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## Imagining the Unimaginable: Torture and the Criminal Law

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# IMAGINING THE UNIMAGINABLE: TORTURE AND THE CRIMINAL LAW

Francesca Laguardia\*

## ABSTRACT

*This article examines use of torture by the U.S. government in the context of the late 20<sup>th</sup> century preventive turn in criminal justice. Challenging the assumption that the use of “enhanced interrogation tactics” in the war on terror was an exceptional deviation from accepted norms, this article suggests that this deviation began decades before the terror attacks, in the context of conventional criminal procedure. I point to the use of the “ticking time bomb hypothetical,” and its connection to criminal procedure’s “kidnapping hypothetical.” Using case law and criminal procedure textbooks I trace the employment of that narrative over several decades, prior to 2001, including growing support for the use of physical brutality in obtaining information from criminal suspects. Far from “unimaginable,” I argue that the use of torture had been imagined, and gained increasing acceptance, in the increasingly preventive focus of these standard criminal procedural debates.*

## I. INTRODUCTION

When the United States began detaining “enemy combatants” at the Guantanamo Bay Detention Facility, it seemed to many that “the unthinkable had become thinkable.”<sup>1</sup> Civil and human rights advocates decried the policy as a radical departure from both human rights norms and prior U.S. practice.<sup>2</sup> The

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1. Jeremy Waldron, *Torture Terror and Tradeoffs: Philosophy for the Whitehouse* 222 (2010); David Luban, *Unthinking the Ticking Time Bomb*, in *Global Basic Rights* 181 (Charles Beitz & Robert Goodin eds., 2009).

2. See, e.g., Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008) (discussing the legal and political underpinnings

revelation that the United States was engaging in torture, by CIA agents and via the intelligence services of proxy countries, served only to heighten the tenor of the criticism.<sup>3</sup> The controversy has since returned to the forefront of the U.S. policy debate with the release of the declassified executive summary of the Senate Select Committee on Intelligence report on the use of torture by the CIA.<sup>4</sup>

However, some scholars have challenged the notion that the “new” counterterrorism practices were such a complete departure from the “old” counterterrorism regime. Some pointed to the history of indefinite detention of immigrants,<sup>5</sup> while others argued that the new policies were merely reflections of the increase in punitive policies that had begun in the 1970s.<sup>6</sup> Still more noted changes within American criminal justice policies, arguing that U.S. military and criminal justice policies were converging on a single system of justice that embraced certain War on Terror practices.<sup>7</sup>

The individual developments noted in the studies above were either presented without reference to broader criminal justice developments<sup>8</sup> or relied upon the vague and overwhelming notion that the United States had become more

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of the War on Terror); Philippe Sands, *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values* (2008) (analyzing the Bush administration’s complicity in acts of torture as a departure from the principles and values set forth in the Geneva Convention and the Torture Convention); David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terror* (2002) (asserting that the U.S. government’s use of torture in the name of the War on Terror violated the civil liberties of non-U.S. citizens).

3. See, e.g., Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, *New Yorker*, Feb. 14, 2005 (describing the rendition program); Sarah Joseph, *Rendering Terrorists and the Convention Against Torture*, 5 *Hum. Rts. L. Rev.* 339 (2005) (discussing the conflict between the practice of rendering terrorists and the Convention Against Torture); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 *Case W. Res. J. Int’l L.* 309 (2005) (criticizing the practice of extraordinary rendition as violative of the Geneva Conventions).

4. S. Select Comm. on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program Executive Summary* (2014) [hereinafter *Senate Report*].

5. David Cole & James Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (2006).

6. John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 *Ga. L. Rev.* 733 (2005); Colin Dayan, *The Story of Cruel and Unusual* (2007); James Forman, *Exporting Harshness: How the War on Crime Made the War on Terror Possible*, 33 *N.Y.U. Rev. L. & Soc. Change* 331 (2009).

7. John T. Parry, *Terrorism and the New Criminal Process*, 15 *Wm. & Mary Bill Rts. J.* 765 (2007); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *Stan. L. Rev.* 1079 (2007).

8. See Parry, *supra* note 6 (discussing *Miranda* rights and torture without reference to broader criminological culture); Dayan, *supra* note 6 (analyzing the development of Eighth Amendment doctrine); Parry, *supra* note 7; Chesney & Goldsmith, *supra* note 7 (discussing militarization of criminal procedure).

“punitive,” leading to a popular acceptance of torture practices.<sup>9</sup> The “punitive” arguments assert a connection between the phenomenon of mass incarceration and the acceptance of torture—a leap that is not easily made.<sup>10</sup> They further rely on the overly general idea that the U.S. public has become bloodthirsty, which fails to explain why some detainees were tortured, while others were merely detained.

In this article, I argue that all of these developments are better explained via reference to the overarching shift in criminal justice policies, away from checks on law enforcement in favor of the prevention of harm—ultimately leading to a devaluation of the presumption of innocence. I argue that, similar to this shift in criminal justice tactics, torture may be seen as the result of a gradual change in popular U.S. expectations regarding government, as evidenced by increasing acceptance of torture-tolerant narratives in criminal procedure doctrine and education. These changes in expectations in turn resulted in a new logic, a way of weighing interests when analyzing the use of torture that reflected the newly lessened value of formerly fundamental norms, and ignored others entirely. I call this reasoning—a reasoning that frames the question of when and whether to use physical abuse in a way that requires an approving answer—the logic of torture.

The origin of the logic of torture, and rationalization of its use, in the conventional criminal context carries severe implications. It indicates that proponents and critics alike are missing the true character of our use of torture. Our rationalization of torture was not an exceptional response to either an unprecedented risk or an unreasonable panic—rather, it arose as a response to the more banal challenges of everyday policing. The use of torture, therefore, is unlikely to stay buried in the domain of counterterrorism, and cannot be explained, defended, or prevented from recurrence if our understanding of it is limited to that extraordinary context. Its acceptance was not exceptional, and there is little reason to think that its use will remain exceptional for long.

This article begins with an analysis of the preventive turn in criminal procedure. Part II outlines the salient aspects of the preventive turn, and the way in which it alters accepted norms and priorities in criminal justice. I focus in particular on the movement in the criminal law towards avoiding possible harms, and the tension this creates with the traditional balance of considerations in criminal justice in order to eliminate concerns about defendants’ rights and undermine the accepted norm that state action should be taken only when the state is confident that harm will occur if it does not act. Following Peter Ramsay,<sup>11</sup> I

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9. Forman, *supra* note 6.

10. See Forman, *supra* note 6 (using the exceptional rates of incarceration in the United States, as well as rhetoric regarding incarceration, to argue that the use of torture in the “war on terror” is an outgrowth of American punitiveness).

11. Peter Ramsay, *Imprisonment Under the Precautionary Principle*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 193 (G.R. Sullivan & Ian Dennis eds., 2012).

refer to this practice as employment of the “precautionary principle,” which allows extreme government action in response to a mere possibility of harm.<sup>12</sup>

Once I have established the primary aspects of the preventive turn, I discuss the way in which the use of torture, and discussion of torture, can be reimagined as part of this turn. I assert that both the primary justification for torture, the ticking time bomb hypothetical, and criticisms of that justification, show the way in which the discussion of torture is in fact a discussion of the propriety of applying the precautionary principle and a preventive framework. In doing so I engage with the concept of the “ticking time bomb scenario,” its logical flaws, and the way in which these flaws have been highlighted by recent terror threats and the practices of the CIA.

In Part III, I turn to the history of this logic and its increasing acceptance over time, *prior* to the terror attacks of 2001. Rather than a panicked response to terrorism, I show that the narratives justifying torture were gaining acceptance in appellate criminal cases, particularly within the discussion of the extent of *Miranda* rights and also in the context of the due process rights of suspects and convicts (in the development of the “shocks the conscience” standard). Here I look not only to case law, but also to accepted norms and evolving exceptions as represented by the description of doctrine in criminal procedure textbooks.

In Part IV, I conclude by highlighting the most salient features of the judicial decisions and their descriptions in criminal procedure textbooks. I find that rather than “thinking the unthinkable,” the use of torture, and narratives defending its use, were well thought out long before the 2001 “emergency.” I argue that this implies two important points: first, that the use of torture, having developed its justification in the sphere of domestic criminal justice, is unlikely to remain isolated in the quasi-international arena of counterterrorism and; second, that proponents of human rights might do well to focus less on exceptionalism and more on the domestic norms that appear to have given rise to the problem in the first place.

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12. The precautionary principle emerged in the context of environmental law. Ramsay uses the principle as an explanation of the risk-averse, preventive turn in criminal law, which has been noted by numerous scholars. For discussion of the preventive turn in criminal law see generally, Ramsay, *supra* note 11 (discussing the precautionary principle); Lucia Zedner, *Pre-crime and Post-criminology?*, 11 *Theoretical Criminology* 261 (2007) (analyzing the shift from a post-crime to pre-crime society); Andrew Ashworth & Lucia Zedner, *Preventive Justice* (2014) (discussing the principles and values that should guide preventative criminal measures).

## II. THE LOGIC OF PREVENTION AND THE LOGIC OF TORTURE

### A. Prevention

For several decades, sociologists and sociolegal scholars have been noting a preventive turn in criminal justice.<sup>13</sup> Many descriptions of this development have focused on the movement of the criminal justice system from a position of reactive punishment to one of risk management<sup>14</sup> and from a focus on individuals to management of populations.<sup>15</sup> Tactics employed as part of this development include the policing of schools, the increasing use of stop-and-frisk, and the use of population-based risk assessment tools in determining criminal sentences.<sup>16</sup>

Other scholars focus on the continuous development of quasi-criminal civil interventions, such as the use of control orders in the United Kingdom, or the use of mental health (or other) statutes in order to preventively detain individuals who are believed to be “dangerous.”<sup>17</sup> Still more scholars

13. Malcolm M. Feeley & Johnathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *Criminology* 449 (1992); Ulrich Beck, *Risk Society: Towards a New Modernity* (1992); Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 *J. Crim. L. & Criminology* 778 (1996); Carol S. Steiker, *The Limits of the Preventive State*, 88 *J. Crim. L. & Criminology* 771 (1998); Gordon Hughes, *Understanding Crime Prevention: Social Control, Risk and Late Modernity* (1998); Paul Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 *Harv. L. Rev.* 1429 (2001); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *Nw. U. L. Rev.* 1 (2003); Eric Janus, *The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*, 40 *Crim. L. Bull.* 576 (2004); Jude McCulloch & Bree Carlton, *Preempting Justice: Suppression of Financing of Terrorism and the ‘War on Terror,’* 17 *Current Issues in Crim. Just.* 397 (2005); Eric Janus, *Failure to Protect: America’s Sexual Predator Laws and the Rise of the Preventive State* (2006); Richard V. Ericson, *Crime in an Insecure World* (2007); Lucia Zedner, *Preventive Justice or Pre-Punishment? The Case of Control Orders*, 60 *Current Legal Problems* 174 (2007); Bernard Harcourt, *Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age* (2007); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007); Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 *Crim. L. and Phil.* 21 (2008); Ashworth & Zedner, *supra* note 12.

14. See Simon, *supra* note 13; see also Feeley & Simon, *supra* note 13, at 452 (describing a “new” penology that is more concerned with techniques to identify, classify, and manage groupings sorted by dangerousness in order to regulate levels of deviance, and not to respond to individual deviants); Harcourt, *supra* note 13; Ericson, *supra* note 13.

15. See Harcourt, *supra* note 13.

16. See Harcourt, *supra* note 13.

17. See Janus, *Failure to Protect*, *supra* note 13 (arguing that sexual predator laws are signs of a preventive state in which the government casts wide nets of surveillance and intervenes to curtail liberty before crimes of any type occur); see also Ian Dennis, *Security, Risk, and Preventive Orders*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 169 (G.R. Sullivan & Ian Dennis eds., 2012) (discussing the use of civil preventive orders to

emphasize the criminalization of increasingly preparatory acts in order to prevent criminal activity.<sup>18</sup> These statutes may include, for instance, provision of aid to terrorists in the form of providing safe harbor, expertise, or financial support.<sup>19</sup> Such statutes, criminalizing everything from the provision of money to the provision of “expert advice,”<sup>20</sup> have been the most commonly invoked federal criminal terrorism statutes used in terrorism prosecutions in the United States.<sup>21</sup>

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provide security from the harm thought to be presented by the people subject to these orders); John Stanton-Ife, *Preventive Detention at the Margins of Autonomy*, in, *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 143 (G.R. Sullivan & Ian Dennis eds., 2012) (discussing the use of mental disorders as a reason for compulsory civil detentions); Martin Wasik, *The Test for Dangerousness*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 243 (G.R. Sullivan & Ian Dennis eds., 2012) (analyzing different measures of dangerousness for protective sentencing of offenders aged eighteen and over); Lucia Zedner, *Erring on the Side of Safety: Risk Assessment, Expert Knowledge, and the Criminal Court*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 219 (G.R. Sullivan & Ian Dennis eds., 2012) (assessing the use of individuals as risk subjects within the criminal court); Larry Alexander & Kimberly Ferzan, *Danger: The Ethics of Preemptive Action*, 9 Ohio St. J. Crim. L. 637 (2011) (setting out defensible grounds for preventive restrictions of liberty for “responsible but dangerous” actors); Michael Corrado, *Sex Offenders, Unlawful Combatants, and Preventive Detention*, 84 N.C. L. Rev. 77 (2005) (describing the use of preventive detention of sexual predators, undesirable aliens, the mentally ill, and unlawful combatants); Adam Crawford, *Governing Through Anti-social Behaviour, Regulatory Challenges to Criminal Justice*, 49 British J. Criminology 810 (2009) (arguing that Britain’s new anti-social behavior agenda brought in regulatory tools that are used to circumvent and erode established criminal justice principles); Janus, *The Preventive State*, *supra* note 13 (describing how governmental social control and “radical prevention” policies are being used to identify “dangerous” people and deprive them of their liberty preventively); McCulloch & Carlton, *supra* note 13 (using suppression of financing of terrorism legislation to argue that these preventive measures erode and sometimes reverse the presumption of innocence and lead to radical injustice); *see also* Slobogin, *supra* note 13 (analyzing the degree of dangerousness necessary to justify preventive detention); *see also* Zedner, *Preventive Justice or Pre-Punishment?*, *supra* note 13 (describing the United Kingdom’s use of Control Orders and the way they side-step the criminal process to impose burdensome restrictions ahead of any wrongdoing).

18. *See* Kimberley Ferzan & Larry Alexander, *Risk and Inchoate Crimes: Retribution or Prevention?*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 103 (G.R. Sullivan & Ian Dennis eds., 2012); Jeremy Horder, *Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation* (2012); Andrew Simester, *Prophylactic Crimes*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 61 (G.R. Sullivan & Ian Dennis eds., 2012); Kimberly Ferzan, *Inchoate Crimes at the Prevention/Punishment Divide*, 48 San Diego L. Rev. 1273 (2011); McCulloch & Carlton, *supra* note 13.

19. *See* McCulloch & Carlton, *supra* note 13; Ferzan & Alexander, *supra* note 18; Simester, *supra* note 18. Statutes criminalizing the provision of material support to terrorists provide examples of such statutes from the U.S. perspective. *See* 18 U.S.C. §§ 2339(a)–(d) (2002).

20. *See* *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (upholding the constitutionality of the “expert advice or assistance” prong of material support).

21. *See* Richard B. Zabel & James J. Benjamin, Jr., *Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* 11 (2009), *available at*

As Carole Steiker has noted, the tendency to study each of these developments individually has undermined scholars' ability to recognize and respond to the overarching trend towards prevention in criminal justice, and its ramifications, in spite of general agreement among these authors that the cause of each development is in fact a focus on preventing (rather than responding to) harm.<sup>22</sup> Yet just the brief summary of tactics offered above highlights the ubiquity of preventive practices. This ubiquity, in turn, suggests a broad legal cultural development, a revolution of priorities in criminal justice, rather than a series of responses to unique problems.

Of course, it must be acknowledged that criminal justice was always preventive in some sense.<sup>23</sup> One purpose of punishment is to deter future crime, and surely crime prevention was always one aspect of efforts to incapacitate criminals as well.<sup>24</sup> But the current preventive turn notably evades due process protections, which although perhaps merely half a century old, have come to be seen as fundamental to modern conceptions of justice and fairness.<sup>25</sup> Quasi-criminal detention, for instance, offers the state the ability to detain individuals while circumventing standards of proof beyond a reasonable doubt, or, in the case of control orders and other responses to terrorism, the right to see and respond to evidence against oneself.<sup>26</sup> By detaining without proving guilt, the state threatens the very existence of the presumption of innocence.<sup>27</sup>

The legal philosophical critique put forward by legal philosophers, who have perhaps done the most work on the preventative turn in criminal justice, offers an excellent explanation of how the purpose and limits of criminal justice interventions have changed in recent years. Under what might be considered a traditional view of criminal justice interventions, the state refrains from imposing on an individual unless and until some imposition is known to be necessary, such

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<http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf>.

22. See Steiker, *supra* note 13, at 778.

23. Ashworth & Zedner, *Preventive Justice*, *supra* note 12, at 11, 17, 21, 27–50; Ashworth & Zedner, *Just Prevention: Preventive Rationales and the Limits of the Criminal Law*, in *Philosophical Foundations of Criminal Law* 279, 279 (Robin Duff & Stuart Green eds., 2011) (“We also assume that the prevention of harm is one of the rationales of the criminal law.”).

24. See, e.g., Albert Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts about the Next*, 70 U. Chi. L. Rev. 1, 1 (2003) (stating that “the textbook purposes of criminal punishment” are “retribution, deterrence, incapacitation, and rehabilitation”).

25. See, e.g., Magnus Ulväng, *Criminal and Procedural Fairness: Some Challenges to the Presumption of Innocence*, 8 Crim. L. & Phil. 469, 470 (including the right against self-incrimination and right to remain silent in a list of fundamental rules created to ensure fair trials).

26. See Stanton-Ife, *supra* note 17; Dennis, *supra* note 17.

27. Kimberly Ferzan, *Preventive Justice and the Presumption of Innocence*, 8 Crim. L. & Phil. 505 (2014); Ashworth & Zedner, *Preventive Justice*, *supra* note 13, at 72, 131.



as in the case of regulations on driving and other risky behavior, or justified by the individual's commission of a crime. In either case, the imposition on the individual is justified only when the state has established that it is responding to some harm that will occur, definitively, without its intervention (or that has already occurred).<sup>28</sup>

This focus on the harm principle—the notion that the state should not punish criminally unless some actual harm has been committed—respects and protects the dignity and autonomy of individuals, by taking seriously the notion that at any point an individual may change his or her mind regarding the commission of a crime.<sup>29</sup> Moreover, as Mill noted, the notion of acting *prior* to the commission of a harm poses a greater risk of abuse than does a reactive criminal law, as almost any freedom or capability granted to an individual might make it more likely (by making it more possible) that the individual will use that freedom to commit a crime.<sup>30</sup>

While preventive crimes, criminalizing risky behavior, have always existed, philosophers reason that criminalization does not threaten the harm principle in the cases of individuals whose actions impair their ability to make the decision to forego criminal behavior, and in the case of behavior that poses risks even outside of the actor's intent.<sup>31</sup> As an example, carrying a loaded gun might pose risks beyond an actor's choice to shoot someone—merely dropping the gun can harm someone, and can happen in spite of the actor's specific intent to avoid harming anyone.<sup>32</sup> In such circumstances, criminalization of preventive behavior does not threaten personal autonomy, since the ability of the individual to choose

28. Peter Ramsay, *Imprisonment Under the Precautionary Principle*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 193, 193 (G.R. Sullivan & Ian Dennis eds., 2012).

29. G.R. Sullivan & Ian Dennis, *Seeking Security: An Introduction*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 1, 1–2 (G.R. Sullivan & Ian Dennis eds., 2012) (explaining that liberal democracies place individual autonomy at a premium and this results in the notion that criminal punishment should follow, rather than precede, harm); Larry Alexander & Kimberly Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 103, 107 (G.R. Sullivan & Ian Dennis eds., 2012) (arguing that moral culpability exists only when an actor unleashes inalterable harm, but that harm may be inalterable before a trigger is pulled).

30. John Stuart Mill, *On Liberty* 95 (Elizabeth Rapaport ed., 1978) (1859)  
The preventive function of government . . . is far more liable to be abused . . . than the punitive function; for there is hardly any part of the legitimate freedom of action of a human being that would not admit of being represented . . . as increasing the facilities of some form . . . of delinquency.

31. Alexander & Ferzan, *supra* note 29; Jeremy Horder, *Prophylactic Crimes*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 79, 95–100 (G.R. Sullivan and Ian Dennis eds., 2012) (suggesting that criminalization does not threaten the harm principle when mere mistake might cause harm, because avoidance of mistakes is not controllable).

32. Horder, *supra* note 31.

to forego behavior that would cause the harm is already determined. In other words, one might choose not to shoot a gun, but if one carries a gun and drops it, one may still cause harm—and one cannot merely choose not to drop the gun, because mistakes are inevitable.<sup>33</sup> Therefore, the harm is still known, definite, and unavoidable by the individual who is to be punished.

The reliance on actual harm having been committed, or becoming inevitable, is not solely based on philosophical notions of liberty and autonomy. It is also a pragmatic protection of the innocent. Sociologists discussing the preventive state argue that its focus on risk-based, managerial practices inexcusably imposes on the innocent (and the underprivileged). Feeley and Simon discuss the creation of an underclass, overpoliced and underrepresented, whose liberty is regularly imposed upon in the interests of preventing criminal behavior.<sup>34</sup> Bernard Harcourt<sup>35</sup> and Stuart Scheingold<sup>36</sup> warn of the manner in which this process imposes upon already marginalized members of society, ignoring questions of guilt and innocence in the effort to manage supposedly dangerous classes (whose guilt at the general level is presumed, negating the value of proving guilt on an individual level).

The presumption of innocence is a final hurdle in the state's responsibility to prove that it is acting only as a response to an actual and existing harm that is directly connected to the individual upon whose liberty it plans to impose. Traditional criminal justice is based on knowledge, proof, and individual responsibility.<sup>37</sup> In other words, traditional criminal justice is based on guilt.

In contrast, preventive criminal justice is based on risk.<sup>38</sup> Risk is evaluated based on group characteristics, generalized notions of levels and characteristics of crime shared by that group, and actuarial predictions of how those criminal activities may be prevented.<sup>39</sup> As Peter Ramsay describes, in

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33. *Id.*

34. Feeley & Simon, *supra* note 13, at 467.

35. Harcourt, *supra* note 13.

36. Stuart Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 *Law & Soc. Inq.* 857, 868 (1998).

37. *See id.* at 868–69 (“[T]he criminal process ordinarily ought to be invoked by those charged with the responsibility for doing so, only when it appears that a crime has been committed and when there is a reasonable prospect of apprehending and convicting its perpetrator.” (internal quotations and citations omitted)).

38. *See* Beck, *supra* note 13 (describing “the risk society”); Hughes, *supra* note 13 (outlining the trend towards risk and crime prevention in late modern criminal justice); Slobogin, *supra* note 13, at 1–2 (discussing the influence of risk and dangerousness in criminal legal jurisprudence); Ericson, *supra* note 13 (describing the influence of risk on criminal justice); Zedner, *supra* note 13, at 174 (describing the development of criminal justice as increasingly risk averse); Harcourt, *supra* note 13 (describing the use of profiling to manage high risk populations).

39. Scheingold, *supra* note 36, at 867–88 (discussing the combination of disciplinary capabilities to monitor, evaluate, and surveil populations believed to have criminal propensities);

shifting from reactive to preventive criminal justice, the conversation shifts from one of known harm to one of unquantifiable danger.<sup>40</sup> Traditional, reactive criminal justice processes have the opportunity to evaluate precisely what amount of harm was done, and to whom, because the harm has been done (or was at a point where its completion was not just wholly perceived but unavoidable). In contrast, preventive measures act on some analysis of *possibilities*. Even if we accept that those possibilities may be inevitable realities of large groups (based on statistical knowledge of communities), the harm posed by *the specific individual upon whom the state is imposing* is completely unknown. Vast percentages of the population imposed upon may never engage in criminal behavior, or may only engage in minor deviance, but the criminal process is used in their cases as well-based on the idea that the community will commit some amount of harm, as a whole, over time.<sup>41</sup>

Rather than justifying state intervention on the known actions or known risk posed by an individual, state intervention is justified based on an unknown and unknowable danger to future possible victims.<sup>42</sup> Direct connection between the individual imposed upon by the state and the harm the state is trying to prevent is therefore no longer necessary.

This is in stark contrast to a philosophy that justifies state intervention only based on the moral fault of the individual whose liberty is being curtailed, or the harms known to be caused by certain proscribed activities. Rather than asking whether actions by offenders justify state intervention, the moral consideration in a system of preventive justice ignores the offender's contribution, focusing instead on the level of harm that *might* occur if the state does not act.

Indeed, at this point the determination of whether or not imposition on the individual is justified has very little to do with the risk posed by that individual. This may be seen in police rhetoric defending the practices of stop and frisk. Police departments attempting to justify the practice routinely rely on the risk posed by some gun carrying offender. For instance, Ray Kelly, former Police Commissioner in New York City, defended stop and frisk by stating that:

Since 2002, the New York Police Department has taken tens of thousands of weapons off the street through proactive policing strategies. The effect this has had on the murder rate is staggering. . . . That's 7,383 lives saved—and if history is a guide, they are largely the lives of young men of color. . . . To critics, none of this seems to much matter. Sidestepping the fact that these policies work, they continue to allege that massive

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Harcourt, *supra* note 7 (discussing generalizations and impositions on groups of individuals due to the use of actuarial methods to evaluate risk).

40. Ramsay, *supra* note 28, at 201, 209–14.

41. See *supra* notes 34–39 and accompanying text.

42. *Id.*

numbers of minorities are stopped and questioned by police for no reason other than their race.<sup>43</sup>

Asked specifically about how he might respond to a resentful, innocent civilian who is continually stopped in his neighborhood, Kelly responded that he was interested in saving that boy's life.<sup>44</sup> Similarly, former New York City Mayor Michael Bloomberg stated shortly before Kelly's interview:

Critics say the fact that we're 'only' finding 800 guns a year through stops of people who fit a description or are engaged in suspicious activity means that we should end stop and frisk. Wrong. That's the reason we need it—to deter people from carrying guns. We are the first preventers.<sup>45</sup>

Those eight hundred guns constituted only 0.1% of stops per year.<sup>46</sup> But the rarity of finding guns is irrelevant. The relatively few times that guns are found, as well as the deterrent effect of the stops themselves, are believed to justify the practice in its entirety, because the safety gained over time by those few successes is so large.

Bloomberg's comments, as well as Kelly's, show that the state is well aware that most people frisked by police are completely innocent of the actions that truly concern police. But their guilt or innocence is irrelevant. Instead, the conversation concerns the amount of harm that might occur if frisks were abandoned.<sup>47</sup> Rather than justifying the imposition on individuals based on their individual risks, the state justifies an overarching practice (ignoring the harm to individuals) based on the overarching harm that might occur if the practice ceased.

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43. Ta-Nehisi Coates, *The Dubious Math Behind Stop and Frisk*, *The Atlantic* (July 24, 2013), <http://www.theatlantic.com/national/archive/2013/07/the-dubious-math-behind-stop-and-frisk/278065/> (quoting Ray Kelly, former Police Commissioner in New York City).

44. Nightline, *NYPD's Stop-And-Frisk: Racial Profiling or Proactive Policing?*, ABC News (May 1, 2013), <http://abcnews.go.com/US/nypds-controversial-stop-frisk-policy-racial-profiling-proactive/story?id=19084229>.

45. *Id.*

46. According to a 2013 New York Attorney General's investigation. Office of Att'y Gen., New York, *A Report on Arrests Arising From The New York City Police Department's Stop-And-Frisk Practices* (2013), available at [http://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf). In 1999, the Attorney General of New York released a report showing that guns had been found in only 2.5% of stops between 1998 and 1999. Office of Att'y Gen., New York, *The New York City Police Department's "Stop & Frisk" Practices 94* (Dec. 1, 1999) [hereinafter OAG Report], available at [http://www.oag.state.ny.us/press/reports/stop\\_frisk/stop\\_frisk.htm](http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.htm).

47. This argument has perhaps gained steam since stop and frisk has declined, coinciding with an increase in gun violence, in New York. See, e.g., Barry Paddock *et al.*, *After Bloody Weekend of 16 Shootings and 19 Wounded, Cops Arrest Only 2 as Number of City Shooting Victims Spikes*, *Daily News* (July 9, 2014), <http://www.nydailynews.com/new-york/nyc-crime/bloody-weekend-19-injured-bullets-cops-arrest-2-article-1.1846552>.

Some of the most popularized, and blatant, calls for preventive justice have come as part of calls for supposedly “exceptional” preventive measures in the context of counterterrorism,<sup>48</sup> and so it is useful to examine an example in that context (although, as this article suggests, far fewer of those measures are as “exceptional” as either critics or proponents of the practices claim). One such example is the practice of preventively detaining terror (and other) defendants in solitary confinement when they are believed to pose a risk of harm from jail. This practice is often cited as an illustration of the extreme changes in criminal justice brought about as a response to, and most often in the cases of, defendants accused of terrorism.<sup>49</sup> While early judicial rulings on the practice suggested that it could be justified only when the individuals so held had shown their own personal likelihood to cause a high level of harm from their jail cell (while awaiting trial, as yet unconvicted of any criminal offence),<sup>50</sup> by 2001, judicial decisions clearly suggested that defendants could be held in solitary confinement if the government showed merely that they had the capability to cause serious harm.<sup>51</sup> Evidence of

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48. Viet Dinh *et al.*, *Life After 9/11: Issues Affecting the Courts and the Nation*, Panel Discussion at University of Kansas Law School, 51 U. Kan. L. Rev. 219 (2003) (describing the need for a strategy of “preventative prosecution”); Memorandum from John Ashcroft, Att’y Gen, Dep’t of Justice, to Heads of the Components of the Dep’t of Justice (Nov. 8, 2001), available at <http://www.fas.org/irp/news/2001/11/ag-memo-110801.html> (asserting that the terrorist attacks of September 11, 2001 revealed need for a new, preventative criminal justice).

49. Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DePaul J. Soc. Just. 83 (2007); Susan Akram & Maritza Karmel, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction without a Difference?*, 38 U.C. Davis L. Rev. 609 (2005); Sadiq Reza, *Unpatriotic Acts: An Introduction*, 48 N.Y.L. Sch. L. Rev. 3 (2004); Sam A. Schmidt & Joshua Dratel, *Turning the Tables: Using the Government’s Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. Sch. L. Rev. 69 (2004); Joshua Dratel, *Ethical Issues in Defending a Terrorism Case: How Secrecy and Security Impair the Defense of a Terrorism Case*, 2 Cardozo Pub. L. Pol’y & Ethics J. 81 (2003); J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What Sept. 11 Taught Us About Defending Them*, 18 Harv. Blackletter L.J. 129 (2002).

50. *United States v. Gotti*, 755 F. Supp. 1159, 1164–65 (E.D.N.Y. 1991) (upholding challenge of pretrial solitary confinement due to the lack of adequate evidence that the defendant intended to engage in violent criminal behavior even while incarcerated); *United States v. Suleiman*, 1997 U.S. Dist. LEXIS 4647, at \*2 (S.D.N.Y. 1997) (upholding similar challenge as in *Gotti*, despite defendant’s fingerprints on bomb manuals, allegations that he had terrorist training, and that he had been associated with a member of the first World Trade Center bombing conspiracy).

51. *United States v. El-Hage*, 213 F.3d 74, 82 (2d Cir. 2000) (justifying continued solitary confinement based solely on defendant’s *capability* to cause harm, with no discussion of the likelihood that he intended to, or was likely to cause harm while incarcerated). See generally Francesca Laguardia, *Special Administrative Measures: An Example of Counterterror Excesses and Their Roots in U.S. Criminal Justice*, 51 Crim. L. Bull. 157 (forthcoming 2015) (describing the transformation of SAMs practice from carefully overseen to reflexive and based on mere possibility of harm).

actual likelihood to do so was completely unnecessary.<sup>52</sup> Individual risk assessments were, apparently, unnecessary. The fact that the defendants *could* cause serious harm suggested a sufficient basis to severely restrict their liberty, imposing the harshest form of confinement available in the criminal justice system, years before a determination of guilt was made.<sup>53</sup> Moreover, the level of imposition on the defendant steadily retreated from discussions of the propriety of his confinement.<sup>54</sup> The practice became routine. As one prosecutor noted, when questioned, “everyone charged with a material support type crime is housed in the same way”: pretrial solitary confinement.<sup>55</sup> Once the defendant is indicted for a certain type of crime, no further analysis of risk is necessary.

Since terrorism has captured the United States’ attention, and responses to terrorism have as well, preventive tactics such as pretrial detention and solitary confinement have been criticized roundly as deviant exceptions to accepted legal and moral norms.<sup>56</sup> Yet, like the use of pretrial solitary confinement, many fundamental aspects of the preventive turn have taken place independent of this context, and prior to 2001. Indeed, discussion of the preventive turn was well underway in 1998, referencing developments in immigration law, detention of juveniles, the use of loitering laws in efforts to curb drug and gang-related crimes, and, of course, the use of stop and frisk.<sup>57</sup> The roots of this preventive turn, then, seem to be in our criminal justice culture, rather than a reaction to the exceptional nature of the threat of terrorism.

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52. Such evidence was provided in cases such as *United States v. Nosair*, 1994 U.S. Dist. LEXIS 12159, at \*1–2 (S.D.N.Y. 1994), to argue that Nosair had been involved in the first World Trade Center bombing conspiracy, and in *United States v. Felipe*, 148 F.3d 101, 104 (2d Cir. 1998), to demonstrate that Felipe had directed murders from prison. The lack of such evidence resulted in release in *United States v. Gotti* and *United States v. Suleiman*, but no mention of such evidence was necessary to continue the detention of the defendant in *United States v. El-Hage*.

53. See *supra* note 51 and accompanying text. El-Hage was held for over fifteen months, while later defendants were held for years at a time *prior* to trial. *El-Hage*, 213 F.3d at 78; see *After 3 Years in Pretrial Solitary Confinement, Fahad Hashmi Pleads Guilty on Eve of Terror Trial*, Democracy Now! (Apr. 28, 2010), [http://www.democracynow.org/2010/4/28/after\\_3\\_years\\_in\\_pretrial\\_solitary](http://www.democracynow.org/2010/4/28/after_3_years_in_pretrial_solitary) (discussing Hashmi’s pre-trial detention in solitary confinement for over three years); Defendant’s Renewed Motion for Conditional Release from the Longest Pretrial Imprisonment in United States History at 1, *United States v. Warsame*, 651 F. Supp. 2d 978 (D. Minn. 2009) (Crim. No. 04-29) (on file with author) (describing Warsame’s four and a half year detention in SAMs as the longest pretrial detention in U.S. history).

54. Laguardia, *supra* note 51.

55. Transcript of Proceeding at 43, *United States v. Sadequee*, No. 1:06–CR–147–WSD, 2009 WL 3785566 (N.D. Ga. Nov. 10, 2009) (on file with author).

56. Mayer, *supra* note 2; Sands, *supra* note 2; Cole, *supra* note 2; Cole & Dempsey, *supra* note 5; see also *supra* note 49 and accompanying text.

57. See generally Steiker, *supra* note 13 (describing the turn toward preventive justice and scholars’ failure to acknowledge the developments up to that point).

If I am right, and our preventive anti-terror practices have more to do with criminal justice culture than with terrorism, we should be able to find precursors of most of these “responses” in conventional criminal justice practices and discourses. Early research on the use of pretrial solitary confinement suggests that this is indeed the case,<sup>58</sup> and several other scholars have noted places where supposedly unique responses to terrorism may actually predate the panic of the early twenty-first century.<sup>59</sup> But can more extreme deviations from accepted U.S. norms really be attributed to a pre-2001 preventive revolution?

To begin an analysis of this question, there may be no better example than the U.S. government’s use, and justification, of torture. With only a few exceptions the words of David Cole can well summarize the starting point for most scholars studying the use of torture since 9/11: “International and U.S. law provide that torture is never justifiable . . . .”<sup>60</sup> In the eyes of these scholars, the fact that the United States tortured therefore signals a major break from the past, showing that in the state of exception no past law can hold back the abusive state. The fact that the United States not only employed torture, but that legal elites offered legal approval for its use, shows that the rule of law, constitutional, and human rights protections were always mere “parchment barriers”<sup>61</sup> against excessive state action. Of course, for the rule of law to provide an effective barrier, that rule would have to be clearly opposed to the use of torture. As this article will show, that opposition was not nearly as clear as critics like Cole would like to believe.

Along with being a striking example of the United States’ supposed deviation from its own prior norms (as well as its actual deviation from accepted international norms) since 2001, torture provides an excellent example of the new preventive logic of criminal justice. This suggests that, rather than sudden deviance, torture may fit well within the preventive paradigm already well underway in U.S. criminal justice.

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58. Laguardia, *supra* note 51 (discussing the evolution of pretrial solitary confinement from its original applications against drug and organized crime defendants to a practice seen as primarily used against suspected terrorists).

59. Mary L. Dudziak, September 11 in History: A Watershed Moment? (2003); John Hagan, Twin Towers, Iron Cages and the Culture of Control, *in* *Managing Modernity: Politics and the Culture of Control* (M. Matravers ed., 2005); *see also supra* notes 6 (discussing the development of material support statutes, the use of immigration violations to preventively incapacitate suspected terrorists, and the use of informants in such investigations), 7 (discussing the development of Eighth Amendment jurisprudence and its relationship to coercive interrogation), and accompanying text.

60. David Cole, *The Torture Memos* 7 (2009).

61. *The Federalist* No. 48, at 305 (James Madison) (Clinton Rossiter ed., 1961).

## B. Torture as Preventive Tactic

From the description of the preventive paradigm presented above, the theoretical placement of torture in this paradigm should not be a difficult jump. Nonetheless, it is worthwhile to discuss the logical connection between the preventive paradigm and the use of torture in the War on Terror.

At least since 2001, the primary justification offered for the use of torture has been the ticking time-bomb hypothetical.<sup>62</sup> In this hypothetical situation, interrogators are faced with the dilemma of knowing of an imminent terrorist attack that threatens multiple lives (a time bomb somewhere in a city); knowing that they have an individual in custody who has information that can prevent the attack; and knowing that the individual will only provide that information if he is tortured.

This hypothetical device is meant to place the spotlight directly on the conflicting interests in U.S. jurisprudence regarding torture: on the one hand, there is the interest of the public in obtaining vital information in order to prevent future deaths; and on the other, there is the interest of the suspect in avoiding unbearable pain.

But the ticking time-bomb situation, as so often described, completely avoids the question of law enforcement's accuracy in evaluating the situation.<sup>63</sup> Commonly, the hypothetical stipulates that law enforcement officers know for a

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62. John Ip, *Two Narratives of Torture*, 7 Nw. UJ Int'l Hum. Rts. 35 (2009); Luban, *supra* note 1; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1440 (2005); Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. Nat'l. Sec. L. & Pol'y 285 (2005). As these scholars describe, the narrative has strong public pull. In 2011, General David Petraeus, soon-to-be Director of the Central Intelligence Agency, suggested that extraordinary interrogation might be called for in situations where lives were at stake, such as "to disarm a nuclear device set to explode under the Empire State Building." Senator John McCain (R-Arizona) quickly agreed, referring to a "ticking time bomb scenario." Ken Dilanian, *Gen. David H. Petraeus Suggests Interrogation Policy for Emergencies*, L.A. Times, June 23, 2011, <http://articles.latimes.com/2011/jun/23/nation/la-na-petraeus-20110624>. The agreement of the two was particularly notable given that both are known to be opposed to the use of torture. This suggests that even those lawmakers who are against torture in a general sense know there is a large political toll to ignoring the ticking time bomb scenario. Similarly, as a presidential hopeful, future President Barack Obama (as well as each of his competitors for the Democratic nomination) had to answer the question of whether torture could be justified when "[w]e know there's a big bomb going off in America in three days and we know this guy knows where it is." Obama responded that America could not have a *policy* sanctioning torture, but he was careful to preface that statement with the promise that "I will do whatever it takes to keep America safe. And there are going to be all sorts of hypotheticals and emergency situations and I will make that judgment at that time." *The Democratic Presidential Debate on MSNBC*, N.Y. Times, Sept. 26, 2007, <http://www.nytimes.com/2007/09/26/us/politics/26DEBATETRANSCRIPT.html?pagewanted=all>.

63. Luban, *Liberalism, Torture, and the Ticking Bomb*, *supra* note 62, at 1442–45.



fact that they have a guilty individual, implicated in a severe crime, who has knowledge of how to stop this crime from occurring. But how do law enforcement officers know that the individual they are holding has the information necessary to find and/or defuse the bomb? How do they even know that a bomb exists?

By ignoring these questions, the suspect's possible innocence—and therefore, the possibility that the suspect cannot possibly deserve to be tortured—is rendered irrelevant. The hypothetical erases innocence from consideration, masking the interests of the suspect rather than focusing on them and dismissing the fact that the person tortured *is merely a suspect*. His guilt and his knowledge have been evaluated only by law enforcement officers. As history continues to prove, law enforcement officers can be wrong even in such high stakes scenarios.<sup>64</sup>

Accepting the hypothetical as representative of the interests at stake necessarily erases the question of the torture victim's innocence from the conversation. It frames the debate so as to necessitate our acceptance of law enforcement determinations, placing no checks on those determinations, and removing from consideration even the possibility that law enforcement may be incorrect. The philosopher engaging with this hypothetical and finding that torture is justified is doing so based on one of two assumptions: either that torture is justified because he has accepted, without any checks or proof, that law enforcement is correct; or torture is justified because he does not care whether law enforcement is correct. In either case, the possibility of preventing harm has overcome the need for law enforcement officers to prove their suspicions before being allowed to infringe on the suspects' wellbeing. The focus of the debate is instead on the possibility of rescuing future victims. The interests of the person upon whose liberty the state will impose<sup>65</sup> have been erased from the calculus.

Readers may respond with the possibility that there is a *high probability* that law enforcement is correct. This response highlights precisely the problem caused by the hypothetical. The hypothetical is not framed in language suggesting a *high probability*. Instead, it jumps straight to *knowledge*. Knowledge is presumed, which cuts off the ability to question how high a probability of correctness might be required before torture is appropriate, or what proof might be required in order to determine that the probability is high enough. By beginning the hypothetical with “law enforcement *knows*,” the thinker necessarily jumps past these questions—at the same time hurdling past considerations of possibly innocent suspects, now victims of (entirely good faith) law enforcement

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64. See, e.g., Scott Shane, *Amid Details on Torture, Data on 26 Who Were Held in Error*, N.Y. Times, Dec. 12, 2014, [http://www.nytimes.com/2014/12/13/us/politics/amid-details-on-torture-data-on-26-held-in-error.html?\\_r=0](http://www.nytimes.com/2014/12/13/us/politics/amid-details-on-torture-data-on-26-held-in-error.html?_r=0) (discussing detainees held and tortured, but described by the CIA's own documents as having been “mistakenly detained”).

65. And this is a euphemistic way to describe torture.

assumptions. The purpose of the hypothetical is to skip these considerations, thereby erasing them from public debate. For purposes of illustration, the following sections highlight the considerations the time hypothetical so conveniently ignores.

### 1. The Issues the Ticking Time Bomb Erases: There Exists a Bomb

Consider the case of the suspect who has boasted of leaving a bomb somewhere in the city. We may be tempted to accept that here, surely, police “know” that the bomb exists. Yet individuals have lied about placing bombs in the past, either due to mental deficiency or efforts to threaten. By the time the torture has begun, it will be difficult to convince law enforcement that the original claim was a lie.

The recent release of the Senate Select Committee on Intelligence’s Report on the CIA’s use of torture exposes the possibility that law enforcement may overestimate its knowledge of an imminent threat. The CIA’s enhanced interrogation program has been repeatedly justified with reference to law enforcement’s confidence that the United States was in danger of a nuclear attack by al-Qaeda in the spring of 2002.<sup>66</sup> Yet the only threat with a semblance of nuclear capability that has been exposed to the public in the past twelve years is that of José Padilla, whose nuclear aspirations consisted of creating a dirty bomb by putting uranium in a bucket and “swinging it around [his] head as fast as possible for 45 minutes.”<sup>67</sup> This was the plot that Jay Bybee specifically pointed to in order to highlight the nuclear threat that was believed to exist at the time the OLC torture memos were written.<sup>68</sup> The foolishness of this plan was universally agreed upon, by both law enforcement and Khalid Sheikh Mohammed (the mastermind of the September 11th attacks), who tasked Padilla with attacking

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66. See Interview by Lesley Stahl with Jose Rodriguez, former Dir. of the CIA’s Nat’l Clandestine Serv., *60 Minutes: Hard Measures: Ex-CIA Head Defends Post 9/11 Tactics* (Apr. 29, 2012), available at <http://www.cbsnews.com/news/hard-measures-ex-cia-head-defends-post-9-11-tactics/3/>; see also Jay Bybee, Classified Response To The U.S. Dep’t of Justice Office of Professional Responsibility Classified Report Dated July 29, 2009, 14–15 (July 29, 2009), available at <https://www.fas.org/irp/agency/doj/opr-bybeefinal.pdf> (describing the belief of the intelligence community that hundreds of American lives would be lost if interrogations did not continue); Senate Report, *supra* note 4, at 225–31 (describing the repeated use of discovery of the “Dirty Bomb Plot” to justify enhanced interrogation based on the threat of nuclear attack).

67. Senate Report, *supra* note 4, at 226.

68. *Id.* at 227.

high-rise buildings in Chicago using natural gas explosions instead.<sup>69</sup> Indeed, the CIA determined that this second plot was also “infeasible as envisioned.”<sup>70</sup>

But consider a case where an officer has seen a bomb, evaluated it, and determined that it requires a code to be disabled, or a specific wire cut. Even here, the fact that the bomb will explode is assumed, and ignores the fact that bombmaking is in fact rather difficult. Exemplifying this fact is the case of the failed Times Square bombing in May 2010.<sup>71</sup> Faisal Shahzad left a car full of explosives set to ignite in Times Square, but the bomb failed to go off (Shahzad had deviated from his originally planned explosive device because he was afraid of detection, and his improvisation failed completely).<sup>72</sup> Alternately, there is the case of “shoe bomber” Richard Reid, whose attempt to ignite a bomb on an airplane failed, apparently after the fuse to the bomb became wet from weather and Reid’s own sweat.<sup>73</sup> Umar Farouk Abdulmutallab attempted a bomb similar to Reid’s, but hidden in his underwear. That bomb would have exploded (according to TSA officials), if not for the fact that Abdulmutallab wore the same underwear for weeks prior to the bombing attempt, “degrad[ing]” the device to the point where it could no longer detonate.<sup>74</sup>

This raises a second misconception in the assumption that there exists a threat of severe harm if no action is taken. The hypothetical assumes that the police “know” of a bomb *in a city* that will explode. As mentioned above, there is no explanation as to how they know this. There is no discussion of the likelihood that it is true, or that it is false. That “many” lives will be lost is assumed and seemingly relied upon for the legitimacy of the hypothetical.<sup>75</sup> There is no

69. *Id.* at 225–26 nn.1301–06; *see id.* at 229 n.1312 (stating that it “took [the CIA] until 2007 to consistently stop referring to [Padilla’s] ‘Dirty Bomb’ plot—a plan [the CIA] concluded early on was never operationally viable”); *see also id.* at 88 (demonstrating that the persistent belief in the nuclear threat was apparently the result of poor signals intelligence).

70. *Id.* at 231.

71. Lorraine Adams & Ayesha Nasir, *Inside the Mind of the Times Square Bomber*, *The Guardian*, Sept. 18, 2010, <http://www.theguardian.com/world/2010/sep/19/times-square-bomber>.

72. Devlin Barrett, *Shahzad Used Poor Bomb Materials to Avoid Detection*, *Wall Street Journal*, July 21, 2010, <http://www.wsj.com/articles/SB20001424052748704723604575379371725895584>. According to another police source, Shahzad had set the bomb to explode at 7 AM rather than 7 PM. Adams & Nasir, *supra* note 71.

73. Ian Sample, *Cargo Plane Bomb Plot: What Is PETN?*, *The Guardian*, Nov. 1, 2010, <http://www.theguardian.com/world/2010/nov/01/cargo-bomb-plot-petn-explosive>.

74. Nicole Hensley, *Underwear Bomb Aboard 2009 Flight Failed Because it was Sullied by Suicide Bomber*, *N.Y. Daily News*, July 25, 2014, <http://www.nydailynews.com/news/national/underwear-bomb-aboard-2009-flight-failed-soiled-article-1.1880193>.

75. This in spite of the fact that one of the most successful attacks in this country, the Boston Marathon Bombing, claimed the lives of only three people. *See* Katharine Seelye, *Marathon Bombings Trial Will Remain in Boston*, *N.Y. Times*, Sept. 24, 2014,

consideration of how many lives are necessary to justify torture. A bomb in a city is supposedly sufficient. Is the same true of a bomb in a town? A village? A bomb tied to a person stranded alone in a desert?<sup>76</sup>

## 2. The Issues the Ticking Time Bomb Erases: The Suspect's Knowledge

Another possible mistake lies in the assumption that the suspect has information worthy of torture. Independent of the moral standing of the suspect is the question of whether the information he has can truly prevent deaths. The question of how sure police are that this suspect can stop the bomb, or that they can stop the bomb with information that they can coerce from him,<sup>77</sup> is similarly ignored in this hypothetical situation. Again, the Report of the Senate Select Committee on Intelligence suggests that the CIA overestimated its knowledge in this regard several times. Abu Zubaydah, for instance, was tortured largely due to CIA beliefs that he could provide information about “the next attack in the U.S.”<sup>78</sup> The CIA later determined that Abu Zubaydah never had this information.<sup>79</sup>

Another example is that of Ramzi bin al-Shibh, who was tortured under the assumption that he knew of “the next attacks planned for the U.S.” and “[w]ho and where [operatives were] inside the U.S.”<sup>80</sup> This assumption contradicted the analysis of the detention site's interrogators, who believed bin al-Shibh was cooperative and was providing all the information he had.<sup>81</sup> After three more weeks of enhanced interrogation,<sup>82</sup> for a total of thirty-four days of torture, the CIA acknowledged it had been wrong regarding the level of information he possessed.<sup>83</sup>

Similarly, Abd al-Rahim al-Nashiri was subjected to enhanced interrogation based on the CIA's beliefs that he had information about imminent

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<http://www.nytimes.com/2014/09/25/us/trial-of-marathon-bombing-suspect-to-remain-in-boston-judge-rules.html>.

76. While I personally cannot see the logic in enumerating how many lives could justify the use of torture—surely if it is worthwhile to save many lives, it would be worthwhile to save just one—the assumption of the hypothetical is one of saving many lives, presumably bolstering the strength of the case through notions of relative sacrifice and utilitarianism while deemphasizing or entirely avoiding considerations of accuracy.

77. A fourth possible fallacy, of course, exists in the assumption that torture is likely to work better than traditional interrogations.

78. Senate Report, *supra* note 4, at 31.

79. *Id.* at 31.

80. *Id.* at 78.

81. *Id.* at 78.

82. *Id.* at 79.

83. *See id.* at 75 (noting that the CIA “concluded that bin al-Shibh was not a senior member of al-Qa’ida and was not in a position to know details about al-Qa’ida’s plans for future attacks”).

plots and al-Qaeda operatives.<sup>84</sup> In fact, high-ranking members of the CIA maintained this belief, determining that it was “inconceivable” that he did not have the information, despite the repeated analyses of interrogators to the contrary.<sup>85</sup> Nearly two years after this assessment was given for the last time, CIA contractors determined that al-Nashiri never had the information that the CIA sought.<sup>86</sup>

Arsala Khan was detained and tortured for a month before CIA interrogators determined that he “[did] not appear to be the subject involved in . . . current plans or activities against U.S. personnel or facilities . . . .”<sup>87</sup> He was then held in military custody for four years before the CIA determined that the source that reported to the CIA regarding Kahn’s involvement with bin Laden had a vendetta against his family.<sup>88</sup>

Indeed, even when an officer has seen an individual set the bomb himself (should this ever happen, and it certainly almost never does), it is impossible to know if the bomb can be stopped. As such, the hypothetical circumstance most favorable to proponents of enhanced interrogation techniques still does not guarantee that the detainee has valuable information to obtain through torture.

### 3. The Issues the Ticking Time Bomb Erases: Torture Will Work

The hypothetical is further flawed in assuming that police will be *able* to obtain information through torture, or will know how to evaluate the truth and falsity of any statements they do obtain. Here, once again, recent revelations are telling. The declassified executive summary of the Senate Select Intelligence Committee’s report on the use of torture by the CIA mentions, as we might expect, that detainees lied in an effort to stop the torture. One footnote in the report tells of a detainee who repeatedly contradicted himself, in a single session, apparently in desperation.<sup>89</sup> Connections between a Jemaah Islamiya cell and al-Qaeda were

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84. *Id.* at 65–67.

85. *Id.*

86. *Id.* at 73 (“21 months after the final documented use of the CIA’s enhanced interrogation techniques against al-Nashiri, an assessment by CIA contract interrogator DUNBAR and another CIA interrogator concluded that al-Nashiri provided ‘essentially no actionable information,’ and that ‘the probability that he has much more to contribute is low.’”).

87. *Id.* at 110.

88. *Id.*

89. The Committee Report states:

Samr al-Barq, told CIA interrogators that ‘we never made anthrax.’ . . . [He] was told that the harsh treatment would not stop until he ‘told the truth.’ According to cables, crying, al-Barq then said ‘I made the anthrax.’ Asked if he was lying, al-Barq said that he was. After CIA interrogators ‘demonstrated the penalty for lying,’ al-Barq again stated that ‘I made the

similarly fabricated by a detainee being tortured.<sup>90</sup> As discussed above, interrogators spent weeks torturing detainees under the mistaken belief that the detainees had more information than they were giving, unable to determine when detainees were telling the truth.<sup>91</sup>

But more strikingly, the report also states that at least two individuals were detained after Khalid Sheikh Mohammed, in response to being waterboarded, falsely stated that they were linked to al-Qaeda.<sup>92</sup> Indeed, Khalid Sheikh Mohammed apparently withstood even waterboarding, regularly (and convincingly) misleading interrogators.<sup>93</sup>

In fact, much of the U.S. invasion of Iraq may be linked back to the torture of one detainee, rendered to Egypt as part of the U.S. program of extraordinary rendition, whose statements that there were connections between al-Qaeda and Saddam Hussein were used to justify the U.S. invasion.<sup>94</sup> The detainee later stated that he had fabricated the connections in order to satisfy his interrogators.<sup>95</sup>

#### 4. How These Assumptions Highlight Torture's Preventive Focus and Flaws

The persistent defense, and the staying power of the ticking time bomb hypothetical, boils down to “*yes, but what if we know?*” The response is, in a preventive regime, *we cannot know*. It is impossible to know that the bomb will explode, because bombs can be duds. It is impossible to know if we have the right person, and what information he or she has, because suspects lie, witnesses lie, and law enforcement gets things wrong. This is the forward-looking nature of preventive tactics—because they are based on future events occurring, they are unknowable.

The natural response is that the facts may be *close enough* to the truth, i.e. “*but what if we know enough?*” This response only serves to show the success of the hypothetical in framing the debate to rely on an undetermined, unquantified,

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anthrax’ and then immediately recanted, and then again stated that he made anthrax.

*Id.* at 82–83 n.442.

90. See *id.* at 108–09 (“Hambali Fabricates Information While Being Subjected to the CIA’s Enhanced Interrogation Techniques”).

91. See *supra* notes 77–87 and associated text.

92. Shane, *supra* note 64; Senate Report, *supra* note 4, at 83, 108 n.448.

93. Senate Report, *supra* note 4, at 94–96.

94. William Maclean, *Libya Reports Prison Suicide of Top Qaeda Man*, Reuters (May 11, 2009), <http://www.reuters.com/article/2009/05/11/us-libya-prisoner-death-idUSTRE54A4WU20090511>.

95. S. Rep. No. 109-331, at 81 (2006) (describing al Libi’s torture, including beatings and placement in a box that was 50 cm by 50 cm, and his fabrication of the story in response to that torture).

and unquestioned balance of likelihoods and possible harms while pretending to speak of certainty. The hypothetical cleverly avoids the questions of how much is enough, how will be prove that much is known, and who will we trust to come to those conclusions (questions which, our current criminal justice system suggests, rely on processes that could not be completed quickly enough to respond to a true ticking time bomb situation).

Similarly, critics point to these assumptions—that the “suspect” is at least to some extent “guilty” (based on his terrorist knowledge), and/or that there exists a large harm that can be prevented through his interrogation—as flaws in the hypothetical,<sup>96</sup> but in fact they reveal the workings of the precautionary principle at its core. The harm posed by the ticking time-bomb need not be quantified, “many” lives will be lost, and no further thought is necessary as to how many lives are required in order to justify the conscious imposition of extreme pain. We need not further examine whether law enforcement is accurate in its belief that the bomb even exists, because the *chance* of the bomb poses a large enough threat to justify intervention *whether or not that intervention is in fact necessary*. The harm here is both uncertain and unquantifiable, but the fact that it may be great offers justification for an extreme response.

In these ways, the ticking time-bomb hypothetical is the distilled essence of the precautionary principle, and the preventive state. The flaws in the hypothetical are precisely the assumptions that lead to preventive policies—the hypothetical ignores innocence, it ignores the importance of certainty regarding the situation and the possible harm threatened, and it manages to expunge considerations of those individuals who may be affected by state policies by redirecting focus solely to the (possible but uncertain) future victims of this unquantified, uncertain harm. Here is where the philosophical transformation of priorities occurs, in Garland’s words, from “protection *from* the state to protection *by* the state.”<sup>97</sup>

As was noted above, this evolution in priorities appears to have begun long before 2001, and as the use of torture and the ticking time-bomb justification for that use so aptly summarize this shift in priorities, we might well expect to see signs of that transformation in the acceptance of this logic prior to 2001. In fact, as the following sections discuss, we do. These predecessors of the logic of torture show that this logic was not an exceptional response to the threat of terrorism, or to the panic caused by that threat. Rather than the threat of terrorism posing a risk

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96. Ip, *supra*, note 62; Luban, *supra* note 1; Luban, *Liberalism, Torture, and the Ticking Bomb*, *supra* note 62; Scheppelle, *supra* note 62; G.R. Sullivan, *The Hard Treatment of Innocent Persons in State Responses to the Threat of Large Scale, and Imminent Terrorist Violence: Examining the Legal Constraints*, in *Seeking Security: Pre-Emptying the Commission of Criminal Harms* 293 (G.R. Sullivan & Ian Dennis eds., 2012).

97. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 12 (2001).

to our conventional criminal justice priorities by offering a slope for the nation to slide down, it was the threat of kidnappers and rapists that created the slick slide on which counterterror interrogators found themselves.

### III. EARLY EVIDENCE OF THE LOGIC OF TORTURE

In testing whether or not the defense of torture was truly “unthinkable” prior to 2001, it is worthwhile to look at the logic and justifications offered by those who authorized and instigated the use of torture by U.S. forces. For these purposes, the legal memos written by lawyers evaluating the program, relied upon by the CIA to provide legal support for their activities, are particularly useful. These memos offer insight into the way legal elites believed they could justify torture.

#### A. Necessity, Self Defense, and Public Safety

In his first, infamous “torture memo,” John Yoo authorized the use of torture based on the notion of necessity and self-defense, a justification that was first floated by CIA officers and lawyers for the CIA as early as November 2001,<sup>98</sup> and was repeated by later torture memo authors.<sup>99</sup> Yoo argued that the government’s interest in defending itself and its people can justify the use of torture.<sup>100</sup> According to Yoo, the likelihood of a damaging terror attack made torturing a terror detainee the lesser of two evils, and therefore justifiable.<sup>101</sup> CIA attorneys similarly referred to the possibility of using the necessity defense when torture could save “many,” even “thousands of lives.”<sup>102</sup> In testimony before Congress in November of 2001, Deputy Director of Operations for the CIA James Pavitt specifically referred to the possibility of using torture in a situation where “there is a nuclear weapon somewhere in the United States that is going to be detonated tomorrow, and I’ve got the guy who I know built it and hid it.”<sup>103</sup>

This justification was implicitly repeated in 2005, while it was carefully and painstakingly avoided in official memos in the years in between.<sup>104</sup> Yet even

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98. Senate Report, *supra* note 4, at 31, 179.

99. Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340.2340A, at 1 (Aug. 1, 2002) [hereinafter Yoo I Memo], *available at* <http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf>.

100. *Id.*

101. *Id.*

102. Senate Report, *supra* note 4, at 179–80.

103. *Id.* at 437 n.2447.

104. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, CIA, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al-Qaeda



while the OLC seemed to be distancing itself from the logic of necessity as a justification for torture, in August 2004, another detainee was tortured based on precisely that reasoning.<sup>105</sup> Even as late as July 2007, the CIA's program was being justified in legal memoranda as necessary in order to obtain lifesaving information regarding "imminent" bomb threats.<sup>106</sup>

In making these claims, Yoo, the OLC, and CIA attorneys, invoked the shadow of the ticking time-bomb scenario. U.S. lawyers were not alone in making this defense, nor did it arise purely in the wake of the 2001 attacks. Instead, the argument had already appeared in *Public Committee Against Torture in Israel v. Israel*,<sup>107</sup> which was cited by CIA attorneys,<sup>108</sup> and by 2000, the question of whether state use of torture could be justified in a ticking time bomb situation had made its way into U.S. criminal law textbooks.<sup>109</sup> By 2004, the textbook was used

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Detainees 3–4 (May 30, 2005), available at <http://www.justice.gov/olc/docs/memo-warcrimesact.pdf> (concluding that the CIA's interrogation program does not shock the conscience because the interests at stake are so large).

In 2004, after the Yoo Memos became public, the Department of Justice acted to distance itself from Yoo's reasoning, including his analysis of the definition of "specific intent," his claims of the reach of executive authority, and his understanding of the protections that might be offered by the necessity defense. However, rather than disagreeing with the reasoning, the Justice Department wrote new memos relying on factual claims of the level of pain caused by various techniques—the reasoning itself remained unchallenged, if momentarily set aside, until it was reborn in 2005 via direct reference to criminal procedure, Fifth Amendment limitations, and the importance of government interests. See Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 Cal. L. Rev. 235, 248–49 (2007) (noting that "the Levin memo specifically does not address the Bybee memo's analysis of the micro-necessity criminal defenses, nor does it take up the Bybee memo's claim that legislation may not constrain the President from acting on military necessity during times of war" and discussing the ways the necessity doctrine continued to be used by the Bush Administration in the case of torture and counterterror policies more generally); Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., Office of Legal Counsel, Legal Standards Applicable Under 18 U.S.C. §§ 2340.2340A, at 1–2 (Dec. 30, 2004), available at <http://news.findlaw.com/cnn/docs/terrorism/doj/torture123004mem.pdf> (calling the discussion of defenses "unnecessary").

105. See Senate Report, *supra* note 4, at 416–17.

106. *Id.* at 434. These threats included, again, Jose Padilla's "Dirty Bomb Plot" and the similarly derided plot to dismantle the Brooklyn Bridge using "machine tools." See *id.* at 434–35, 435 n.2438 ("[T]he former chief of CTC's Bin Ladin Unit described [the plot against the Brooklyn Bridge] as 'half-baked,' and 'more of a nuisance [sic] than a threat.'"); see also *id.* at 283 n.1605 ("[He] wrote: 'again, odd. ksm wants to get 'machine tools' to loosen the bolts on bridges so they collapse? did he think no one would see or hear these yahoos trying to unscrew the bridge?'").

107. See H CJ 5100/94 Pub. Comm. Against Torture in Isr. v. Isr. [1999] (Isr.).

108. See Senate Report, *supra* note 4, at 19 n.51.

109. See Sanford Kadish & Stephen Schulhofer, *Criminal Law and Its Processes* (6th ed. 2000). It is worth noting that Jennifer Koester, Yoo's co-author of the memos, who the Office of Professional Responsibility claimed bore "initial responsibility for a number of significant errors of scholarship and judgment" would have been in law school in 2000. Office of Prof'l

in Criminal Law classes, including at New York University, Georgia State University, George Mason University, Hofstra University, Pace Law School, Harvard, and the University of Chicago.<sup>110</sup> By 2001, the discussion had made its way into at least one criminal law class at an elite institution, and another by 2004 (prior to the revelations regarding the United States' use of torture).<sup>111</sup>

But this pure question of necessity was not the only inroad into the acceptance of physical brutality as a part of interrogation in the face of an immediate threat. Instead, the ticking time bomb scenario had appeared numerous times already, in response to the criminal procedure requirement that suspects be advised of their right to an attorney prior to custodial interrogation. It is worth briefly retelling the history of this doctrine in order to contextualize it.

The *Miranda* doctrine<sup>112</sup> arose as a response to the types of coercive interrogation in which law enforcement routinely engaged leading up to the mid-1960s, when the case was decided. Prior efforts to stem the tide of brutal police interrogation practices led to a hodge-podge of rules given on a case-by-case basis and limited to the case at hand. Police moved through a variety of tactics, and the Supreme Court's analysis was specific to the facts of each individual case, so that a decision that police could not hold a defendant, naked, for hours, meant nothing to a decision as to whether police could "threaten to bring in his ailing wife" or threaten to take away a defendant's children if she refused to cooperate with the interrogation.<sup>113</sup> Police

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Responsibility, U.S. Dep't of Justice, Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists, 188 (draft, Dec. 22, 2008) (on file with author). Although most likely she would have completed her criminal law class prior to 2000, she may have heard of the case and argument in other classes.

110. See Harry Subrin, Criminal Law Syllabus, New York University (2004) (on file with author); Georgia State University Criminal Law Syllabus (2002), available at <http://laws.gsu.edu/wedmundson/Syllabi/CRIM02.SYL.htm>; George Mason Initial Class Assignments (2003), available at <http://www.law.gmu.edu/academics/assignments/2003/2003spring>; Hofstra University School of Law First Year Book List (2003), available at [http://www.hofstra.edu/pdf/law\\_1styearbooklist\\_f2003\\_812.pdf](http://www.hofstra.edu/pdf/law_1styearbooklist_f2003_812.pdf); John Humback, Criminal Law Analysis and Writing, Pace University (2002), available at <http://lawweb.pace.edu/jhumbach/ASSGNMT-1st.htm>; Carol Steiker, Criminal Law Outline, Harvard Law School (on file with author); Stephen Schulhofer, Criminal Law Outline, University of Chicago (on file with author); Jacqueline McMurtrie, Criminal Law Outline, University of Washington School of Law (2004), available at [http://faculty.washington.edu/jackiem/Criminal\\_Law\\_2004/Syllabus.htm](http://faculty.washington.edu/jackiem/Criminal_Law_2004/Syllabus.htm).

111. See Criminal Law Outline, University of Chicago, *supra* note 110; Criminal Law Outline, New York University, *supra* note 110.

112. So called because it was first iterated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

113. See Jerome Skolnick, *American Interrogation: From Torture to Trickery*, in *Torture: A Collection* 105, 113-14 (Sanford Levinson ed., 2004); see also Charles D.

continued to employ the “third degree” through the 1960s, which could include such interrogation methods as beatings, extended interrogations,<sup>114</sup> and the sweat box (in which suspects were placed in incredibly small rooms containing stoves so they would suffer from extreme heat conditions until coerced into “confessing”).<sup>115</sup> Finally, rather than continuing to rule individual methods unconstitutionally coercive, the Supreme Court ruled that suspects must be advised of their right to counsel.<sup>116</sup> This created a bright-line rule that limited police conduct far more than a prohibition on brutality by avoiding the constant argument as to what level of abuse was sufficient to constitute “brutality.” In contrast to prior decisions on interrogations, *Miranda* seems to have successfully limited police use of force in interrogations,<sup>117</sup> but it was subject to immediate public backlash.<sup>118</sup>

Public and scholarly critique of the *Miranda* requirements often took the same form, that of the “kidnapping hypothetical,” a variant and precursor of the ticking time bomb.<sup>119</sup> In this hypothetical situation a child is kidnapped, the perpetrator (but not the child) is found, and has already suggested that the victim’s life is in danger, but questioning of the perpetrator must wait for a lawyer to be made available to the suspect.<sup>120</sup> The hypothetical was later reiterated in response to *Miranda*, and quickly developed to include an imminent threat to the victim’s life.<sup>121</sup>

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Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 115 (1998) (listing similar cases exemplifying the difficulties created by the lack of a bright line rule on voluntariness).

114. While the Supreme Court determined in 1944 that thirty-six hours was too long to interrogate a suspect under constitutional requirements, recent research shows that police often continue to interrogate suspects for as long as twenty-four hours. See Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 894 (2003).

115. See Skolnick, *supra* note 113, at 112.

116. See *Miranda*, 384 U.S. at 478–79.

117. Skolnick, *supra* note 113; Drizin & Leo, *supra* note 114.

118. Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2466 (1996).

119. See Allen Rostron, *The Law and Order Theme in Political and Popular Culture*, 37 Okla. City U. L. Rev. 323 (2012) (discussing *Dirty Harry* as representative of the broader public backlash to *Miranda*). The kidnapping hypothetical seems to have first appeared in response to an earlier right to counsel case, which is typically considered a *Miranda* precursor. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

120. Henry Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 949 (1965).

121. Henry Friendly, *Benchmarks 277* (University of Chicago Press, 1st ed. 1967). See William Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. Crim. L. & Criminology 567, 568–69 (1985) (referencing Friendly’s articulation of the kidnapping hypothetical).

The hypothetical achieved more public attention when it was popularized in the movie *Dirty Harry* in 1971.<sup>122</sup> There, the situation was more extreme. Rather than simply being kidnapped, the victim, a 14-year-old girl, was buried alive and drawing her last breath at any moment. *Dirty Harry*, the hero cop who refused to play by the rules, found the perpetrator, shot him in the leg, held his gun to the perpetrator's head, and threatened to kill him if he did not reveal the girl's location. The perpetrator, of course, requested a lawyer. *Dirty Harry* proceeded to step on the perpetrator's wounded leg, applying pressure until the perpetrator, screaming in agony, finally gave up the requested information. Police rushed to the location, but it was too late—the girl was dead.<sup>123</sup>

The thirty years preceding the 2001 attacks show increasing acceptance in criminal law of the framework and reasoning of the kidnapping or ticking time bomb hypothetical as a way to evaluate when torture might be used in order to facilitate interrogation. In 1974, the California Court of Appeals ruled that statements obtained prior to the provision of an attorney would be admissible in court when they had been obtained as part of an emergency situation where the primary interest of questioning police officers was to save a life.<sup>124</sup> This case reaffirmed a previous case, *People v. Modesto*,<sup>125</sup> which responded to *Escobedo*, the case from which the kidnapping hypothetical originates, and made a similar ruling that had come into question after the *Miranda* decision.

Eight years later, the Florida Court of Appeals came to a more extreme, if connected, determination. In *Leon v. State*,<sup>126</sup> several officers had attacked a kidnapping suspect. In the words of the appellate court, “[t]hey threatened and physically abused him by twisting his arm behind his back and choking him until he revealed where [the victim] was being held.”<sup>127</sup> The record does not suggest the officers had any reason to believe there was an imminent threat to the victim's life (other than the fact that kidnapping is often followed by the murder of the victim). Yet the ruling opinion held that the defendant's later confession to unrelated police officers was not affected by the earlier coercion, in large part because the coercion had been applied solely in order to save the victim's life, and not to obtain a confession.<sup>128</sup> The case was affirmed by the Eleventh Circuit, which similarly noted that “[t]his was . . . a group of concerned officers acting in

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122. *Dirty Harry* (Warner Bros 1971).

123. *Id.* See Michael Paulsen, *Dirty Harry and the Real Constitution*, 64 U. Chi. L. Rev. 1457 (1997) (describing the movie and its relation to criminal procedure).

124. *People v. Dean*, 114 Cal. Rptr. 555, 561–62 (Cal. App. 1974).

125. 42 Cal. Rptr. 417 (Cal. App. 1965).

126. 410 So. 2d 201 (Fla. App. 1982).

127. *Id.* at 202.

128. *Id.* at 203.

a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death.”<sup>129</sup>

By this time, the *Escobedo* situation had already come to life in New York, and in 1984 an appellate ruling came down in the case resulting from those facts. Like *Leon v. State*, *People v. Krom*,<sup>130</sup> dealt with a kidnapping. However, unlike *Leon*, the victim was not held in an apartment while ransom was arranged. Instead, she was buried alive in a wooded area, and by the time the defendant led police to her whereabouts, she was dead.<sup>131</sup>

Interestingly, there is no hint in the appellate case that the police officers that interrogated Krom knew that his victim was in such dire circumstances until she was located. Krom demanded money and immunity in exchange for revealing the victim’s whereabouts, and he eventually won promises from the government and the victim’s father complying with those demands.<sup>132</sup> He claimed that he had made efforts to prevent the victim from suffocation by shooting holes in the lid of the box in which she was buried.<sup>133</sup> The credibility of this statement is not commented upon in the record, but this claim of an intention not to kill the victim and the lack of information in the record as to the police officers’ knowledge of the victim’s imminent death both suggest that the defendant had not threatened his interrogators with her death and that the interrogators did not consider this possibility.<sup>134</sup>

But the court’s ruling makes clear that whether police knew how serious the situation actually was is irrelevant in a kidnapping case. In justifying the admission of Krom’s statements into evidence, the court created an emergency exception to its procedural requirements (one already existing in New York’s Fourth Amendment doctrine in kidnapping situations), stating that when “police are engaged in their primary duty of attempting to provide assistance to a person whose life is, *or may be*, in danger,” such an exception would be appropriate.<sup>135</sup> The court’s discussion of a preexisting Fourth Amendment exception to the warrant requirement similarly makes clear that a life-threatening emergency

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129. *Leon v. Wainwright*, 734 F.2d 770, 773 (11th Cir. 1984).

130. 61 N.Y.2d 187, 192–93 (1984).

131. *Id.* at 195.

132. *Id.* at 194.

133. *Id.* at 195.

134. The possible procedural violation in *Krom* was not a *Miranda* violation *per se*. Instead it involved New York’s even higher standards, requiring that all interrogation or efforts to convince a defendant to waive his right to an attorney cease once a defendant has invoked his right. In *Krom*’s case, police merely continued to question him (and attempted to bargain with him) in order to get him to cooperate. *Id.* at 197–98.

135. *Id.* at 198 (emphasis added).

situation is presumed to exist in a kidnapping case, and that in such circumstances, exceptions to procedure are acceptable.<sup>136</sup>

While these isolated cases bore similarities to one another, the nationwide discussion began in earnest with the decision of *New York v. Quarles*.<sup>137</sup> In that case, a police officer entered a store and demanded to know where a suspected rapist had hidden his gun. An exception to the *Miranda* doctrine was created, allowing the use of this statement at trial, based on the idea that the gun *may* have been on the premises and that some bystander *might* have happened upon the gun, thereby putting him and the surrounding public in jeopardy.<sup>138</sup> One dissent noted emphatically that there would be no question that a police officer could question a suspect without offering *Miranda* warnings in the case of a bomb about to explode.<sup>139</sup> As the following section makes clear, this case brought to the rest of the country the “public safety,” “emergency,” or “rescue” exception to the *Miranda* requirements and in a manner that went beyond the allowance of mere questioning.

#### B. Beyond Doctrine: The Entrance of the Ticking Time Bomb in the Socialization of Legal Elites

These concerns slowly entered elite legal culture, as evidenced by their inclusion in basic criminal procedure textbooks. Here, concerns were included in discussions of what might be referred to as a “public safety exception,”<sup>140</sup> a “rescue doctrine,”<sup>141</sup> or, notably, an “emergency exception”<sup>142</sup> to *Miranda*’s bright line rule.

In order to analyze the acceptance of emergency exceptions to the right against abusive interrogation, I looked to the evolution of criminal procedure textbooks from 1970 through 2005. After a preliminary examination of fifteen textbook series (those series I could find that had existed prior to 1980 and

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136. *Id.* at 198–99 (“In Fourth Amendment cases this court and others have recognized an emergency exception which permits the police to enter premises, without a warrant or probable cause to believe that a crime has been committed, in order to search for a person who is missing and *may be* in danger.” (emphasis added)).

137. 467 U.S. 649 (1984).

138. *Id.* at 655–56. In fact, this danger was almost nonexistent because the environment was completely controlled, the store was empty, it was the middle of the night, and there was sufficient police presence to easily surround and cut off all access to the store. *Id.* at 676 (Marshall, J., dissenting).

139. *Id.* at 686 (Marshall, J., dissenting) (arguing that while the questioning should be legal, admission of the statements as evidence should not).

140. Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments, and Questions* 532 (9th ed. 1999).

141. *Id.* at 538.

142. Stephen Saltzburg & Daniel Capra, *American Criminal Procedure* 519 (3d ed. 1988).

continued through 2002), I limited my analysis to those textbooks used most heavily in 2003, in order to ensure that I covered the most well-accepted doctrine of the time (as represented by its presence in established law schools).<sup>143</sup> These series are listed as Appendix A. In order to evaluate how this law evolved over several decades, I obtained editions of the textbooks, to the extent that they existed, dating back to the *Miranda* decision.<sup>144</sup>

To analyze the evolving acceptance of exceptions to the prohibition on coercive interrogation I performed content analysis and word counts, to represent the extent of discussion on the issue.<sup>145</sup> My content analysis focused on narratives and themes used by the authors to describe the evolving public safety exception. I looked to the phrases used to describe the exception (in some cases “emergency,” in others, “public safety” or “rescue”), which offer a clue as to the purposes these authors believed were determined to be (and students in the process of legal socialization absorbed as being) legally sufficient to negate *Miranda* and other protections against coercive interrogation.

I further looked for signs that the authors were attempting to problematize the doctrine, by offering counterlogic, oppositional cases or naturally (logically) following doctrine that seemed unreasonable.<sup>146</sup> I evaluated whether authors offered additional supportive or unsupportive legal reasoning, such as dissenting opinions, supportive case law, and supportive or unsupportive legal scholarship.

I rely particularly heavily on Kamisar et al.’s *Modern Criminal Procedure: Cases, Comments, Questions*, which seems to hold an established position as the dominant criminal procedure textbook in the United States.<sup>147</sup> Most

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143. See Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. Crim. L. & Criminology 789, 792–93 (2003) (providing data on how many law schools use each of the major criminal law textbooks).

144. I also collected several textbook series based on the fact that they had lasted from the 1970s through 2001, but as I could not get reliable statistics on their usage in law schools, I omitted them from my final analysis.

145. For prior use of this technique, see generally Joachim Savelsberg & Peter King, *American Memories: Atrocities and the Law* (2011) (performing word counts in history textbooks as part of an analysis of the dominance of trial narratives in American understanding of the Mai Lai massacre).

146. Examples of such problematization were surprisingly absent. One textbook series did offer a discussion of *Quarles* prior to a discussion on due process protections and, after a few pages, suggested that threats of physical violence *might* present “a per se factor” of involuntariness. See Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 625, 629–30 (6th ed. 2000).

147. Douglas Kahn, *Yale Kamisar: A Principled Man For All Seasons*, 102 Mich. L. Rev. 1722 (2004); Daniel Yeager, *Searches, Seizures, Confessions, and Some Thoughts on “Criminal Procedure: Regulation of Police Investigation—Legal, Historical, Empirical, and Comparative Materials*, 23 Fla. St. U. L. Rev. 1043 (1996); Bibas, *supra* note 143. Yale Kamisar et al. have written one of the twenty most cited legal texts, according to a 2005 analysis of texts

importantly, Kamisar et al.'s text was well established both before and after 2001, giving insight into the way the emergency exception entered the legal discussion, rather than its mere existence in the moment.

These textbooks represent not only the opinions of influential and prestigious members of the legal academy, but they form the basis of understanding for students entering the legal field. Unlike specific precedent, which may be debated, textbook discussions are presented as fact. Any argument that appears in a textbook acquires at least some credibility, as there is an assumption that, if it were entirely incredible, it would be omitted from discussion. While questions and hypotheticals may offer some room for critical analysis, the cases presented directly after those questions become baseline legal authority for young law students, establishing a foundation of legal thought and a broad outline of the contours of the legal discussion on the matter.

Any legal decision may be considered supportive of the notion that the ideas in the opinion are, at least, within the realms of legal possibility (that those ideas passed at least one laugh test). But cases cited in legal textbooks obtain this authority for students before they have formed any other conception of the law of the land. Therefore, these cases become a starting point for young lawyers, upon which any following legal research rests and against which it may be compared.<sup>148</sup>

To be sure, this methodology has its limitations. First, it is always possible for a student to reject the statements of the textbook entirely. Second, we cannot be sure how much each individual professor stressed these aspects of criminal procedure, entirely skipped over them, or even personally undermined the claims the textbooks were making. Finally, these textbooks are only a small sample of the dozens of criminal procedure textbooks on the market, and it is possible that even their most uniform aspects are chance occurrences that are not representative of the majority of criminal procedure classes.

Still, at the very least these textbooks are a window into the education of thousands of young lawyers each year for over a decade, as well as the accepted wisdom of those experts who seem to be most trusted by other scholars in the field. At a minimum, the presence of the torture narrative in these textbooks suggests that it was far from unimaginable in legal thought preceding the terror attacks of 2001, and the uniformity of the narrative (described below) in the dominant texts of the time makes it highly unlikely that these textbooks were complete outliers.

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and treatises written between 1978 and 1999. Fred R. Shapiro, *Most Cited Law Books of All Time*, Wash. Univ. Sch. of Law, <http://lib.law.washington.edu/ref/mostcited.html> (last updated Jan. 14, 2005).

148. For an analysis of the way in which law school, and particularly the first year of law school, fundamentally changes the thinking and worldview of law students, see Elizabeth Mertz, *The Language of Law School: Learning to Think Like a Lawyer* (2007).



These popularly used textbooks, therefore, occupy a particularly powerful position in the creation and representation of the dominant legal culture. However, I also looked to citations of the relevant cases, in order to evaluate their staying power and reach among judges and in case law nationwide.

Under this analysis it is apparent that *Quarles* quickly created a weakness in the prohibition on coercive interrogation. Following the decision, textbooks immediately began to include an excerpt of *Quarles*, possibly with half a page of notes on other cases and dilemmas presented by the need to protect the public.<sup>149</sup>

*Quarles* was merely the most cited example of the cases appearing across the country,<sup>150</sup> and as scholars began to discuss the issue,<sup>151</sup> the lacuna of the public safety exception expanded. This, too, was reflected in criminal procedure textbooks. In Kamisar, et al., 1980–2005, the number of words used to describe issues related to the public safety exception (outside of the continued presence of the excerpt from *New York v. Quarles*) rose from zero, to 334 words in 1986, and to 549 words in 1999 and 2002 (See Table 1). In 2005 the space allotted to such questions quadrupled, clearly in response to questions of torture (although brutality had already received attention in previous years with reference to *Leon v. State*).

TABLE 1: NUMBER OF WORDS USED TO DISCUSS PUBLIC SAFETY EXCEPTIONS TO *MIRANDA* IN EDITIONS OF KAMISAR ET AL.'S *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS, QUESTIONS*.

1980 (Fifth Edition)	0
1986 (Sixth Edition)	334
1990 (Seventh Edition)	419
1994 (Eighth Edition)	419
1999 (Ninth Edition)	549
2002 (Tenth Edition)	549
2005 (Eleventh Edition)	2000

149. See Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments, Questions* 599 (6th ed. 1986); Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure: Cases and Commentary* 519 (3rd ed. 1988).

150. See *supra* notes 124–137 and accompanying text; *State v. Finch*, 975 P.2d 967 (Wash. 1999).

151. See, e.g., Pizzi, *supra* note 121 (discussing the rescue situation); Charles Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109 (1998) (discussing exceptions to the *Miranda* requirements).

Recall that, as Kamisar et al. state, in *Leon v. State* one judge held that “the use of police threats and physical violence at the scene of arrest in order to ascertain the kidnap victim’s whereabouts ‘did not constitutionally infect the later confessions.’”<sup>152</sup> Recall that, in that case, officers had exceeded *Miranda*’s limitations not with questioning, but with physical abuse.<sup>153</sup> Notably, the reason this activity was excused from due process protections was in large part because (as would later be suggested in the Yoo and Bybee memos) the intention of police officers was to save the victim’s life.<sup>154</sup>

In textbooks, *Leon* appears to have been subsumed in *Quarles*, but *Leon* did carry some life of its own, as is seen in its citation record. By 2001 the case was cited in five cases (four in Florida and one in Alabama),<sup>155</sup> seven scholarly articles,<sup>156</sup> and Kamisar et al. (along with one other criminal procedure textbook).<sup>157</sup> Between 2001 and 2010 the case was cited in three books<sup>158</sup> and

152. Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments, Questions* 514 (10th ed. 2002) (citing *Leon v. State*, 410 So. 2d 201 (Fla. App. 1982)).

153. See *Leon v. State*, 410 So. 2d 201, 203–05 (Fla App. 1982).

154. *Id.* at 203–04.

155. See *Watkins v. State*, 497 So. 2d 1153, 1157 (Ala. Crim. App. 1986); *Andrade v. State*, 564 So. 2d 238, 239 (Fla. Dist. Ct. App. 3d Dist. 1990); *Turner v. State*, 423 So. 2d 594 (Fla. Dist. Ct. App. 3d Dist. 1982); *Porter v. State*, 410 So. 2d 164 (Fla. Dist. Ct. App. 3d Dist. 1982); *Porter v. State*, 410 So. 2d 164, 169 (Fla. Dist. Ct. App. 3d Dist. 1982) (Ferguson, J., dissenting). I have omitted discussion of whether the citations were positive or negative because it makes little difference to the question of whether the reasoning in *Leon* had impact and staying power in case law. As the question is largely one of the laugh test, and whether it was imaginable in criminal legal doctrine that circumstances could exist to excuse the use of physical coercion of suspects, I am more interested in the extent to which judges felt this reasoning was worthy of being addressed at all.

156. Paul Marcus, *A Return to the “Bright Line Rule” of Miranda*, 35 Wm. & Mary L. Rev. 93, 101 n.41 (1993); Ada Clapp, *The Second Circuit Review—1988–1989 Term: Criminal Procedure: The Second Circuit Adopts a Clarification Approach to Ambiguous Requests for Counsel*: *United States v. Gotay*, 56 Brook. L. Rev. 511, 534 n.131 (1990); Irene Rosenberg & Yale Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. Rev. 69, 97 n.176 (1989); Roger Machlis, *Criminal Procedure II: The Privilege Against Self-incrimination*, 1985 Ann. Surv. Am. L. 289 (1985); Donald Dripps, *Supreme Court Review: Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. Crim. L. & Criminology 699, 721 n.89 (1988); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 Vand. L. Rev. 1, 13 n.73 (1986); Martin Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 Hastings L.J. 429, 472 n.277 (1984).

157. Kamisar, *supra* note 152; James Haddad et al., *Criminal Procedure: Cases and Comments* (1987).

158. *Discourses and Practices of Terrorism: Interrogating Terror* 53, 188, 192, 195 (Bob Brecher et al. eds., 2010); Yuval Ginbar, *Why Not Torture Terrorists?: Moral, Practical and Legal Aspects of the “Ticking Bomb” Justification for Torture* 319 n.233, 320 n.236 (2008); James Acker et al., *Criminal Procedure: A Contemporary Perspective* 14–17, 99, 283, 300 (2004).

seven scholarly articles,<sup>159</sup> six discussing torture in the context of terrorism, as well as one more state case.<sup>160</sup> *Leon v. Wainwright*,<sup>161</sup> the federal resolution of the case, was cited in ten federal cases outside of the Eleventh Circuit,<sup>162</sup> eight cases within the Eleventh Circuit (including four federal appellate decisions),<sup>163</sup> six state court decisions,<sup>164</sup> and four journal articles by 2001.<sup>165</sup> After 2001 it was cited in another fourteen law journal articles (all but four explicitly refer to torture

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159. Kenneth Lasson, *Torture, Truth Serum, and Ticking Bombs: Toward a Pragmatic Perspective on Coercive Interrogation*, 39 Loy. U. Chi. L.J. 329, 353 n.100 (2008); John Cohan, *Torture and the Necessity Doctrine*, 41 Val. U. L. Rev. 1587, 1603 n.71 (2007); Paul Marcus, *Seegers Lecture: It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 Val. U. L. Rev. 601, 607 n.31 (2006); Mirko Bagaric & Julie Clarke, *The Torture Debate: Tortured Responses (A Reply to Our Critics): Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered*, 40 U.S.F. L. Rev. 703, 721 n.56 (2006); Marcy Strauss, *Torture*, 48 N.Y.L. Sch. L. Rev. 201, 240–41 nn.138–42 (2003); Alan M. Dershowitz, *The Torture Warrant: A Reply to Professor Strauss*, 48 N.Y.L. Sch. L. Rev. 275, 285 nn.48–49 (2003).

160. *People v. Richardson*, 917 N.E.2d 501, 517 (Ill. 2009).

161. 734 F.2d 770 (11th Cir. 1984).

162. *United States v. Perdue*, 8 F.3d 1455, 1467 (10th Cir. 1993); *Streetman v. Lynaugh*, 812 F.2d 950, 957 (5th Cir. 1987); *Vasquez v. Senkowski*, 54 F. Supp. 2d 208, 217 (S.D.N.Y. 1999); *United States v. Glover*, 1999 U.S. Dist. LEXIS 1649 (D. Kan. 1999); *United States v. Stewart*, 51 F. Supp. 2d 1136, 1146 (D. Kan. 1999); *United States ex rel. Holland v. McGinnis*, 754 F. Supp. 1245, 1258 (N.D. Ill. 1990); *United States ex rel. Holland v. McGinnis*, No. 90 C 04359, 1991 U.S. Dist. LEXIS 15753 (N.D. Ill. Feb. 8, 1991); *United States v. Rullo*, 748 F. Supp. 36, 41 (D. Mass. 1990); *United States ex rel. Wilson v. O'Leary*, 709 F. Supp. 837, 840 (N.D. Ill. 1989); *United States ex rel. Wilson v. O'Leary*, No. 87 C 6521, 1988 U.S. Dist. LEXIS 14074 (N.D. Ill. Dec. 7, 1988).

163. *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992); *Harris v. Dugger*, 874 F.2d 756, 761 (11th Cir. 1989); *United States v. Arango*, 853 F.2d 818, 824 (11th Cir. 1988); *Smith v. Wainwright*, 777 F.2d 609, 618 (11th Cir. 1985); *Parker v. Turpin*, 60 F. Supp. 2d 1332, 1374 (N.D. Ga. 1999); *United States v. Grimes*, 911 F. Supp. 1485, 1498 (M.D. Fla. 1996); *Ferrell v. Davis*, 1991 U.S. Dist. LEXIS 16137, at \*11 (S.D. Ala. Sept. 10, 1991); *Rutherford v. Davis*, 1990 U.S. Dist. LEXIS 16064, at \*16 (S.D. Ala. Sept. 28, 1990).

164. *Johnson v. State*, 696 So. 2d 326, 329 (Fla. 1997); *State v. O'Hara*, 627 A.2d 1001, 1004 (Me. 1993); *Maqueira v. State*, 588 So. 2d 221, 222 (Fla. 1991); *Halberg v. State*, 903 P.2d 1090, 1095 (Alaska Ct. App. 1995); *People v. Douglas*, 788 P.2d 640, 655 (Cal. 1990); *Lee v. State*, 484 So. 2d 1180, 1184 (Ala. Crim. App. 1985).

165. *Project: Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985–1986: I. Investigation and Police Practices*, 75 Geo. L.J. 713, 836 n.879 (1987); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 Ohio St. L.J. 733, 754 n.156 (1987); *Project: Fifteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1984–1985*, 74 Geo. L.J. 499, 607 n.800 (1986); Gregory K. Thoreson, Note, *The Compelled Confession: A Case Against Admissibility*, 60 Notre Dame L. Rev. 800, 807 n.54 (1985).

or human rights in their titles),<sup>166</sup> four state cases,<sup>167</sup> three Eleventh Circuit cases,<sup>168</sup> two federal cases in other circuits,<sup>169</sup> and one book.<sup>170</sup>

In the courts, citations of *Leon* and of the Eleventh Circuit case that came out of it, generally ignore the question of the validity of use of force in *Leon*'s first interrogation. Instead, judges cite the case primarily to support the decision that police impropriety in early interrogations may be "cleaned" by the passage of time, new interrogators, or other factors, in order to avoid "tainting" later confessions.<sup>171</sup>

166. Stephen Hoffman, *Is Torture Justified in Terrorism Cases?: Comparing U.S. and European Views*, 33 N. Ill. U. L. Rev. 379, 388–89 nn.59–64 (2013); Gregory McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DePaul L. Rev. 943, 961 n.123, 963 nn.136–39 (2010); *Symposium: Origins of Reasonable Doubt: Evidentiary Standards from Christian Theology to Guantanamo: Evidence Gained from Torture: Wishful Thinking, Checkability, and Extreme Circumstances*, 17 Cardozo J. Int'l & Comp. L. 281 (2009); Cohan, *supra* note 159; Lasson, *supra* note 159; Elizabeth Silker, Note, *Terrorists, Interrogation, and Torture: Where Do We Draw the Line?*, 31 J. Legis. 191, 209 nn.150–53 (2004); Jeffrey Addicott, *Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?*, 92 Ky. L.J. 849, 888 nn.268–76 (2004); The Committee on International Human Rights and The Committee on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees*, 59 The Record 183, 207 n.59 (2004); Dershowitz, *supra* note 159; Strauss, *supra* note 159; Andrew Moher, Note and Comment, *The Lesser of Two Evils?: An Argument For Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. Jefferson L. Rev. 469, 487 n.97 (2004); Welsh White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 988 n.51 (2003); Seth Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints in the War on Terror*, 6 U. Pa. J. Const. L. 278, 291 n.44 (2003); Susan Burger, Book Review, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, 174 Mil. L. Rev. 189, 193 n.30 (2002).

167. *Hall v. State*, 107 So. 3d 262, 271 (Fla. 2012); *Ellington v. State*, 735 S.E.2d 736, 747 (Ga. 2012); *Braddy v. State*, 111 So. 3d 810, 880 (Fla. 2012) (Quince, J. dissenting); *State v. Pulliam*, 2012 Del. Super. LEXIS 545 (Del. Super. Ct. Dec. 13, 2012).

168. *United States v. Vickers*, 2010 U.S. Dist. LEXIS 127661 (M.D. Ala. Oct. 14, 2010); *United States v. Morante-Palacios*, 2010 U.S. Dist. LEXIS 45275 (S.D. Fla. Mar. 15, 2010); *United States v. Merrill*, 2010 U.S. Dist. LEXIS 11041 (S.D. Fla. Feb. 9, 2010).

169. *Carter v. Poole*, 2008 U.S. Dist. LEXIS 58674 (N.D.N.Y. July 30, 2008); *United States v. Lopez*, 437 F.3d 1059, 1067 (10th Cir. 2006).

170. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 124, 247 n.3, 253 (2002).

171. *United States v. Lopez*, 437 F.3d 1059, 1067 (10th Cir. 2006) (distinguishing the circumstances of that case from those in *Leon*); *United States v. Perdue*, 8 F.3d 1455, 1467–68 (10th Cir. 1993) (quoting *Leon*'s statements concerning when a second confession will be admissible when an earlier confession is not); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1475 (11th Cir. 1992) (citing *Leon* to support the argument that a defendant's second confession will only be suppressed if it is tainted by the unconstitutional coercion used in an earlier interrogation); *Smith v. Wainwright*, 777 F.2d 609, 618 (11th Cir. 1985); *Carter v. Poole*, 2008 U.S. Dist. LEXIS 58674, at \*46 (N.D.N.Y. July 30, 2008) (enumerating factors to consider in determining whether a confession has been tainted by earlier coercion); *Vasquez v. Senkowski*, 54 F. Supp. 2d 208, 217 (S.D.N.Y. 1999) (quoting *Leon* and *Perdue* on the issue of when a

In contrast, Kamisar et al.'s reference to *Leon* and the acceptance of police abuse in life-saving circumstances is not just citation, but suggestion. "Are there (should there be) any limits on what a police officer may do to a suspected kidnapper in order to get him to reveal the location of a kidnap victim?" the textbook asks.<sup>172</sup> It answers by referring to *Leon*, stating that the "use of police threats and physical violence at the scene of arrest in order to ascertain the kidnap victim's whereabouts 'did not constitutionally infect the later confessions.'" <sup>173</sup> While the first edition's discussion of *Quarles* included a counterexample, suggesting that there may be limits on the interrogation of a suspect already represented by counsel, later editions dropped this case in favor of a reference to Pizzi's 1985 article, which restates the kidnapping hypothetical and suggests, again, that physical abuse might well be appropriate in such circumstances.<sup>174</sup>

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second confession can be considered voluntary); *United States v. Glover*, No. 98-10059-01-JWL, 1999 U.S. Dist. LEXIS 1649, at \*34–35 (D. Kan. Jan. 29, 1999) (quoting *Perdue* and *Leon* on the issue of when a second confession is admissible); *United States ex rel. Wilson v. O'Leary*, 709 F.Supp. 837, 840 (N.D. Ill. 1989) (citing *Leon* for the statement that courts of appeals look at whether the second confession was sufficiently attenuated from the earlier confession); *United States ex rel. Wilson v. O'Leary*, No. 87 C 6521, 1988 U.S. Dist. LEXIS 14074, at \*3 (N.D. Ill. Dec. 7, 1988) (citing *Leon* in determining that a second confession was admissible where the circumstances were sufficiently different from the earlier interrogation); *Watkins v. State*, 497 So. 2d 1153, 1157 (Ala. Crim. App. 1986) (citing *Leon* in support of the decision to suppress one of the defendant's inculpatory statements but to admit a later statement); *Lee v. State*, 484 So. 2d 1180, 1184 (Ala. Crim. App. 1985) (citing *Leon* and other cases in enumerating the significant factors in determining whether a later statement is admissible); *People v. Douglas*, 788 P.2d 640, 655 (Cal. 1990) (citing *Leon* in determining that the circumstances of the second confession were sufficiently distinct); *State v. Pulliam*, I.D. No. 1112006547A, 2012 Del. Super. LEXIS 545, at \*26 n.65 (Del. Super. Ct. Dec. 13, 2012) (citing *Leon* and other cases in enumerating the factors to consider in deciding whether a second confession is valid); *Braddy v. State*, 111 So. 3d 810, 880 (Fla. 2012) (Quince, J. dissenting) (distinguishing the case from *Leon* and arguing that the defendant's second confession was not admissible); *Andrade v. State*, 564 So. 2d 238, 239 (Fla. Dist. Ct. App. 3d Dist. 1990) (citing *Leon* and other cases supporting the determination that the defendant's incriminating statements were unrelated to earlier physical and verbal abuse by different police officers); *Ellington v. State*, 735 S.E.2d 736, 747 (Ga. 2012) (quoting *Leon*'s statement that a second confession is admissible if there has been a "sufficiently isolating break in the stream of events"); *People v. Richardson*, 917 N.E.2d 501, 517 (Ill. 2009) (citing *Leon* to support the proposition that a confession is not inadmissible when it is sufficiently distinct from earlier coercion); *State v. O'Hara*, 627 A.2d 1001, 1004 (Me. 1993) (citing *Leon* in stating that a witness's prior involuntary statement does not preclude admission of a later voluntary statement).

172. Kamisar, *supra* note 149, at 539.

173. *Id.*

174. *Id.*; Yale Kamisar et al., *Modern Criminal Procedure: Cases, Comments, Questions* 505 (7th ed. 1990) (citing *People v. Knapp*, 441 N.E.2d 1057 (N.Y. 1982)); Kamisar, *supra* note 140, at 539 ("There are due process limits . . . even where life is at stake' but '[i]n determining those limits [the] traditional scope of police conduct permitted . . . is only a starting point.'"). Note that even the limitation on abuse

This article was cited again in another line of textbooks, apparently instead of reference to *Leon* and *Krom*.<sup>175</sup> Indeed, no textbook responded to this question with case law or scholarship contradicting *Leon*, *Krom*, or *Quarles*. Where the question was asked, it was uniformly answered in the affirmative.<sup>176</sup>

The *Quarles* reasoning (and particularly the dissent, referring to the threat of bombs, which was included in three of the five most commonly used textbooks, including both of the two most commonly used books<sup>177</sup>) offers a clear hole in the prohibition on coercive interrogation, suggesting that in extreme cases any level of abuse may be acceptable. The notion that even extreme abuse may be acceptable in extreme circumstances gained force as it was specifically highlighted by textbooks, and as textbooks offered further support for the suggestion in the form of at least one court and one legal scholar.<sup>178</sup>

Where the textbooks recognize limits to the amount of abuse authorized by *Quarles*, they do so by referring back to the older limits of voluntariness and due process limitations.<sup>179</sup> Yet this creates circular reasoning, eventually leading back to the allowance of brutality, because these limitations (themselves quite weak, as discussed below) are influenced as well by the kidnapping/ticking time bomb reasoning of *Quarles*.

### C. Shocking the Conscience, Specific Intent, and Cruel and Unusual Punishment

One of John Yoo's most shocking claims, and perhaps most ridiculous as well, is that brutal treatment cannot be torture if motivated by a desire to apply only enough pain to get information, rather than a specifically sadistic desire to

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is given in the context of due process violations, an analysis which returns to the question of the size of the government interest at stake. For further discussion, see *infra* Part III(c).

175. Welsh White & James Tomkovicz, *Criminal Procedure: Constitutional Constraints upon Investigation and Proof* 538 (4th ed. 2001); Welsh White & James Tomkovicz, *Criminal Procedure: Constitutional Constraints upon Investigation and Proof* 488 (3d ed. 1998); Welsh White & James Tomkovicz, *Criminal Procedure: Constitutional Constraints upon Investigation and Proof* 561 (2d ed. 1994); Welsh White & James Tomkovicz, *Criminal Procedure: Constitutional Constraints upon Investigation and Proof* 507 (1st ed. 1990).

176. One series of textbooks did not broach the question directly, but did follow its discussion of *Quarles* with a reiteration of due process and voluntariness requirements, and the suggestion that threats of physical violence *might* breach these limits. Saltzburg & Capra, *supra* note 142, at 497.

177. Kamisar, *supra* note 140; Ronald Allen et al., *Comprehensive Criminal Procedure* 836 (2001); White & Tomkovicz (3d ed. 1998), *supra* note 175, at 487–88.

178. *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984); Pizzi, *supra* note 121.

179. See, e.g., Saltzburg & Capra, *supra* note 146 (“[T]he confession itself can be admitted if obtained under emergency circumstances . . . . However . . . the due process involuntariness test retains vitality today.” (internal citations omitted)). In Allen et al.’s casebook, the *Quarles* case is included within a section on “voluntariness reconsidered.” Allen, *supra* note 177, at 828–37.

apply a torturous level of pain to a victim.<sup>180</sup> The notion is belied by the fact that torture in the context of interrogation is specifically enumerated as one of the types of torture banned under the Convention Against Torture (CAT),<sup>181</sup> and torture in order to force a confession is specifically envisioned by the Torture Victim Protection Act of 1991 (passed by Congress in order to enact CAT).<sup>182</sup>

Yet Daniel Levin echoes this logic, when he states that severe pain and suffering should be “the conscious desire” of the torturer.<sup>183</sup> Bradbury states the same.<sup>184</sup> The two agree that individuals who act in good faith believe “that [their] conduct would not be expected to inflict severe physical or mental pain or suffering . . . would not have the specific intent necessary to violate [the federal statute prohibiting torture].”<sup>185</sup>

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180. Yoo I Memo, *supra* note 99, at 4.

[E]ven if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent . . . [A] defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person.

It was so well accepted that this was a claim that applying only enough pressure to get vital information from the victim would not be torture, that the claim was specifically discredited in Daniel Levin’s December 2004 memorandum. Memorandum from Levin, *supra* note 104, at 17 (“[A] defendant’s motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute.”). Still, Levin held to the notion that a torturous level of pain must be the “conscious desire” of the defendant, undermining his disavowal of Yoo’s logic. *Id.* at 16–17; *see also infra* note 183 and accompanying text.

181. The Convention Against Torture defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.” Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <http://www.hrweb.org/legal/cat.html>.

182. Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (1992) (codified as note following 28 U.S.C. § 1350 (2014)). The Act included a definition of torture adopting the language of the Convention Against Torture, so that torture includes, “any act . . . by which severe pain or suffering . . . is intentionally inflicted on [an] individual for such purposes as obtaining from that individual or a third person information or a confession.” 28 U.S.C. §1350 note 3(b)(1) (1992).

183. Memorandum from Levin, *supra* note 104, at 16.

184. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, CIA, Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee 27 (May 10, 2005), *available at* <http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-3.pdf> (discussing the meaning of “specifically intended”) [hereinafter Memorandum from Steven Bradbury, May 10, 2005].

185. Memorandum from Daniel Levin, *supra* note 104, at 17; *see* Memorandum from Steven Bradbury, May 10, 2005, *supra* note 184, at 28 (“[I]f an individual acted in good faith, and only after reasonable investigation establishing that his conduct would not be expected to

It is true that, between the torturer who acts believing he will not cause a torturous level of pain, and the torturer who acts with the conscious desire to cause that pain with no higher motive driving him, there is the “knowing” torturer who, possibly reluctantly, engages in behavior he knows will cause torturous levels of pain, but only for some higher purpose. Post-Yoo memo authors, through avoidance of legal analysis, carefully protect the status of this individual. The situation is expressly avoided in the Levin memo, which discusses contradicting legal analyses regarding knowledge of harm as related to specific intent, and concludes that it would not be “useful to try to define the precise meaning of ‘specific intent’ in [the torture statute].”<sup>186</sup> Bradbury’s May 10, 2005 memo echoes Levin’s analysis, as well as his refusal to draw a conclusion regarding such defendants.<sup>187</sup>

In 2005, it became clear that the Department of Justice’s reasoning was that torture must be sadistic; it must be cruel. Bradbury’s May 30, 2005 memo expands the prior analyses of motive, while arguing that the CIA techniques could not be considered cruel, inhuman, and degrading (a standard generally considered to be less abusive than torture). Here, Bradbury relies on the criminal legal doctrine requiring that behavior “shock the conscience” in order to qualify as cruel and unusual.<sup>188</sup> This is also the outer boundary of violations of due process—a due process violation is found to have occurred only when the behavior of police officers “shock the conscience.”<sup>189</sup>

Like Yoo, Bradbury notes that the United States specifically limited its adherence under CAT to behavior that falls under domestic legal standards of cruel and unusual punishment.<sup>190</sup> Like Yoo, Bradbury finds that these legal standards set an incredibly high bar—specifically one of arbitrariness—where punishment is cruel for cruelty’s sake, rather than for any legitimate governmental purpose, such as obtaining direly needed information.<sup>191</sup>

The reiteration of this logic suggests that it was not as far-fetched as critics suggest.<sup>192</sup> As other scholars have noted, by 2005 the “shock

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inflict severe physical or mental pain or suffering, he would not have the specific intent necessary to violate sections 2340-2340A.”).

186. Memorandum from Daniel Levin, *supra* note 104, at 16.

187. See Memorandum from Steven Bradbury, May 10, 2005, *supra* note 184, at 27–28.

188. Memorandum from Steven Bradbury, May 30, 2005, *supra* note 104, at 2–3.

189. *Rochin v. California*, 342 U.S. 165, 175 (1952); *County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998).

190. See Memorandum from Steven Bradbury, May 30, 2005, *supra* note 104, at 16.

191. See *id.* at 27–28.

192. For arguments that the Department of Justice’s reasoning was swayed by improper influences and offered an inaccurate analysis, as well as a sudden and severe deviation from accepted legal doctrine, see, e.g., Cole, *supra* note 60 (arguing that the memos show evidence of a desire to insulate torturers from prosecution); Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 *Houston L. Rev.* 71, 79 (2012) (finding the memos



the conscience” standard—used to evaluate violations of the prohibition on cruel and unusual punishment as well as due process requirements—had long devolved into one that seemingly allowed absolutely any brutal treatment as long as some governmental interest could be cited in justification.<sup>193</sup> Under this jurisprudence, liability will not be found to exist unless officials are malicious, sadistic, or deliberately indifferent.<sup>194</sup> In other words, any amount of pain can be justified, based on a need to protect the public, or the official himself.

As John Parry<sup>195</sup> and Jerry Skolnick<sup>196</sup> point out, the extreme evolution of the “shock the conscience” test was illustrated in the case of *Chavez v. Martinez*.<sup>197</sup> That case, which arose in 1997 but was decided in 2003 before torture had reached the public eye, concerned the hospital interrogation of a crime suspect who had been shot several times, including in the face. The interrogation is memorialized in an audiotape, wherein the listener can plainly hear the suspect begging for the interrogation to stop and for a doctor to be brought in, as well as screaming, apparently in pain.<sup>198</sup>

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dishonest and lacking credibility); Tung Yin, *Great Minds Think Alike: The “Torture Memo,” Office of Legal Counsel, and Sharing the Boss’s Mindset*, 45 Willamette L. Rev. 473 (2009) (arguing that the memos are flawed due to a desire to please a supervisor); David Luban, *Legal Ethics and Human Dignity* 176–80, 200–02 (2007) (describing legal ethics, the obligation to accurately state the law, and the failure of the Office of Legal Counsel to do so with respect to the question of torture); Frederick Schwarz Jr. & Aziz Huq, *Unchecked and Unbalanced: Presidential Powers in a Time of Terror* (2007) (describing why the Bush Administration’s legal analyses were “embarrassingly wrong”); W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 68 (2005) (“This is not legal analysis of which anyone could be proud.”).

193. See Dayan, *supra* note 6; see generally John Parry, “Just for Fun:” *Understanding Torture and Understanding Abu Ghraib*, 1 J. Nat. Sec. L. & Pol’y 253 (2005) (arguing that the “law in fact fails to regulate torture”); John Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 Ga. L. Rev. 733 (2005) (describing the “shock the conscience” standard as vague).

194. See Parry, *Constitutional Interpretation*, *supra* note 193; see also *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (holding that whether force used to quell violence in prison violated the Eighth Amendment depended on whether it was applied “maliciously and sadistically for the very purpose of causing harm”); *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (holding that whether force used in interrogating a witness violated the Eighth Amendment depended on whether the force was “unjustifiable by any government interest”).

195. See Parry, *Constitutional Interpretation*, *supra* note 193.

196. See Skolnick, *supra* note 113.

197. *Chavez v. Martinez*, 538 U.S. 760 (2003).

198. *Id.* at 784. Justice Stevens’ opinion, concurring in part and dissenting in part, includes an excerpt of the transcript, including, “Ay! What are you doing to me! No . . . ! [unintelligible scream].” The suspect, Oliverio Martinez, was never tried for any crime, but he did sue the officer involved for violating his constitutional right against self-incrimination. *Id.* at 764–65. Because he had not been charged with a crime, however, the Supreme Court found that he had no self-incrimination right to be violated. The brutality of the interrogation might have been a violation of due process, but the case had not been brought on that basis. *Id.* at 766

In dicta, six justices addressed the question of whether Martinez's due process rights had been violated. Three of the justices specifically stated there was no such violation—as such a violation required conduct that is “unjustifiable by any government interest”.<sup>199</sup> In other words, brutality was acceptable if it was necessary to fulfill some legitimate goal of government. Here, these justices found that the government's interest in determining whether or not “there had been police misconduct constituted a justifiable government interest” because of the emergency situation in which the police found themselves. Had Martinez died before talking to police, evidence would have been irrevocably lost.<sup>200</sup> Only three justices bothered to suggest that loss of evidence might not justify the type of violence the audiotape suggests.<sup>201</sup>

In a brief for *Chavez* written in 2002, before the torture memos were complete or the use of torture by U.S. government agents had become a public scandal, the government cited *Quarles* as part of its argument that death threats, “grabbing of the throat,” (a clear reference to *Leon*) and threats of physical abuse would be justifiable if a bomb were “about to explode” and the police were “seeking life-saving information.”<sup>202</sup> At oral arguments, the amount of abuse possible ascended to the level of beating a suspect with a rubber hose.<sup>203</sup>

In fact, the ubiquity of the *Quarles* precedent highlights just how central that precedent and the public safety exception were to the question of police brutality in interrogating witnesses, and how well acknowledged that centrality was. Not only was the precedent discussed at oral arguments and relied on by the government, but also lawyers for Martinez cited the case and *Leon v. Wainright*.<sup>204</sup> This suggests that the public safety narrative was not merely the product of a desperate search for precedent, but was also an accepted aspect of U.S. law.

The split in *Chavez* regarding these questions suggests that the prohibition on using physical abuse to obtain evidence in a situation where time is of the essence was up for debate in 2002 and 2003. It is precisely this interpretation that forms the basis of the Bradbury memo, and it is for this reason

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(“We fail to see how . . . Martinez can allege a violation of [the Fifth Amendment], since Martinez was never prosecuted for a crime . . .”).

199. *Id.* at 775.

200. *Id.*

201. *Id.* at 787–88 (Stevens, J., concurring in part and dissenting in part); *id.* at 796–99 (Kennedy, J., concurring in part and dissenting in part). Justice Ginsburg joined the relevant portions of Justice Kennedy's opinion. *Id.* at 799 (Ginsburg, J., concurring in part and dissenting in part). See also Parry, “*Just for Fun*,” *supra* note 193, at 273 (discussing the limited support in the Supreme Court for the notion that Martinez's interrogation violated due process).

202. Seth Kreimer, *Torture Lite, Full-Bodied Torture, and the Insulation of Legal Conscience*, 1 J. Nat. Sec. L. & Policy 87, 206 n. 72 (2005).

203. Oral Argument, *Chavez*, 538 U.S. 760 (No. 01-1444), available at [http://www.oyez.org/cases/2000-2009/2002/2002\\_01\\_1444](http://www.oyez.org/cases/2000-2009/2002/2002_01_1444).

204. Brief for the Petitioner at 27, 31, *Chavez*, 538 U.S. 760 (No. 01-1444).

that Bradbury discusses extensively the governmental interest in using brutal tactics to interrogate detainees. Bradbury describes the imminence and magnitude of the threat that interrogators (supposedly) encountered before resorting to these methods, and the care interrogators (supposedly) used in applying the techniques.<sup>205</sup> Relying on the “shocks the conscience” standard, Bradbury makes his case that the CIA’s methods were not cruel and unusual, because they were called for in order to fulfill legitimate governmental interests.<sup>206</sup> Indeed, Bradbury cites *Chavez*, claiming it was a more extreme interrogation than that planned by the CIA and suggesting that the Supreme Court found it was justified.<sup>207</sup> Bradbury also highlights how much more legitimate the government’s national security interest must be Bradbury is not alone in thinking that the *Chavez* case illustrates just how low due process standards had sunk by the time of that decision. Legal scholars analyzing the application of the “shocks the conscience” test in Fifth and Eighth Amendment doctrines come to similar conclusions<sup>208</sup> as does my own analysis above.

The connection made by the government, both in the *Chavez* case and in Bradbury’s memo citing *Chavez*, between the legitimacy of brutal tactics and the search for vital information is precisely the connection made not only in *Quarles*, but in *Krom*, and *Leon*. Those cases similarly relied upon the notion that rather than an illegitimate purpose, namely seeking a confession, police were acting towards a legitimate government interest, seeking information.

Indeed, the “shocks the conscience” limitation to “unjustifiable based on any governmental interest” is inherently connected to a division between the reactive and preventive functions of law enforcement. Actions that would be unacceptable as “punishment” (i.e., in the words of *Leon*, the “secondary role” of police that commences once a crime is completed and danger is past) are unquestioned as part of ongoing efforts to prevent future harms.

#### D. Doctrine, Torture, and the Logic of Prevention

I have already discussed how the logic of the ticking time-bomb scenario replicates the preventive logic of the precautionary principle, but it is worth noting the workings of the logic of prevention and the precautionary principle in the language of the courts and the textbooks themselves.

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205. Memorandum from Steven Bradbury, May 30, 2005, *supra* note 104, at 29–30.

206. *Id.* at 28.

207. *Id.* at 33.

The CIA program is considerably less invasive than much of the conduct at issue in these cases. In addition, the government interest . . . at stake here: the national security—in particular, the protection of the United States . . . against attacks that may result in massive civilian casualties.

208. *See supra* note 193 and accompanying text.

The precautionary principle is particularly evident in the discussion of kidnapping, and the removal of defendants' protections in such cases. The cases discussed above offer varying levels of intrusion on defendants' rights and varying levels of danger presented to the victim in the case. But the judges universally agree that, in a kidnapping case, no investigation into the level of threat presented is necessary.<sup>209</sup> Instead, kidnapping qualifies as a type of crime that carries with it an immeasurable risk of high-level damage. Judges do not know, and do not ask, how likely it is that this kidnapper will kill this victim. Kidnappers sometimes kill their victims. Therefore, there is a known high-level risk, which makes analysis of its likelihood unnecessary.<sup>210</sup>

In each of these cases police officers had good reason to believe they had a suspect with valuable information, with evidence ranging from the defendant stating he "might know something about it"<sup>211</sup> to the apprehension of the suspect in the middle of a ransom transaction.<sup>212</sup> But discussion of how much evidence is available is considered unnecessary to the broader ruling. Judges consider it sufficient to look at the evidence available (in the hindsight of reviewing a defendant who has confessed and whose confession has been corroborated) and state broadly that a life was in danger, without providing a concluding sentence that police officers had sufficient evidence to believe they had the offender in custody.

Here, again, we see the disappearance of the question of law enforcement evaluations. The risk that emergency exceptions might pose to innocent suspects is not worthy of consideration, even where (as in *Krom*) judges appear conscious of the fact that they are creating or extending an exception to procedure that will carry forward into other cases.

It is also worth noting that judges place these determinations squarely within the rubric of preventive criminal justice. In *Krom*, for instance, Judge Wachtler prioritized the preventive role of policing, stating that preventing crime was "a primary role of the police," whereas apprehending suspects and gathering evidence was merely "secondary."<sup>213</sup> In *Dean*,<sup>214</sup> *Krom*,<sup>215</sup> and, notably, *Leon*, judges emphasized that the purpose of the interrogation, and brutality in the case

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209. See *supra* notes 124–136 and accompanying text.

210. It is once again worth noting the comparison to the case of the use of preventive solitary confinement of terrorists. There, as well, judges no longer bother to examine how likely individual defendants are to engage in the harm of which they are assumed to be capable. The mere fact that they are prosecuted for a certain type of crime that is associated with a high level of harm is sufficient to preventively detain them in the harshest conditions known in the criminal justice system.

211. *People v. Krom*, 61 N.Y.2d 187, 193–94 (1984).

212. *Leon*, 410 So. 2d 201 (Fla. App. 1982).

213. *Krom*, 61 N.Y.2d at 198.

214. *People v. Dean*, 114 Cal. Rptr. 555 (Cal. App. 1974).

215. *Krom*, 61 N.Y.2d at 198.

of *Leon*, was not to get a confession, but to save a life.<sup>216</sup> In other words, the exception to the defendants' protections was based on the fact that the purpose was not to gather evidence, but to prevent future harm from occurring.

It is true that, other than *Leon*, these cases approved of purely procedural violations rather than physical abuse. However, this distinction disappeared as the cases moved into the realm of criminal procedure textbooks. There, the "public safety," "rescue," and/or "emergency" exceptions referenced the possibility that physical abuse might well be tolerable (in some textbooks more heavily than in others).

Moreover, the omission of questions of the accuracy of police beliefs regarding the possible harm and the suspect's guilt, and questions of the level of necessity of this interrogation in order to acquire the information, is even starker in textbooks. In fact, Kamisar et al. make no reference to the possibility that a suspect might be innocent, or that a life may not actually be at stake. "Should statements obtained in violation of *Miranda* be admissible if police interrogation of a suspected kidnapper is motivated primarily by a desire to save the victim's life?" they ask, just prior to asking about the limits of those interrogations.<sup>217</sup> That the interrogation should, and will, occur is supported by case law and scholarship.<sup>218</sup> While it is true that at times the cases are not described, the case law cited consists of precisely those cases that similarly ignored the question of innocence.<sup>219</sup> No opposing answer is given. Should a student choose to consider whether or not these violations are permissible, he or she will be directed towards an answer that the interrogation is proper, with no complication, debate, or doubts.

The book goes on to discuss the possible limits of the extent of the interrogations.<sup>220</sup> The questions of whether the victim's life is in danger, whether the suspect is guilty, and how certain police are of those facts, are completely omitted. This structures students' thought processes to look to questions of degree, rather than propriety, and to skip over doubts regarding whether any original (completely ignored) ignorance may be a concern. Motivation "by a desire to save the victim's life" is sufficient, with no question as to the facts, or assumptions, underlying that desire. Moreover, the fact that the kidnapper is only "suspected" is quickly glossed over.

In each of these ways, the precautionary principle shows its hold on U.S. criminal legal doctrine, and its reach into limitations on the treatment of persons suspected of having (possibly) life-saving information. The primary interest at stake is one of prevention of future harm. It is known that the future harm might

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216. *Leon v. State*, 410 So. 2d at 203; *see also Leon v. Wainwright*, 734 F.2d 770, 773 (11th Cir. 1984) (describing the purpose of the interrogation).

217. Kamisar, *supra* note 174, at 505.

218. *Id.*

219. *Id.*

220. *Id.*

be large, but its actual likelihood is unknown and irrelevant. The status of the suspect and the accuracy of the belief that he has relevant information are sufficiently irrelevant to be largely undiscussed. His moral guilt, which in other circumstances would be the basis for imposing upon his freedom, is irrelevant in light of the (possible but not definite) harm to be prevented.

The evolution of the “shocks the conscience” standard shows the reach of the logic of prevention in criminal justice. While the most direct connection to the discourse of the ticking time bomb and the protection of public safety can be found in exceptions to *Miranda*, the logic is clearly present in other areas of criminal law and procedure. Typically, the use of torture in criminal justice would fall under a due process violation, rather than *Miranda*, as a violation in its own right. The *Chavez* discussion and the limitation of this protection to solely those violations that are done for purposes *other than prevention* attest to the prioritization of prevention.

#### IV. CONCLUSION: THE CRIMINAL ROOTS AND CRIMINAL FUTURE OF TORTURE

The malleable and indeterminate nature of the law is well accepted in socio-legal scholarship.<sup>221</sup> Particularly in times of extreme duress, the popular assumption is that law will have no force in the face of political will. The use of torture by the United States since 2001 is often discussed in this context as an example of the failure of legal norms, legal institutions, and the rule of law. In the wake of the terror attacks of 2001, it is claimed, “the unthinkable became thinkable,”<sup>222</sup> and all prior norms were abandoned.

But the above analysis demonstrates that torture was not nearly as unthinkable as these critics would like to believe. To the contrary, the circumstances in which torture would be acceptable was a subject of ongoing debate and consideration in the realm of criminal procedure. Nor was this debate limited to a few outlier judges, discussing scenarios they believed would never arise. To the contrary, it was present in the education of law students at schools across the country, and in cases that arose, seemingly, with some regularity.

Most importantly, the notion of accepting torture in one of these circumstances was not presented as a ridiculous suggestion, to be rejected as far

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221. See, e.g., Martin Shapiro, *Courts: A Comparative and Political Analysis* (1981) (arguing that courts, and therefore law, are influenced by political pressures); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) (explaining how judges are not distanced from cases but actively engage with litigants, and their rulings are influenced by those interactions as well as the law); Donald Black, *Sociological Justice* (1989) (arguing that law is a social process, influenced by social characteristics of judges and lawyers as well as litigants).

222. Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* 222 (2010).

outside of the realms of legal limits. Instead, cases that were accepting of the use of physical abuse in order to obtain information in circumstances where a *single* life *might* be at stake were presented as accepted doctrine, thereby creating the assumption that an exception might be made in such a circumstance.

The clearly preventive nature of the use of torture, and the preventive reasoning that was presented in cases and in textbooks to justify its use, as well as its appearance in standard criminal procedure debates, suggest that this logic was an outgrowth of the preventive turn in criminal law and procedure that began in the late 20<sup>th</sup> century. This suggestion has broad ramifications for scholars studying the use of torture and activists seeking to prevent it.

Since 2001, the use of torture has been justified, consistently, in reliance on the exceptional nature of the threat of terrorism. There appears to be wide agreement that torture, if used, should only be used in extreme circumstances.<sup>223</sup> Among proponents of the use of torture the argument is that the threat of terrorism fits these circumstances. Indeed this is the very point of the ticking time-bomb hypothetical. In response, critics of the use of torture have focused on this hypothetical scenario as well, pointing to its flaws, suggesting that it is based on assumptions of facts that rarely, if ever, occur in real life, and arguing that it fails as a philosophical justification for torture, for those reasons.

But the fact that justifications for torture originated in conventional criminal procedure shows the mistake of allowing the argument to be framed as a response to terrorism in the first place. In fact, the ticking time-bomb is merely a version of an earlier criminal procedural thought experiment. Far from exceptional reasoning, requiring “mission creep”<sup>224</sup> to make its way into conventional criminal process, the use of torture is the realization of criminal procedural theory. Acceptance in criminal procedure is therefore not nearly so far off.

Pigeonholing the discussion of torture in the context of terrorism has the same result as the ticking time bomb hypothetical itself does—it assumes that the question will arise only in the most extreme cases, where (as was the case, in the minds of government actors in the spring of 2002)<sup>225</sup> there is some ultimate threat

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223. See, e.g., Paul Gronke et al., *U.S. Public Opinion on Torture, 2001–2009*, 43 *Pol. Sci. & Pol.* 437 (2010) (discussing public opinion polls on torture); see also Mark Danner, *US Torture: Voices from the Black Sites*, *New York Review of Books*, Apr. 9, 2009, at 1, 23 (“Polls tend to show that a majority of Americans are willing to support torture only when they are assured that it will ‘thwart a terrorist attack.’”).

224. See, e.g., F.A.O. Schwartz, Jr., *The Church Committee, Then and Now*, in *U.S. National Security, Intelligence, and Democracy: From the Church Committee to the War on Terror* 22, 26 (Russell A. Miller ed. 2008) (warning of the risk of “mission creep,” the progression of intelligence activities against military or intelligence targets to use of those activities against civilians).

225. See *60 Minutes: Hard Measures* (CBS television broadcast Apr. 29, 2012), available at <http://www.cbsnews.com/news/hard-measures-ex-cia-head-defends-post-9-11->

of nuclear weapons and at the very least multiple lives lost.<sup>226</sup> This ignores the discussion of torture that is already ongoing in the federal courts and legal classrooms across the country, that reaches to circumstances where there is a *possible* (unconfirmed) threat to a *single* life, where police are acting on conventional detective work rather than overwhelming evidence provided by foreign intelligence surveillance, where all the normal caveats related to police behavior and government fallibility can and should apply.

This does not contradict the criticisms lodged against the ticking time-bomb hypothetical, that government intelligence may still be wrong, and that there is no way to *know* all the important factors that are presumed to be known in the hypothetical. Rather it exemplifies these criticisms. Allowing the discussion to remain in the context of the threat of terror allows scholars and the public to rely on the belief that multiple steps along the slippery slope will be necessary before we reach the application of this reasoning to conventional crime. This reliance is unfounded. We are already down the slippery slope. The discussion on allowing torture in conventional criminal cases is well underway and has been for decades. For example, in May of this year, an article was written citing a government source who claimed that “the world’s most notorious drug lord” had been found in December of 2013 by torturing a number of his subordinates.<sup>227</sup>

Indeed, it seems it was this discussion that created the narrative that eventually justified the use of torture. This is an important point for those who are intent on eradicating the use of torture. If the prohibition on torture is to become truly absolute, it is in the conventional criminal domain that we must guard against exceptions and allowances for its use. A prohibition in the realm of international law will mean very little if our norms in the domestic sphere offer outlets and justifications for the use of torture. It may be wise, rather than guarding against the use of torture in exceptional circumstances, to more quickly credit the threat of the slippery slope in the everyday world of criminal justice norms. It is to these norms that our imagination jumps when the exceptional circumstance appears.

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tactics/; *see also* Jay S. Bybee, Classified Response to the U.S. Department of Justice Office of Professional Responsibility 15 (2009), *available at* <https://www.fas.org/irp/agency/doj/opr-bybeefinal.pdf> (describing the belief of the intelligence community that hundreds of American lives would be lost if interrogations did not continue).

226. Of course, basing a justification of torture on the loss of multiple lives leaves one to wonder whether similar measures would be justified in order to prevent, for instance, school shootings or other mass killing events.

227. Patrick R. Keefe, *The Hunt for El Chapo: How the World’s Most Notorious Drug Lord was Captured*, *New Yorker*, May 5, 2014, <http://www.newyorker.com/magazine/2014/05/05/the-hunt-for-el-chapo?currentPage=allNew> (suggesting that information had come from informants who had been tortured by Mexican authorities).



## APPENDIX A:

Most Adopted Criminal Procedure Textbooks, 2003, in order of common usage, highest to lowest (from Bibas, 2003):

## ADOPTIONS | TEXT

- 56 YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS (2000)
- 40 WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (2001)
- 38 NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS CASES AND MATERIALS (2000)
- 37 STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY (2000)
- 35 RONALD JAY ALLEN, WILLIAM STUNTZ, JOSEPH HOFFMANN, DEBRA LIVINGSTON, & ANDREW LEIPOLD, COMPREHENSIVE CRIMINAL PROCEDURE (2001)
- 34 MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (1998)
- 34 JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES (1999)