exception permits.

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[132] 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, we do not believe that it compares with the magnitude of the danger to our society of the use of a weapon of mass destruction in a large urban area.

[133] One can imagine a type of non-terrorism criminality that were it to develop in this country might be grounds for extending this exception to another area. For example, in Mexico today, drug cartels are murdering people at will, running rampant in their 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 that type of criminality turns into a basic threat to the viability and effective control of the government over its territory, it begins to acquire some attributes of terrorism, but it still would lack the potential to kill thousands of victims in a single event. Were this type of rampant criminality ever to occur in this country, it would be time enough to think about the extension of the cabined exception to another substantive area of the law.

[134] 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.

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 a particular category of crime, namely, terrorism? We do not believe so.

As discussed in the previous section, once one gets beyond terrorism, one cannot draw a 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 crime that can pose a risk of catastrophic loss of life. Further, while many imminent terrorist events will involve a risk of a major loss of human life, as we envisage application of the categorical exception, a showing in the individual case of the risk of loss of life is not required.

Extension of the exception to cases involving specific showings 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, we believe, lend itself to an undue erosion of constitutional principles, anymore 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.[135]

**4. The risk of a general weakening of the protections afforded by the coerced confession doctrine**

It can, of course, 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, etc., this could lead to a judicial watering down of what is ruled to be legally permissible, even absent exigent circumstances, in ordinary criminal cases.[136] By the same token, if the police are

[135] 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, we do not believe so. The terrorism exception applies to imminent terrorism events; it is a categorical exception based on the type of crime, where a showing of the imminence of that type of crime is sufficient simply because in many such cases there will be a risk of large scale loss of human life. In the exigency/risk of loss of human life cases, a specific showing in the particular case justifies application of the exception.

[136] Compare the argument made supra, in section , 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.

permitted to engage in certain conduct in exigent circumstances and in certain categories 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, we believe that 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. In section E, infra, we provide some preliminary thoughts on the categories and terms that might be used. Ultimately, it will be up to the judges to ensure that as a result of adopting a cabined exception approach, erosion of constitutional coerced confession doctrine does not occur through judicial interpretation.

**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 judicial decision or through dictum in a judicial opinion.. The other exigency exceptions were initiated in this way.[137]

It would be desirable, however, at an early point, for the proposal to be detailed in legislative form. This is more likely to occur, however, 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 by the Supreme Court in United States v. United States District Court (Keith).[138] Congress, partially acting on that suggestion, later legislated special rules for foreign intelligence matters in the form of the Foreign Intelligence Surveillance Act.[139]

This does not necessarily mean that Congress should be the first to act on the subject, 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

[137] See generally, Part One supra.
[138] 407 U.S. 297 (1972).
[139] 50 U.S.C. § 1801 et seq.

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.

Accordingly, action by the Executive Branch, through informal policy or guidelines could turn out to be the preferred route to pursue, after a judicial expression of support for the subject. As mentioned, the FBI guidelines relating to a terrorism-related exception to the Miranda rules provide a useful model[140]; similar internal guidelines might be developed regarding a cabined exception to the coerced confession/involuntariness 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.[141] Ultimately, it will be for the courts to determine whether 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 we suggest in some instances particular terms of coverage, the identification of the issues to be addressed is more important than the particular substantive suggestions we make. 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

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[140] Action promulgating the FBI Guidelines was preceded first by the decision in New York v. Quarles, 467 U.S. 649 (1984), then by the decision in United States v. Khalil, 214 F. 3d 111 (2d Cir. 2000), and finally by the dictum in the In re Terrorist Bombings of U.S. Embassies in East Africa—United States v. Odeh, 552 F. 3d 177 (2d Cir. 2008) at n. 6.

[141] Compare, for example, how, in connection with the subject of continuing detention of detainees at Guantanamo Bay, the Obama administration issued an Executive Order (E.O, Periodic Review of Individuals Detained at Guantanamo Bay Naval Station…, issued March 7, 2011) providing for procedures and standards to be applied in a period review process of the detainees status. Congress then followed up with provisions in the NDAA, 2012 (HR 1540), signed into law on December 31, 2011 (§§ 1021-1024) adding legislative backing for certain of these provisions and requiring reports to Congress regarding implementing procedures.

the general federal statutory definition which requires violent acts intended "to intimidate or coerce a civilian population" or "influence the policy of a government by intimidation or coercion." The element which the FBI adds to that definition might also be included--the idea that the terrorist acts must be "in furtherance of political or social objectives." We would also add the limiting idea that the activities intended or planned must involve serious violence, by which we mean a threat or potential threat to large numbers of human beings, major public structures, or a threat of assassination of a major governmental official.

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. We would not distinguish between international and domestic terrorism.[142] Our view is that 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 we appreciate that 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, we suggest that 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,[143] 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 index of the fact that he or she has information about a terrorist planning and preparations. Sometimes, however, there may be sufficient other evidence that someone

[142] 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-911), we do not rely on such claims of enlarged executive powers as warrant for the proposals made in this paper. Recall, for example, that the Supreme Court in *Keith* authorized the use of somewhat broader search and seizure standards in a domestic security context.

[143] The FBI guidelines discussed in note , supra, 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."

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 which the government must have? And if so, to what elements must the factual predicate relate? We would 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 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); 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-linked exceptions, existing or proposed in this paper, 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.[144]

**e. The multiple purpose issue**

There is a further issue to address in defining the exception, namely how to deal with situations where there are multiple purposes underlying the investigation and the interrogation. This same issue has arisen and been addressed in connection with implementation of the Foreign Intelligence Surveillance Act (FISA), and similar questions would be likely to arise in administering a new coerced confession cabined exception.[145] 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.

[144] See text, supra, p. .

[145] Compare Justice Sotomayor's mention in *Bryant* of the "mixed motives" that the police may have in asking questions, supra .

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.[146]

2) The intelligence purpose of an interrogation may be legally controlling even if the interrogation also has another purpose.[147] Originally under the FISA, for the intelligence purpose to be legally controlling, it must have been the primary purpose of the investigation. [148] Congress, however, subsequently amended the FISA to provide that it was sufficient if the intelligence purpose was a significant purpose of the investigation.[149] We suggest, however, a return to the primary purpose standard, a formula utilized by Justice Scalia in Davis, and by Justice Sotomayor in Bryant.[150]

**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, we suggest that a separate showing of exigency in the particular case should be required in order to narrow somewhat the application of the exception. We do not suggest, however, that a showing of an "immediately" imminent terrorism event (which is how we interpret the familiar "ticking bomb" test) should be required. Rather, a showing should be required of a reasonable belief that there is ongoing planning for terrorist acts.[151]

**3. Drawing the cabining line. What kind or categories of interrogation methods will be permitted under the exception?**

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[146] See, e.g., *United States v. Duggan,*743 F.2d 59 (2d Cir. 1984).
[147] *In re Sealed Case,*310 F.3d 717 (F.I.S.Ct.Rev. 2002).
[148] Id. at .
[149] 50 U.S.C. § 1804(a)(6)(B), eff. Oct. 7, 2001.
[150] See supra, text at . 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 See e.g., NPR interview of Tim Weiner (author of a history of the CIA), August 27, 2009, discussing the conflict between the FBI and the CIA regarding interrogation methods:

> Steve Inskeep (host): Well, now, that's an interesting point, because the FBI has this tradition of trying to gather information in such a way that it can be used in court. The CIA was not thinking about trials, correct? They were just thinking about getting information ….

[151] Compare the "threat to public safety" element in the FBI guidelines, extending *Quarles to* terrorism interrogations. See text, supra .

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.[152] Instead, developing a specific list of interrogation techniques has a number of advantages: It can provide more guidance than other approaches, can fix the line more precisely between the always-impermissible and the sometimes-permissible, and most importantly, 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, i.e., the listed methods, should not introduce too broad a criterion.

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[152] Examples of a type of general standard that might be used to define methods that would under all circumstances be impermissible include: those methods that "flout the 'decencies of civilized conduct… [and] the community's sense of fair play and decency," or violate basic standards of western civilization, or "shock the conscience,"[152] 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 and 2340A. 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.

As contemplated here, the use of these standards 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.

The use of these standards for this purpose 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. An additional 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 suffer from some of the same disadvantages as the other general standards. Because they are somewhat more specific and have some attached definitions, using them for this purpose would be preferable to using the more general standards mentioned above.

Our goal 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 which 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,[153]which, inter alia, lists 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:

5-74, 5-75

> 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. [154]

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[153] FM 2-22.3 (2006)

[154] While the AFM list in the text of prohibited methods 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…. As 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.
> Separation does not constitute sensory deprivation, which is prohibited. …sensory deprivation is defined 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.

What about other problematic techniques? For example, under the AFM, sleep deprivation may not be used as an interrogation technique but as part of the notion of permissible physical separation, some limits on the amount of sleep are permissible: "Use of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours." 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.[155]

The AFM also lists many standard interrogation techniques which 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 detainees 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 handbook[156] also highlights the uncertainty of the law in this area by listing a series of factors[157] -- "Threats and psychological pressure;… Isolation, incommunicado interrogation; ... Trickery, ruse, deception;…Promises of leniency or other inducements." that the courts predictably "will examine in making its determination." The handbook does not indicate whether any of these will be 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 discussed previously. Whatever the status of these methods under the prevailing

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Clearly, separation is viewed as a technique that facilitates the obtaining of intelligence, and some procedural safeguards attach to its use (e.g. 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 http://harpers.org/archive/2010/11/hbc-90007808.

[155] The AFM in Appendix M seems to authorize a standard of limiting the suspect to four hours in 24 standard for up to a 30 day period. So there are really two issues here: Can a person be allowed less than 4 hours of sleep in each 24 hour period. And for how long can a person be subjected to the 4 hour sleep standard. Thirty days seems excessive. So, once more a line will need to be drawn.

[156] 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

[157] 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.

constitutional doctrine, consideration should be given to being able to use them in appropriate terrorism investigations under a cabined exception approach, and the to-be-drafted guidelines or legislation should address the question of which of these techniques may be permissible to use under the cabined exception approach.[158]

By loosening the rules of interrogation in exigent circumstance/ 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, we believe reasonably clear lines can be drawn and government interrogators given more leeway than they currently have, given the uncertainties of current law.

As noted at the beginning of this section, 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/or legislators, with the appropriate authority. Our purpose has been limited to arguing for the principle of a cabined exception and to providing general directions and identifying some of the kind of issues that will need to be addressed in the process of drafting the needed provisions.[159]

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[158] As previously discussed, see , supra, 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 note , supra , 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.
> Any member of the International Committee of the Red Cross (ICRC) or its affiliates. Such a ruse is a violation of US treaty obligations.
> A chaplain or clergyman.
> A journalist.
> A member of the US Congress.

There are special policy reasons why these particular deceptions may not be used under the AFM, and if the reasons for them are deemed strong and generally applicable these kinds of deceptions should not permitted even under the cabined exception.

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

## Conclusion

In cases where there is a need to obtain information in urgent circumstances concerning future 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 somewhat 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 One. 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 but rather on an ad hoc basis.

The cabined exception proposal may also be viewed as a capstone highlighting commonalities with the other four exceptions discussed in Part One; 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 underlying 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.[160]

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. It will be argued by some that authorizing limited, increased flexibility at the lower end of the

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If the use of religion is to be permitted as an interrogation technique, the line drawn in the foregoing AFM provisions seems to provide sufficient guidance.

[160] 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 the terrorism intelligence purpose by itself (as developed earlier, text at p. ) 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, i.e. 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.

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.[161] 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 us, without compromising basic societal values, toward a vital goal—the prevention of catastrophic terrorist events.

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[161] Whether torture an effective way to obtain reliable information is, of course, a challenged proposition. See, e.g., The Torture Debate in America (Karen J. Greenberg, editor) (Cambridge U. Press, NY, 2005); Martin Robbins, Does Torture Work? The Guardian, published http://www.guardian.co.uk/science/the-lay-scientist/2010/nov/04/2; Robert Creamer, Does Torture Work? The Huffington Post, published at http://www.huffingtonpost.com/robert-creamer/does-torture-work_b_189954.html.