# How the War on Terror May Affect Domestic Interrogations: The *24* Effect

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## INTRODUCTION

For the first time since *Miranda* was decided nearly forty years ago,[1] interrogation techniques have been at the forefront of the American consciousness. The War on Terror has forced Americans to grapple with the definition of torture, whether torture is ever an appropriate interrogation technique, whether it is an effective interrogation technique, and so on. Unlike many past discussions of interrogation techniques, the current torture debate has not been limited to law enforcement and the legal academy; discussions of torture and "hard treatment" have been front page news, have permeated popular culture, and have forced the American people to examine their preconceptions of the appropriateness of coercion in obtaining information from suspects.

I call the omnipresence of depictions and discussions of torture in popular culture the "*24* Effect."[2] We see torture depicted in fiction,[3] on the news,[4] and on the internet.[5] My concern is not

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

2 The effect is, of course, named after the Fox television show *24*. The show and its effect are described in Part III, *infra*.

3 *24* is the most obvious example, but clearly far from the only one. *See, e.g.*, David Edelstein, *Now Playing at Your Local Multiplex: Torture Porn*, N.Y. MAG., Feb. 6, 2006, at 63.

4 The Fox News Channel ran a three-part report on "waterboarding," an interrogation technique known to have been used by American forces interrogating terror suspects overseas. A Fox reporter agreed to undergo the procedure at the hands of private soldiers dressed in black hoods. He concluded that while it would be impossible to describe the procedure as anything other than torture, it was certainly "effective." *See* Steve Harrigan, *Waterboarding: Historically Controversial*, FOXNEWS.COM, Nov. 7, 2006, http://www.foxnews.com/story/0,2933,227357,00.html.

5 The now-infamous photographs of the torture and degradation of prisoners at the Abu Ghraib prison in Iraq are available from numerous sources and in more excruciating detail on the internet than they ever were in the mainstream American press. One of the

that the *24* Effect will necessarily cause torture to spill over from the War on Terror into local police departments' interrogation rooms.[6] I do not believe that the causal relationship is nearly that direct.[7] Rather, my concern is that once the public has become inured to torture by its repeated factual and fictional representations—even its disturbing representations—the public will increasingly discount the effect of non-physical coercive interrogation techniques on criminal defendants and will become more receptive to the use of those non-torturous techniques in run-of-the-mill criminal cases.

The ultimate result of the *24* Effect, therefore, will likely be a shifting of the baseline for permissible treatment of criminal defendants; because psychological coercion, trickery, false promises and threats have a lesser visceral impact than the physical

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milder examples can be found on the Salon.com website along with an extensive exposition of the history of abuse in Abu Ghraib. *See* Joan Walsh, *The Abu Ghraib Files*, SALON.COM, Oct.–Dec. 2003, http://www.salon.com/news/abu_ghraib/2006/03/14/introduction/index.html.

6 Of course, it is not always easy to distinguish "crime" from the "War on Terror." Take, for example, the case of Jose Padilla. He was arrested at O'Hare airport in Chicago in May of 2002 and held in a Navy brig in South Carolina for several years, allegedly suspected of plotting to explode a dirty bomb in the United States. Just before his habeas petition was due to be heard by the Supreme Court, Padilla was transferred to a civilian prison and is currently awaiting greatly reduced charges in the Southern District of Florida. Linda Greenhouse, *Justices Decline Terrorism Case of a U.S. Citizen*, N.Y. TIMES, Apr. 4, 2006, at A1; Errin Haines, *Appeals Court Weighs Padilla Charge*, FOXNEWS.COM, Jan. 10, 2007, http://www.foxnews.com/wires/2007Jan10/0,4670,PadillaTerrorCharges,00.html; *see also* Padilla v. Hanft, 126 S. Ct. 1649 (2006). For a fuller discussion of the interaction between civilian criminal prosecutions and the War on Terror, see M. Katherine B. Darmer, Miranda *Warnings, Torture, the Right to Counsel and the War on Terror*, 10 CHAP. L. REV. 619 (2007); Joan L. Larsen, Visiting Professor of Law, Univ. of Mich. Law Sch., Remarks at the Chapman Law Review Symposium: *Miranda* at 40: Applications in a Post-Enron, Post-9/11 World (Jan. 26, 2007), *available at* http://www.chapman.edu/LawReview/symposium2007_webcast.asp (follow "Click here for Panel #1" hyperlink).

7 There *is* some evidence, however, that what appears on television has a direct effect on interrogation techniques in the field. For example, an Army official recently met with writers and producers of the Fox Television show *24* in order to try to convince them that their show had a deleterious effect on interrogations in the military.

> [The army officials] had come to voice their concern that the show's central political premise—that the letter of American law must be sacrificed for the country's security—was having a toxic effect. In their view, the show promoted unethical and illegal behavior and had adversely affected the training and performance of real American soldiers. "I'd like them to stop," [one officer] said of the show's producers. "They should do a show where torture backfires."
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> . . . The third expert at the meeting was Tony Lagouranis, a former Army interrogator in the war in Iraq. He told the show's staff that DVDs of shows such as "24" circulate widely among soldiers stationed in Iraq. Lagouranis said to me, "People watch the shows, and then walk into the interrogation booths and do the same things they've just seen."

Jane Mayer, *Whatever It Takes: Torture on "24"*, NEW YORKER, Feb. 19 & 26, 2007, at 66, 72, 77.

torture to which we are all becoming accustomed, courts as well as the public at large are likely to become more accepting of these techniques. This is particularly distressing given the fact that non-torturous but coercive interrogation techniques are highly correlated with unreliable confessions and with wrongful convictions.[8] Thus, in addition to the dignitary harms that befall criminal defendants and the rest of society whenever statements are coerced from criminal defendants, the bottom-line result of the *24* Effect will be more convictions of the innocent and, by logical extension, more guilty criminals going unpunished.

In this Article, I briefly trace the history of police interrogation and its legal regulation in the United States, from the founding-era understanding that a defendant's silence was entitled to great respect, to the modern practice of *Miranda* warnings and voluntariness inquiries. I then turn to the portrayal of torture in contemporary media, arguing that whatever the motivation may be for the production of these images, their effect will be to desensitize Americans to the effects of torture. Returning then to interrogation, I argue that this desensitizing effect of omnipresent torture will make Americans more accepting of coercive but nonviolent interrogation techniques. I show that, given the close connection between coercive interrogation techniques and wrongful convictions, we should be very concerned about this development, regardless of our thoughts about the continuing wisdom and relevance of the *Miranda* decision.

## I. HISTORY—THE EVOLUTION OF INTERROGATION TECHNIQUES AND THEIR REGULATION IN THE UNITED STATES

Not much is known about interrogation techniques prior to the turn of the last century.[9] Because the individual guarantees of the Fifth Amendment and the rest of the Bill of Rights had not yet been incorporated into the Due Process Clause of the Four-

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8 *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791 (2006); TIMOTHY SULLIVAN, UNEQUAL VERDICTS: THE CENTRAL PARK JOGGER TRIALS 23–47, 84–85 (1992).

9 It is known that compulsory questioning of witnesses was a favorite technique of the Star Chamber, and that the Fifth Amendment adopted the then-common practice in the colonies of prohibiting the compulsory questioning of suspects *at trial*. *See, e.g.*, Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2649 (1996); 4 NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT [WICKERSHAM COMMISSION], REPORT ON PROSECUTION 25–26 (1931). A number of commentators have argued that the right was meant to be limited to questioning in the courtroom. *See, e.g.*, Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 2 (1930). For a discussion of early understandings of the Fifth Amendment, see generally Alschuler, *supra*.

teenth Amendment,[10] there was relatively little litigation of interrogation cases until the late nineteenth century.[11] In one of the first such cases, the 1897 case of *Bram v. United States*,[12] the Supreme Court held that any official inducements or threats whatsoever were sufficient to render a confession invalid.[13] Borrowing from centuries of English common law, the *Bram* Court determined that the use of threats or promises to induce a defendant to confess violated the defendant's rights under the Fifth Amendment.[14]

The facts of *Bram* are illustrative. Bram was suspected of murder. Another suspect, Brown, had been interviewed prior to Bram's interrogation. The examining officer admitted in court that he had said the following to Bram:

> "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accom-

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10 *See* Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968) (cataloguing the incorporation of various rights into the Due Process Clause of the Fourteenth Amendment).

11 Alan G. Gless, *Self-Incrimination Privilege Dvelopment* [sic] *in the Nineteenth-Century Federal Courts: Questions of Procedure, Privilege, Production, Immunity and Compulsion*, 45 AM. J. LEGAL HIST. 391 (2001).

> The United States Supreme Court did not decide a self-incrimination issue in a federal criminal case during the first ninety years after the ratification of the Fifth Amendment. The reason was simple. The Court almost completely lacked any appellate jurisdiction over federal criminal cases for most of the first ninety years.

*Id.* at 393.

12 168 U.S. 532 (1897).

13 *Id.* at 565. It is also fairly clear that the Court did not entirely mean what it said in *Bram*. As Professor Marcus has argued:

> The greatest reach of this notion would be to take it literally so that *any* degree of inducement would be sufficient to invalidate an otherwise permissible statement by the defendant. Not surprisingly, very few courts have ever followed such an interpretation. Instead, the modern view of the statement is that threats and promises are to be taken seriously but that these are rarely determinative on their own.

Paul Marcus, *It's Not Just about* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 606 (2006).

14 A number of critics have lambasted *Bram* as a misreading of both the Fifth Amendment and the English cases on which the Court purported to base its decision. *See, e.g.*, Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005).

> Rather than examine the text, the Court simply borrowed the voluntariness test from a line of early English and American common law cases and used it in place of the compulsion paradigm textually delineated within the self-incrimination clause. While these early cases stand for the proposition that confessions must be voluntary in order to be admissible, they are historically unrelated to the self-incrimination clause and the interrogation practices the self-incrimination clause was intended to ban.

*Id.* at 478 (citations omitted); Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757, 777 n.101 ("As a matter of history the *Bram* Court was probably wrong." (citations omitted)).

> plice, you should say so, and not have the blame of this horrible crime on your own shoulders."[15]

The court invalidated the confession on the basis of these statements by the officer.[16] Needless to say, such comments would hardly raise an eyebrow today. The police officers in *Bram* encouraged Bram to confess, but certainly did nothing that would render his confession involuntary under the standard currently applied by our courts.[17]

It is fairly clear that, although the *Bram* Court was extremely protective of the rights of suspects, interrogation practices in the United States did not necessarily follow suit. In particular, with regard to minority or unpopular defendants, it is clear that police practices during this time were anything but protective of the rights and dignity of suspects.[18] In the 1930s, the Wickersham Commission Report on police practices both exposed and decried the widespread physical abuse of criminal suspects at the hands of interrogators throughout this country.

> To obtain confessions or admissions the officers (usually detectives) proceed to "work" the prisoner. "Work" is the term used to signify any form of what is commonly called the third degree, and may consist in nothing more than a severe cross-examination. Perhaps in most cases it is no more than that, but the prisoner knows that he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating. This knowledge itself undoubtedly induces speedy confessions in many instances and makes unnecessary a resort to force. If the prisoner refuses to answer, he may be returned to his cell with notice that there he will stay till ready to "come clean." The cell may be especially chosen for the purpose—cold, dark, without bed or chair. The sweat box is a small cell completely dark and arranged to be heated till the prisoner, unable to endure the temperature, will promise to answer as desired. Or refusal to answer may be overcome by whipping, by beating, with rubber hose, clubs, or fists, or by kicking, or by threats, or promises.
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> Powerful lights turned full on the prisoner's face, or switched on and off, have been found effective. The electric chair is another device to extort confessions.
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> The most commonly used method is persistent questioning, con-

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15 *Bram*, 168 U.S. at 539.

16 *Id.* at 564–65.

17 For a discussion of current confession law, see *infra* Part II.

18 There is a strong overlap between the Court's criminal procedure cases and its cases protecting racial minorities. *See, e.g.*, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1305–06 (1982) ("Although the Court had never treated them as race cases, there can be little doubt that the decisions in *Moore v. Dempsey*, *Powell v. Alabama*, and *Brown v. Mississippi* made new criminal procedure law in part because the notorious facts of each case exemplified the national scandal of racist southern justice." (citations omitted)).

> tinuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.[19]

The Wickersham Commission did not merely describe the third degree, it decried it; the Commission noted that torture was a sign of laziness and a lack of initiative on the part of law enforcement. Only a police officer without faith in his own wits and intelligence, the Commission argued, would resort to brute force in order to obtain a confession.[20]

The kind of brutality discussed by the Wickersham Commission led to a national revulsion[21] and was unequivocally rejected by the Supreme Court shortly thereafter. *In Brown v. Mississippi*,[22] the Supreme Court was confronted with a case in which a Mississippi sheriff's deputy admitted quite freely to brutalizing a black defendant in very much the same way described by the Wickersham Commission.

> [T]he two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.
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> . . It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, "Not too

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19 11 WICKERSHAM COMMISSION, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 47 (1931).

20 The Commission decried these tactics as laziness in the extreme.

> A former district attorney of New York County said: "It would enhance the ability of the police force if the practice was stamped out. It is a short cut and makes the police lazy and unenterprising." Another former New York prosecutor stated that it impaired police efficiency; if the police "could not get their results by brawn, they were helpless."

*Id.* at 188.

21 *See, e.g.*, Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 313–14 (2003).

> "Third degree" brutality by police officials, however, was judged constitutionally anathema by the Supreme Court in the aftermath of the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission Report in the early 1930s. That official rejection was reinforced by the revulsion against torture as characteristic of America's totalitarian enemies.

*Id.* (citations omitted).

22 297 U.S. 278 (1936).

> much for a negro; not as much as I would have done if it were left to me." Two others who had participated in these whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding.[23]

The Court acknowledged that while the states are generally free to organize their criminal justice systems however they wish, such freedom comes with clear boundaries.

> Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process.[24]

Clearly, the Court argued, the abuse of criminal defendants in order to obtain a confession fell beyond the permissible range of options available to the states.

Although it would be naïve to think that the Court's decision in *Brown* single-handedly caused the cessation of the third degree,[25] the available empirical evidence certainly indicates that by the time *Miranda* was decided some thirty years later, the third degree *as an interrogation technique* had virtually disappeared from contemporary police practice.[26] While prisoners and defendants were no doubt still being abused at the hands of police after the Supreme Court prohibited such practices, *Brown* and its progeny had made clear that using physical violence to extract information was worse than useless in terms of criminal prosecution.[27] If police wished merely to harm or intimidate those under their custody, they could continue to do so subject only to civil and criminal actions against them; if they wished to prosecute those abused defendants in court using information ob-

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23 *Id.* at 284–85 (quoting Brown v. State, 161 So. 465, 470–71 (Mo. 1935) (Griffith, J., dissenting)).

24 *Id.* at 285–86. Of course, the Supreme Court would later conclude that a state may *not* do away with trial by jury. *See* Duncan v. Louisiana, 391 U.S. 145 (1968).

25 As Richard Leo argues, the professionalization of police departments throughout the nation also played an important part in the disappearance of the third degree. Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME L. & SOC. CHANGE 35, 47–52 (1992).

26 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, at 446–48 (1966) (noting that, although instances of the third degree clearly continued to exist, "we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented").

27 *See, e.g.*, Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, *in* TORTURE: A COLLECTION 105 (Sanford Levinson ed., 2004) (discussing the legal admissibility of torture-induced confessions).

tained through the third degree, however, *Bram* and its progeny made clear that they would be unable to do so.[28]

Police departments reacted to the loss of the third degree by developing a number of interrogation techniques designed to achieve the third degree's goals. When *Miranda* was decided in 1966, requiring the now-familiar warnings in all instances of custodial interrogation, the Court made extensive reference to the coercive but non-violent interrogation techniques catalogued and perfected by Inbau and Reid in their police interrogation materials and in wide use throughout the country.[29]

Although the *Miranda* Court was extremely critical of these interrogation techniques, it chose not to invalidate them wholesale, but rather to interpose the four warnings[30] between the accused and that coercion. As commentators have criticized for nearly forty years, once a defendant has been made aware of and voluntarily waived his rights, the inherently coercive techniques that the Court criticized in *Miranda* may continue to be used so long as they do not render the defendant's confession "involuntary."[31]

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28 *See, e.g.*, Malloy v. Hogan, 378 U.S. 1, 7 (1964).

29 *See, e.g.*, *Miranda*, 384 U.S. at 450 ("The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim, or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty." (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 34–43, 87, 43–55 (1962))); *see also id.* at 451 ("Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956))).

30 The police must warn a suspect: 1) that he has the right to remain silent, 2) that anything he says may be used against him, 3) that he has the right to an attorney, and 4) that if he cannot afford an attorney one will be appointed to represent him. *Id.* at 444.

31 *See, e.g.*, Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1020 (1988).

> [W]aiver . . . appeared to be the Achilles' heel of the *Miranda* decision. The Supreme Court emphasized the conditions and inherent evils of custodial interrogation in concluding that the process was inherently coercive. As a result, the voluntariness test could not be relied upon to regulate confession admissibility. However, the question remained whether these same factors would undercut the legitimacy of *Miranda* waivers. The more astute custodial suspects

It is important to remember that the Court did not replace the voluntariness test that had preceded *Miranda* with a test that looked merely at whether or not the *Miranda* warnings were administered.[32] Rather, the Court created an additional layer of protection *on top of* the voluntariness inquiry: A confession obtained in violation of *Miranda* is irrebuttably presumed to be involuntary.[33] However, a confession obtained after the *Miranda* warnings have been read to a defendant is admissible only so long as both the waiver of *Miranda* rights and the subsequent confession itself were voluntarily obtained.[34]

## II. INTERROGATIONS AND CONFESSIONS TODAY

There has been much scholarly discussion in recent years regarding the effect that the *Miranda* warnings have had on the number of confessions obtained from criminal suspects. Some have argued that the warnings have lead to the rejection of a number of otherwise voluntary confessions and to the loss of many convictions.[35] Others have argued with equal force that, while confessions may have been lost immediately following the *Miranda* decision, police departments have effectively adapted to the new rules, developing techniques that are at least as efficient at obtaining confessions from resistant defendants as the coercive techniques used before *Miranda*. Just as police departments adapted to the loss of the third degree following *Brown*, they have adapted to the warnings that the *Miranda* dissenters worried would be the death of confessions in criminal investigation.[36]

Regardless of whether the number of confessions since

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> would now be able to assert their rights, but the remainder might well succumb to the environment and waive their rights due to "inherent coercion" just as pre-*Miranda* suspects had succumbed and answered police questions.

*Id.*

32 Congress attempted to undo this decision in 1968 with its passage of § 3501, which stated that voluntariness was the only standard for determining the admissibility of confessions. *See* 18 U.S.C. § 3501 (2000).

33 *Miranda*, 384 U.S. at 476 ("The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.").

34 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry."); Marcus, *supra* note 13, at 638 ("The test today for voluntariness remains what it has been for more than half a century: Judges 'look at the totality of the circumstances of the case in determining whether the confession was voluntary.'" (quoting State v. Barden, 572 S.E.2d 108, 124 (N.C. 2002))).

35 *See, e.g.*, Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996).

36 *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); Stephen Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

*Miranda* has gone up or down, nearly everyone seems to agree that contemporary courts place enormous weight on whether *Miranda* warnings were given, essentially endorsing as voluntary any statement that is made following the warnings and the voluntary waiver of the rights contained therein.[37] For much the same reason that the Federal Bureau of Investigation gave a precursor to the *Miranda* warnings long before they were required to do so, many prosecutors and members of law enforcement opposed the argument in *Dickerson* to return to the pre-*Miranda* status quo. The warnings have so immunized the police conduct that follows that, as one of the participants in this Symposium succinctly put it, "If the [Supreme] Court had not imposed the warnings on the police, they would eventually have discovered their value and given them anyway."[38]

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37 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000).

> The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But as we said in *Berkemer v. McCarty*, "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."

*Id.* (citation omitted) (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984)).

38 Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 566 (2007). In fact, as the Supreme Court noted in *Miranda*, the Federal Bureau of Investigations was giving warnings akin to those mandated in *Miranda* prior to the Court's mandate. *Miranda*, 384 U.S. at 483. As proof that courts are not taking seriously the requirement of judging the totality of the circumstances in cases in which a defendant was properly Mirandized, consider the following from a recent article by Professor Marcus:

> This Article has considered thousands of opinions on confessions from the past two decades. One necessarily comes away with a feeling of being unclean and tainted by government activities that are not honorable even given the environment needed for interrogations. Many judges allow confessions into evidence in cases in which police interrogators lied and threatened defendants or played on the mental, emotional, or physical weaknesses of suspects. While judges write that they do not condone such conduct and find such practices repugnant, reprehensible, or deplorable, some of those same judges have upheld the admission of such confessions that result from those practices after applying the totality of circumstances test.

Marcus, *supra* note 13, at 643 (citations omitted). *See also* Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1021–22 (2001).

> [F]or the most part, *Miranda* has helped, not hurt, law enforcement. As argued above, *Miranda* has helped law enforcement by de facto displacing the case-by-case voluntariness standard as the primary test of a confession's admissibility, in effect shifting courts' analysis from the voluntariness of a confession to the voluntariness of a *Miranda* waiver. By creating the opportunity for police to read suspects their constitutional rights and by allowing police to obtain a signed waiver form that signifies consensual and non-coercive interrogation, *Miranda* has helped the police shield themselves from evidentiary challenges, rendering admissible otherwise questionable and/or involuntary confessions.

*Id.* (citations omitted).

## III. DEPICTIONS OF INTERROGATION AND TORTURE IN THE PUBLIC CONSCIOUSNESS

It is against this legal and historical background that the current public discussions and depictions of torture and hard treatment appear. At least since the start of the War on Terror in 2001, discussions and depictions of torture have been front-page news in the United States. Leaked photographs of mistreated prisoners at the Abu Ghraib prison in Iraq made prime-time news,[39] Congress and the executive branch have debated the appropriate role of torture in American foreign policy,[40] and furor arose over the so-called "torture memo," in which now-Attorney General Alberto Gonzalez argued that the Geneva Convention's prohibitions on torture do not apply to terror suspects.[41] The legal academy was drawn into the popular debate on terror, led in no small part by University of California, Berkeley law professor John Yoo, who was a deputy to Gonzalez at the time the torture memo was written,[42] and who has written extensively on how international agreements on the treatment of prisoners do not apply to the war against Al-Qaeda and the Taliban.[43]

At the same time that this discussion of actual American pol-

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39 Charlotte Sector, *More Abu Ghraib Prison Abuse Photos Leaked: Australian TV Sidesteps Efforts by the U.S. Government to Squash Release*, ABC NEWS, Feb. 15, 2006, http://abcnews.go.com/International/story?id=1621440.

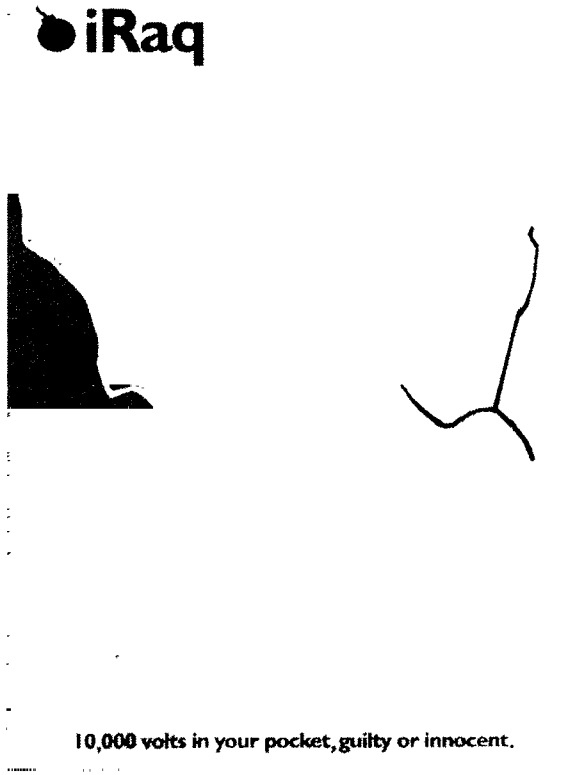
40 For example, on December 14, 2005, the House of Representatives passed the Department of Defense Appropriations Act, H.R. 2863, 109th Cong. (2005), a bill regulating interrogation by U.S. military officials. The bill, already passed by the Senate, received the grudging support of the White House; it was signed into law by President Bush on December 30, 2005. *See* Josh White, *President Relents, Backs Torture Ban: McCain Proposal Had Veto-Proof Support*, WASH. POST, Dec. 16, 2005, at A1; Press Release, The White House, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

41 Memorandum from Alberto R. Gonzales to President George W. Bush (Jan. 25, 2002), *available at* http://msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf. In the memo, Gonzalez defends the need to dispense with the Geneva Conventions on the grounds that "[t]he nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians." *Id.* at 2.

42 Boalt Hall School of Law, Professor John Yoo, http://www.law.berkeley.edu/faculty/yooj/ (last visited Mar. 30, 2007).

43 While not discussing his role in the production of the torture memo, Professor Yoo defends much of its contents in John Yoo, *Behind the 'Torture Memos'*, SAN JOSE MERCURY NEWS (N. Cal. Edition), Jan. 2, 2005, at 1P. Yoo is hardly the only legal academic, however, who has weighed in on the torture debate. *See, e.g.*, TORTURE: A COLLECTION, *supra* note 27; Alan M. Dershowitz, *Want to Torture? Get a Warrant*, S.F. CHRON., Jan. 22, 2002, at A19 (arguing that nonlethal torture techniques "such as sterile needles, being inserted beneath the nails to cause excruciating pain" should be permitted if law enforcement demonstrates to a magistrate the "absolute need to obtain immediate information in order to save lives coupled with probable cause that the suspect had such information and is unwilling to reveal it").

icy was making headlines, the media began bombarding us with fictional depictions of torture. In movies,[44] on television,[45] even in the streets (see image, below), depictions of torture are everywhere in our popular culture.




MILTON GLASER & MIRKO ILIĆ, THE DESIGN OF DISSENT 66 (2005). Such images have become the subject of a variety of parodies or social commentaries.

In 2006, David Edelstein of New York Magazine coined the phrase "torture porn" to describe a new slate of horror movies aimed at teenagers, linking the rise of "torture porn" to contem-

44 The PG-13 James Bond film *Casino Royale* had a scene of graphic genital torture. CASINO ROYALE (MGM 2006). The Oscar-winning film *The Last King of Scotland* explicitly depicts a man being hung from meat hooks piercing his chest. THE LAST KING OF SCOTLAND (DNA Films 2006). In *Hostel*, vivisections of unsuspecting tourists are par for the course. HOSTEL (Hostel LLC 2005).

45 *See, e.g., 24: Day 6: 11:00 AM–12:00 PM* (FOX television broadcast Jan. 29, 2007). *24* is the most obvious example, but others come to mind. For example, a recurring theme on ABC's *Lost* is the toll that becoming a torturer during war has had on one of the characters. Although the character is clearly haunted by what he has done, his skills come in handy more than once. *Lost: One of Them* (ABC television broadcast Feb. 15, 2006); *Lost: Enter 77* (ABC television broadcast Mar. 7, 2007).

porary events:

> Post-9/11, we've engaged in a national debate about the morality of torture, fueled by horrifying pictures of manifestly decent men and women (some of them, anyway) enacting brutal scenarios of domination at Abu Ghraib. And a large segment of the population evidently has no problem with this. Our righteousness is buoyed by propaganda like the TV series *24*, which devoted an entire season to justifying torture in the name of an imminent threat: a nuclear missile en route to a major city. Who do you want defending America? Kiefer Sutherland or terrorist-employed civil-liberties lawyers?[46]

Edelstein argues that in the wake of pictures and discussion of actual torture on the front page of the newspaper, torture has become far more acceptable in fiction: "Explicit scenes of torture and mutilation were once confined to the old 42nd Street . . . whereas now they have terrific production values and a place of honor in your local multiplex."[47] In other words, events have taken torture mainstream.[48]

As Edelstein's article makes clear, when it comes to depictions of torture in the post-9/11 universe, the Fox show *24* stands above all others.[49] Centered on the Los Angeles office of the fictional Counter-Terrorism Unit ("CTU"), *24* is primarily the story of a single agent, Jack Bauer, portrayed by Kiefer Sutherland.[50]

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46 Edelstein, *supra* note 3, at 64.

47 *Id.*

48 *See* John Hayes, *Tolerance for Torture: TV and Movies Up the Ante on Graphic Torture Scenes and Audiences Keep Coming Back for More*, PITTSBURGH POST-GAZETTE, Jan. 19, 2007, at C-1.

> The American security agent is strapped to a chair beside a table covered with knives and assorted medical tools. A sadistic Middle Eastern terrorist whispers gentle insults into his ear as he roughly twists the blade—and the agent screams in agony.
>
> It's not a midnight screening of a campy 1960s Russ Meyer splatter classic, or even an R-rated teen slasher film. It's the sixth-season premiere of the Fox TV hit "24."
>
> . . . .
>
> It's curious that America's taste for more fictional media torture is happening at a time when real-life torture is a daily ordeal in Iraq, and the nation is debating America's use of coercive interrogation methods and splitting hairs over the definition of "torture."

*Id.*

49 The Parents Television Council, a non-partisan organization that monitors the content of prime-time television shows, has singled out *24* for the darkness of its content:

> The PTC review found that Fox's "24" showed 67 scenes of torture in the first five seasons. Upon review of prime time broadcast programming from 1995 to 2001, there were 110 scenes of torture. From 2002 to 2005, the number increased to 624 scenes of torture.

Press Release, Parents Television Council, PTC Calls for More Network Responsibility over Violent Content: PTC Reveals New Research on Torture Scenes (Feb. 14, 2007), *available at* http://www.parentstv.org/PTC/publications/release/2007/0214.asp.

50 Parents Television Council, *Twenty Four*—Parents Television Council Family TV

Jack and CTU battle repeated terrorist attacks on American soil, relying on improbably sophisticated surveillance technology,[51] flawless intuition,[52] and, quite often, torture.[53]

The sixth season of the show has been no exception. In the first three weeks the show was on the air, spanning six episodes, Jack is released from a Chinese prison, bearing the physical and emotional scars of nearly two years of what was likely nearly constant torture.[54] He is released only to be handed over to a Middle-Eastern terrorist who has promised to cease his attacks against American civilians in exchange for the right to torture Jack who, it turns out, had tortured the terrorist's brother years before.[55] Jack escapes his sadistic captor and, within hours, is interrogating his own brother.[56] Rightly intuiting that his interrogation subject has not told him the complete truth, Jack ties him to a chair and holds a plastic bag over his head, cutting off his breathing until he gives up the truth about nuclear devices loose on American soil.[57]

Here is what we have learned about torture from *24*, not just this season, but throughout its run. First, torture works. The imposition of torture on a suspect invariably and almost instantaneously forces the suspect to speak and to speak truthfully

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Guide Show Page, http://www.parentstv.org/ptc/shows/main.asp?shwid=1538 (last visited Mar. 30, 2007); FOX Television Broadcast Company, 24, http://www.fox.com/24/ (last visited Mar. 30, 2007).

51 *See, e.g.*, *24: Day 4: 10:00 AM–11:00 AM* (FOX television broadcast Jan. 10, 2005); *24: Day 6: 1:00 PM–2:00 PM* (FOX television broadcast Feb. 12, 2007) (using real-time satellite feeds to track moving suspects and vehicles). The technical savvy of CTU stands in marked contrast to the technological backwardness of actual U.S. counter-terrorism officials. *See, e.g.*, Dan Eggen, *FBI Pushed Ahead with Troubled Software*, WASH. POST, June 6, 2005, at A1 (describing the FBI's failed attempt to develop a computerized case management system which ended up costing taxpayers $170 million); Noah Shachtman, *The Federal Bureau of Luddites: Why There Are* Still *FBI Agents Who Don't Have E-mail Addresses*, SLATE, Apr. 6, 2006, http://www.slate.com/id/2139274/ (describing the FBI's inability to provide email addresses to all of its relevant employees). *See also* Timothy P. Carney, *I am Jack Bauer: What* 24 *Means for Homeland Security*, NAT'L REV. ONLINE, June 26, 2006, http://search.nationalreview.com (enter "I Am Jack Bauer" (including quotation marks) in "Search Terms" field and click "Search").

52 See, for example, *24: 12:00 AM–1:00 AM* (FOX television broadcast Nov. 6, 2001), where Jack blackmails George Mason upon speculation that he stole money from the government; *24: Day 2: 12:00 PM–1:00 PM* (FOX television broadcast Nov. 26, 2002), where Jack deduces that Mason is suffering from radiation sickness; and *24: Day 6: 10:00 AM–11:00 AM* (FOX television broadcast Jan. 22, 2007), when Jack decides his brother is lying about his level of knowledge based solely on his brother's mannerisms.

53 *See infra* note 58 and accompanying text.

54 *24: Day 6: 6:00 AM–7:00 AM* (FOX television broadcast Jan. 14, 2007).

55 *Id.*

56 *Id.*; *24: Day 6: 7:00 AM–8:00 AM* (FOX television broadcast Jan. 14, 2007); *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52; *24: Day 6: 11:00 AM–12:00 PM*, *supra* note 45.

57 *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52; *24: Day 6: 11:00 AM–12:00 PM*, *supra* note 45; *24: Day 6: 12:00 PM–1:00 PM* (FOX television broadcast Feb. 5, 2007).

about what she knows.[58] Jack Bauer can tell when a suspect is lying or withholding important evidence and his application of torture can make the suspect speak and make him speak truthfully.[59] On a recent episode of the show, Jack uses a high-tech lie-detector to augment his impeccable intuition regarding whether or not a suspect is telling all he knows.[60] Although lie-detectors in the real world are so unreliable that their results are almost never admissible at trial, on television they are infalli-

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58 See, for example, *24: 10:00 AM–11:00 AM* (FOX television broadcast Feb. 12, 2002), where Jack slams a man's head into a partition, tapes him up, and threatens to torture him if the man does not take Jack to where his wife and daughter are being held hostage, which he does; *24: Day 2: 9:00 PM–10:00 PM* (FOX television broadcast Feb. 25, 2003), where Jack shoots a woman suspected of having information about a bomb in the arm and then refuses to give her pain medication until she divulges the information about the location of a bomb, which again, she does; *24: Day 3: 8:00 AM–9:00 AM* (FOX television broadcast Apr. 27, 2004), where Jack threatens to torture the daughter of a man who is about to release a deadly virus in San Francisco in order to find out his location; *24: Day 4: 12:00 AM–1:00 AM* (FOX television broadcast Apr. 18, 2005), where Jack breaks a suspect's fingers, one by one, to get him to release the whereabouts of another suspected terrorist; *24: Day 5: 9:00 PM–10:00 PM* (FOX television broadcast Mar. 27, 2006), when the "torture tools" are brought out and Jack's love interest is given a drug to induce her to talk, and Jack threatens to kill another woman in order to get her to admit that she, not Jack's love interest, is the real culprit; *24: Day 6: 5:00 PM–6:00 PM* (FOX television broadcast Mar. 5, 2007), when Jack uses a cigar cutter to cut off the tip of a suspect's pinky, and the suspect then states that a terrorist is in the Mojave Desert preparing to launch aerial drones to deliver nuclear warheads. There is, of course, a wealth of information, all of which indicates that torture is an incredibly ineffective interrogation technique. *See, e.g.*, Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 261–62 (2004); DARIUS REJALI, TORTURE AND DEMOCRACY (forthcoming 2007) ("Advocates of torture often assume that torture works in this sense better than other methods of investigation and all that is left is the moral justification. But if torture does not work, if it cannot be administered professionally, scientifically, and productively, if it offers no temporal advantage in the case of "a ticking time bomb," then the whole argument is pointless. Can torture be used to intimidate prisoners? Yes. Can it force false confessions [sic] yes? Can it produce true information better than other policing techniques? No. . . . The available empirical evidence on this is conclusive.").

59 The only exception to this role, it seems, is Bauer himself:

> Virtually the sole exception to this rule is Jack Bauer. The current season begins with Bauer being released from a Chinese prison, after two years of ceaseless torture; his back is scarred and his hands are burnt, but a Communist official who transfers Bauer to U.S. custody says that he "never broke his silence."

Mayer, *supra* note 7, at 69. *See also 24: Day 2: 2:00 AM–3:00 AM* (FOX television broadcast Apr. 15, 2003) (showing Jack bound and gagged, his abdomen is cut several times with a scalpel dipped in ammonia, and the open wounds are burnt; he is then tasered twice and then CPR and epinephrine must be administered to revive him; Jack reveals nothing); *24: Day 2: 3:00 AM–4:00 AM* (FOX television broadcast Apr. 22, 2003) (showing Jack's chest being shocked with a defibrillator, after which he is given a dose of medication to paralyze his diaphragm, preventing him from breathing; Jack still reveals nothing). *But see 24: Day 2: 7:00 PM–8:00 PM* (FOX television broadcast Feb. 11, 2003) (showing that after Jack's interrogation of a suspected terrorist fails, Jack stages the killing of the terrorist's son and makes the terrorist watch the "murder" on tape, and the terrorist still refuses to talk); *24: Day 5: 6:00 PM–7:00 PM* (FOX television broadcast Mar. 6, 2006) (showing Jack giving a man large doses of a pain-inducing drug to convince him to reveal information, but the man refuses to succumb).

60 *24: Day 6: 12:00 PM–1:00 PM*, *supra* note 57.

ble.[61]

Second, torture is used only on the guilty and only when it is imminently necessary to obtain information. In much the same way that Inbau and Reid counseled that coercive interrogation techniques should only be used when there is a high probability of the suspect's guilt,[62] so Jack and his colleagues resort to torture only when it is clear that nothing else will get the job done.[63]

Third, Jack Bauer does not seem to enjoy employing torture.[64] While others on the show—Islamic terrorists, the Chinese—either use torture gratuitously or seem to derive a sadistic thrill from its use, Jack resorts to it only when it is necessary and only when he is convinced that it will produce the results he needs. If the "ticking time-bomb" scenario is the best argument for torture—Alan Dershowitz argues that a warrant for torture should be issued if necessary to prevent imminent harm[65]—then *24* makes that argument each week. Given how successful torture is at obtaining the truth, and given how high the stakes are on *24*, it is hard to see how anyone could be *against* torture.[66]

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61 *See, e.g.*, Todd R. Samelman, Note, *Junk Science in Federal Courts: Judicial Understanding of Scientific Principles:* Daubert v. Merrell Dow Pharmaceuticals, Inc., *509 U.S. 579 (1993)*, 6 J. TECH. L. & POL'Y 263, 264 (2001) ("Over the seventy-year use of the *Frye* standard, only the admissibility of lie detector tests received negative treatment . . . .").

62 Miranda v. Arizona, 384 U.S. 436, 451 (1966) ("In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable." (quoting CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956))).

63 See, for example, *24: Day 6: 10:00 AM–11:00 AM*, *supra* note 52, where Jack suffocates his brother with a plastic bag to gain information; *24: Day 6: 12:00 AM–1:00 PM* (FOX television broadcast Feb. 5, 2007), where Jack, in desperation, has his brother injected with a painful serum to force him to speak; *24: Day 6: 5:00 PM–6:00 PM*, *supra* note 58, where Jack uses a cigar cutter to cut off the tip of a suspect's pinky and threatens to shoot him in order to prevent nuclear warheads from launching; *24: Day 2: 9:00 PM–10:00 PM*, *supra* note 58, where Jack shoots the only available terrorist with knowledge of a bomb's location and refuses to give her pain killers until she gives information; *see also 24: Day 5: 6:00 PM–7:00 PM*, *supra* note 59; *24: Day 4: 5:00 PM–6:00 PM* (FOX television broadcast Feb. 28, 2005). But see *id.*, where Jack tortures Paul Raines with an electric wire in the mistaken belief that he is associated with terrorists; Paul quickly forgives Jack, eventually taking a bullet that was meant for him.

64 *See, e.g.*, *24: Day 6, 7:00 AM–8:00 AM*, *supra* note 56; *24: Day 6, 12:00 PM–1:00 PM*, *supra* note 57. As one expert has put it, Jack seems surprisingly unchanged by the things he has done over the years. *See, e.g.*, Mayer, *supra* note 6, at 72 ("Joe Navarro, one of the F.B.I.'s top experts in questioning techniques . . . told me, 'Only a psychopath can torture and be unaffected. You don't want people like that in your organization. They are untrustworthy, and tend to have grotesque other problems.'").

65 Dershowitz, *supra* note 43.

66 In fact, the popularity of the show has been taken by some on the right as an endorsement of the use of torture in the War on Terror. For example, on the Fox News Channel, conservative commentator Laura Ingraham described the popularity of the show *24* as being "as close to a national referendum" on the use of "tough tactics" in the War on Terror as we are likely to see. *The O'Reilly Factor* (Fox News Channel broadcast Sept. 13,

## IV. THE *24* EFFECT

As I stated above, my concern is not necessarily that torture will return to the interrogation rooms of the United States.[67] While police professionalization and judicial oversight may not have entirely eliminated the abuse of suspects in our country, these processes have largely removed the third degree from the repertoire of techniques available to officers interested in obtaining a conviction. Furthermore, given the lack of scrutiny that courts generally give to Mirandized confessions,[68] police officers working today rarely need to resort to physical abuse in order to obtain confessions.

What concerns me about the current torture debate in the United States is the desensitizing effect that depictions of torture can have. Compared with torture, coercive but non-violent interrogation techniques—the litany of techniques expressly disapproved of by the *Miranda* court—pale by comparison. Isolating a suspect from his support network, diminishing the seriousness of his crime, feigning sympathy for his plight, using promises of leniency or threats of increased punishment to obtain a confession—these techniques simply do not resonate with the American public the way physical brutality does.[69] As a result, I fear that the public as well as the courts may become even more accepting of these practices than they already are.

Why would this increased acceptance of coercive but non-

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2006).

67 Not everyone is so sanguine about the lines between torture in the military and torture at home. For example, in an article in Slate magazine, Darius Rejali argues that the connection has been made before:

> [T]his corruption will not be limited to the military. Two-track interrogation systems have similar corrupting influences in domestic policing, particularly as former interrogators and MPs seek jobs as police officers after being decommissioned. The military tortures in the Franco-Algerian War soon seeped into French policing in the 1960s. And in the United States, this kind of slippage has happened twice: initially, as the water tortures of the Spanish-American War began appearing in police stations in the 1920s, and again as electrical techniques used during the Vietnam War appeared in Chicago policing in the 1970s. These torturers-turned-policemen-turned-torturers were especially attracted to techniques that were clean, and there is every reason to believe that the clean techniques now approved in the Iraq war will, sooner or later, appear in a neighborhood near you.

Darius Rejali, *Containing Torture: How Torture Begets Even More Torture*, SLATE, Oct. 27, 2006, http://www.slate.com/id/2152268/.

68 *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." (alteration in original) (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984))).

69 *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910 (2004).

torturous interrogation be so problematic? It is important to remember that the techniques currently in use by police departments were extensively catalogued and explicitly critiqued by the *Miranda* court. On its way to mandating the now-familiar warnings, the Court described these psychologically coercive techniques as being "equally destructive of human dignity" as the third degree.[70] Even if we do not find this appeal to human dignity compelling,[71] there is great reason to be concerned about coercion in the interrogation room.

Principally, for my purposes, it is important to remember that the coercive interrogation techniques catalogued but ultimately upheld in *Miranda* are likely to produce false confessions. The social science literature on interrogation makes two things very clear: One, false confessions are a leading cause of wrongful convictions, and two, they are most often attributable to coercive interrogation techniques. As Leo, Drizin, Neufeld, Hall, and Vatner recently wrote:

> The primary cause of false confession is the interrogator's use of psychologically coercive interrogation techniques such as implicit or explicit promises of leniency in exchange for confession and threats of differential punishment in the absence of confession. Other coercive techniques include lengthy or incommunicado interrogation; depriving essential necessities such as food, sleep, water, or access to bathroom facilities; refusing to honor a suspect's request to terminate interrogation; and inducing extreme exhaustion and fatigue. Some researchers have argued that additional situational risk factors that may cause innocent people to confess falsely include physical custody and isolation, confrontation, and minimization techniques.[72]

If this parade of horribles sounds familiar, it should. The interrogation techniques that Leo and his co-authors identify with false confessions match up with surprising consistency to the

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70 Miranda v. Arizona, 384 U.S. 436, 457 (1966) ("It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.").

71 *See, e.g., id.* at 539 (White, J., dissenting).

> The most basic function of any government is to provide for the security of the individual and of his property. These ends of society are served by the criminal laws which for the most part are aimed at prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

*Id.* (citations omitted).

72 Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 517.

techniques described by the *Miranda* Court as common interrogation techniques in the post-*Brown* world.[73]

The danger of a false confession that is induced by coercive techniques is compounded by the apparently innocuous nature of these techniques. The risk of false confessions leading to wrongful conviction would be greatly minimized if it were broadly understood that coercive interrogation techniques can induce even an innocent person to confess. Sadly, however, quite the opposite appears to be the case. As Drizin and Leo write:

> [I]n the era of psychological interrogation, the phenomenon of false confession has become counter-intuitive. Because police interrogation is beyond the common knowledge of individuals who have neither experienced it firsthand as a criminal suspect nor performed it as a trained police officer—i.e., the vast majority of the American public—most people are ignorant of the psychologically manipulative methods and strategies of police interrogators. Most people do not appear to know that interrogation-induced false confessions even exist, let alone that police detectives are sent to specialized training schools to learn the techniques of interrogation or how and why they are designed to manipulate the perceptions, reasoning, and decision-making of a custodial suspect and thus lead to the decision to confess. Like many criminal justice officials, most people appear to believe in what one of the authors has labeled "the myth of psychological interrogation": that an innocent person will not falsely confess to a serious crime unless he is physically tortured or mentally ill.[74]

In other words, the impact of psychological interrogation is compounded by its stealth character. Because the defendant does not appear in the courtroom with bruises and welts, it is easier for the judge to find that his confession was voluntarily given.

As we become more accustomed to bruised and beaten bodies in Iraq, on television dramas, and in the movies, the gap between what we know is possible and what happens in the run-of-the-mill criminal case will inevitably become wider. My fear is that as we become more aware of the possibility and reality of horrific violence being perpetrated against detainees, anything less than that will come to seem tame by comparison. This will lead courts to monitor Mirandized interrogations even less than they do now, will likely produce more coerced confessions, and will ultimately result in more false confessions and wrongful convictions. This should be troubling regardless of one's views about the wisdom or legitimacy of *Miranda*.

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73 *Miranda*, 384 U.S. at 446–47.

74 Drizin & Leo, *supra* note 69, at 910.

## CONCLUSION

The fortieth anniversary of the *Miranda* decision provides us with an opportunity to re-examine our recent past and to consider the future of interrogation in this country. From *Bram* to *Brown* to *Miranda*, courts have consistently, though not uniformly,[75] increased their supervision of what happens in the stationhouse. In response, law enforcement officials have adapted to these changing rules and have found ways to continue to question suspects and obtain information within the dictates of the law.

My concern is that torture will change this balance. Because torture lowers our baseline assumptions about the fair treatment of detainees, I worry that it will negatively impact the judicial oversight of interrogation in a way that will be very difficult to undo.

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75 The direction of the law is rarely uniform in any field. There have been decisions, both before *Miranda* and after, that have had the effect of contracting rather than expanding the rights of those undergoing interrogation. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (holding that a statement obtained in violation of *Miranda*, but not of the Fifth Amendment itself, could be used for impeachment purposes); Berkemer v. McCarty, 468 U.S. 420 (1984) (holding that a suspect subject to questioning during a traffic stop is not in custody for *Miranda* purposes); Moran v. Burbine, 475 U.S. 412 (1986) (approving a *Miranda* waiver in a case where counsel had been retained by family members and had been expressly told by police officers that the suspect would not be interrogated that night); Illinois v. Perkins, 496 U.S. 292 (1990) (holding that *Miranda* warnings need not be given when the officer who questions the suspect is undercover). This list is by no means exhaustive.