Alternatives to *Miranda*: Preventing Coerced Confessions via the Convention Against Torture

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INTRODUCTION

This article discusses an international law alternative to *Miranda*'s preventive measures concerning coerced confessions. Others have explored *Miranda*'s effectiveness, or lack thereof, in preventing compelled confessions. This article addresses another avenue for protection from coercion during interrogation: international treaty law. It focuses on "War on Terror" detainees in U.S. custody as an example of interrogation subjects unlikely to be given the protection of *Miranda*. This article draws on the example of the hostile use of truth serum to illustrate the difficulties in defining the term "torture" in the context of preventive interrogation.[1] Although there is general agreement that outright torture should be prohibited in most if not all circumstances, the meaning of the term "torture" is unsettled. The internationally accepted definition of torture does not clearly set out which tactics are prohibited. The line between aggressive interrogation techniques and torture is difficult to discern, particularly when dealing with psychological pressure rather than physical coercion. The *Miranda* Court recognized the psychological coercion

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1 For a more in-depth discussion of this issue, see Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT'L L. REV. 521 (2005). In this article, I trace the history of the definition of torture from the drafting of the Convention Against Torture through the Bush Administration's infamous torture memos. In order to explore the understanding of mental torture, I evaluate the use and threatened use of truth serum as either torture or cruel, inhuman, or degrading treatment. Here, I focus on the definition of torture in light of the apparent consensus that torture is unacceptable even in the War on Terror, but that the meaning of the term "torture" is unclear. *See, e.g.*, M.K.B. Darmer, Professor of Law, Chapman University School of Law, 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).

inherent in custodial interrogation and established prophylactic rules for its prevention.[2] Where *Miranda* does not apply, the international treaty on torture might serve a similar purpose.

Part I of this article briefly summarizes the reasons for *Miranda*'s ineffectiveness or inapplicability to War on Terror detainees. Part II outlines the accusations of torture brought by detainees and the U.S. government's position regarding coercive interrogation. This part also highlights some of the key domestic laws prohibiting torture and their shortcomings. Part III explains the definition of torture under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")[3] as modified by the United States via its ratification with reservations. This part reveals a significant lacuna in the treaty by analyzing whether the use or threatened use of truth serum on War on Terror detainees would constitute torture. Although the threatened use of truth serum violates CAT's definition of torture as modified by the United States, the actual use of truth serum does not. This paradoxical conclusion should not stand.

I. *MIRANDA* AND WAR ON TERROR DETAINEES

In *Miranda*, the Supreme Court faced "questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime."[4] The Court was worried about the "incommunicado police-dominated atmosphere" of interrogation and "the evils it can bring."[5] In particular, the Court voiced concerns regarding physical brutality and psychological coercion.[6] Similarly, the so-called Global War on Terror being waged by the U.S. government raises concerns about the limits on interrogation methods when questioning detainees suspected of having knowledge that would help prevent a terrorist attack. In the wake of 9/11, "the gloves came off."[7] The challenge is determining where to draw the line between aggressive questioning and unacceptable tactics in the War on Terror.

In *Miranda*, the Court required "procedural safeguards" to ensure the privilege against self-incrimination, in the form of

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[2] Miranda v. Arizona, 384 U.S. 436 (1966).

[3] G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT].

[4] *Miranda*, 384 U.S. at 439.

[5] *Id.* at 456.

[6] *Id.* at 446–49.

[7] *See* John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 29, *available at* http://www.msnbc.msn.com/id/4989422/ (quoting the congressional testimony of Cofer Black, the onetime director of the CIA's counterterrorism unit).

four warnings that are familiar to most Americans: that the suspect has the right to remain silent; that any statements made after waiver of this right can be used as evidence against him; that he has the right to an attorney; and that this attorney would be appointed if he cannot afford to retain one.[8] These warnings are not aimed merely at preventing the admission of coerced statements into evidence at trial; they are also intended to prevent coercion in the first place. The Court determined that the *Miranda* warnings would serve as assurance that coercion would be eradicated.[9] Such coercion could take the form of physical beatings but, in modern interrogation, more often consists of psychological coercion.[10] While recognizing society's need for interrogation, the Court held that the measures were necessary to protect the privilege while not unduly burdening law enforcement.[11]

The *Miranda* warnings, however, might not apply to War on Terror detainees for several reasons.[12] *Miranda* typically does not apply abroad, particularly to non-citizens.[13] Even if *Miranda* were to apply, it would be of limited effectiveness. *Miranda* would not be violated until the confession is introduced at trial,[14] offering little protection for War on Terror detainees that the government has no intention of prosecuting in criminal court. Moreover, the public safety exception to *Miranda* would likely apply to preventive interrogation; i.e., under *New York v. Quarles*, the failure to give *Miranda* warnings would be excused

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8 *Miranda*, 384 U.S. at 444. For a discussion of the *Miranda* warnings in pop culture, see Panel 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 #2" hyperlink) (noting that young Americans may be less able to recite the warning than those of an earlier TV-watching generation).

9 *See Miranda*, 384 U.S. at 447.

10 *Id.* at 448.

11 *Id.* at 479–83.

12 *See generally* Panel 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).

13 For an extensive discussion of the limits of *Miranda*, see, for example, M.K.B. Darmer, *Beyond* Bin Laden *and* Lindh*: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003) (advocating a foreign interrogation exception to *Miranda* combined with a due process "shocks the conscience" standard for interrogation techniques); Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851 (2003) (discussing the applicability of confessional law abroad, including Fifth Amendment self-incrimination and due process involuntary confession rules); Mark A. Godsey, Miranda*'s Final Frontier—the International Arena: A Critical Analysis of* United States v. Bin Laden, *and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703 (2002) (arguing for modifications to *Miranda* for law enforcement officials interrogating suspects abroad).

14 *See, e.g.*, Darmer, *supra* note 13, at 348–51 (discussing the Fifth Amendment as a trial right); *see also* Keller, *supra* note 1, at 559–63 (same).

if the interrogation were aimed at obtaining information crucial to protecting the public, like the location of a gun—or a dirty bomb.[15]

In addition, other exceptions might apply, as in the case of Jose Padilla, the alleged dirty bomber who was arrested at Chicago's O'Hare airport.[16] Padilla was eventually released from indefinite detention as an "enemy combatant" and criminally charged with terrorist activities having little to do with the initial dirty bomb allegations.[17] He then moved to suppress the statements made during the interrogation at the airport on the ground that the FBI agents failed to give *Miranda* warnings. The district court denied the motion because the interrogation was not "custodial" under special rules for border questioning.[18] The court cited the Eleventh Circuit's recognition of a border-interrogation exception to *Miranda*.[19]

II. TORTURE IN THE U.S. "WAR ON TERROR"

Where *Miranda* warnings are inapplicable or ineffective, other standards might serve the purpose of preventing coerced confessions. In particular, CAT, the leading international treaty on torture, aims to prevent and punish torture. Torture has become a key flashpoint in the War on Terror. The U.S. government has repeatedly asserted that it does not utilize torture even during preventive interrogation of War on Terror detainees.[20] In its most recent report to the monitoring body created under CAT, the United States reiterated this point. "The President of the United States has made clear that the United States stands against and will not tolerate torture under any circumstances."[21] Acknowledging the fundamental changes wrought by the 9/11 attacks, the U.S. report stated: "In fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S.

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15 New York v. Quarles, 467 U.S. 649, 657–58 (1984) (excusing the failure to give warnings where police were asking arrestee about the location of a gun).

16 United States v. Padilla, No. 04-60001-CR-COOKE, 2006 WL 3678567, at *1 (S.D. Fla. Nov. 17, 2006).

17 *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005); *see also* Jerry Markon, *Court Bars Transfer of Padilla to Face New Terrorism Charges*, WASH. POST, Dec. 22, 2005, at A1 (discussing the refusal of the appellate court to transfer Padilla due to the government's changing rationales for holding Padilla). The Supreme Court subsequently allowed the transfer to go forward. *See* Hanft v. Padilla, 126 S. Ct. 978 (2006) (mem.).

18 United States v. Padilla, No. 04-60001-CR-COOKE, 2006 WL 3678567, at *7 (S.D. Fla. Nov. 17, 2006) (describing a more limited definition of "custody" at the border).

19 *Id.*

20 *See* Keller, *supra* note 1, at 552–53 & n.150.

21 *See* Comm. against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Reports of States Parties Due in 1999: Addendum: United States of America*, ¶ 5, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006).

Constitution, federal statutes, and international treaty obligations, including the Torture Convention."[22]

There have been, however, widespread allegations of the use of tactics tantamount to torture.[23] Moreover, the infamous "torture memos" interpreted the definition of torture so narrowly that tactics commonly considered torture were excluded; they also asserted a Commander-in-Chief exception to the laws prohibiting torture.[24] Although these tactics and memos have been partially repudiated,[25] it is not clear that the United States prohibits all acts that likely constitute torture under international law.

Even recent legislation meant to quell the controversy over U.S. torture does not amount to a clear repudiation of coercive interrogation.[26] For example, the Detainee Treatment Act of 2005 (a.k.a. the McCain Amendment) provides: (1) no one under the custody or control of the Department of Defense shall be subject to interrogation tactics not authorized by the U.S. Army Field

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22 *Id.* at ¶ 4.

23 The various techniques approved and later rescinded by the Department of Defense included coercive techniques like stress positions and waterboarding. *See, e.g.*, Julian G. Ku, Ali v. Rumsfeld*: Challenging the President's Authority to Interpret Customary International Law*, 37 CASE W. RES. J. INT'L L. 371, 380–86 (2006).

24 Two recent articles provide powerful analysis of the torture memos and related Bush Administration policies, calling into question U.S. adherence to the ban on torture. *See* José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 396 n.33 (2006); *see also* Keller, *supra* note 1, at 550–56 (discussing differences in defining torture in two key Bush Administration memos); *cf.* U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention ¶ 24, CAT/C/USA/CO/2 (July 25, 2006) (urging the United States to rescind interrogation techniques that constitute torture or cruel, inhuman or degrading treatment or punishment). For the memos themselves and related materials, see THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

25 Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455, 462–63 (2005).

26 This article focuses on legislation related to criminal penalties. Civil remedies include the Torture Victim Protection Act, which is limited to torture by foreign officials. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256 § 2, 106 Stat. 73, 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2000)) (allowing U.S. citizens and aliens to seek damages for torture or extrajudicial killings but limiting its jurisdiction to acts committed by those acting under the authority of foreign nations). The Alien Tort Claims Act provides a remedy for aliens claiming torture as a violation of the laws of nations. *See* Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) (stating that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that torture constitutes a violation of the law of nations for the purposes of the alien tort statute). Although the Alien Tort Claims Act might cover noncitizen War on Terror detainees, it is unlikely to provide a sufficient remedy. *See, e.g.*, Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 763–70 (2006) (discussing sovereign immunity and the exclusivity of the Federal Tort Claims Act as obstacles to civil suits against U.S. government officials). Other civil tort remedies are also unlikely to be effective. *See generally id.*

Manual on Intelligence Interrogation; and (2) no one in the custody or control of the U.S. government shall be subject to cruel, inhuman or degrading treatment or punishment.[27] While these two steps seem like progress, both are problematic.

First, the legislation does not prevent changes to the Army Field Manual.[28] The Field Manual currently bans tactics like waterboarding, forced sexual positions or nudity, beatings, using military working dogs, and hypothermia or heat injury.[29] Yet other disputed techniques like extended periods of forced standing are not listed. In addition, it appears that there is a classified section of the Field Manual, leading to the question of whether there is a waiver provision or exceptions to the list of prohibited techniques.[30] Second, the scope of the ban on cruel treatment is unclear. Since cruel, inhuman or degrading treatment is a lesser version of torture, it seems that the Detainee Treatment Act would encompass torture as well. But cruel, inhuman or degrading treatment or punishment is defined in the Act in terms of the Eighth Amendment ban on cruel or unusual *punishment*.[31] In other words, it might only cover acts that can be considered "punishment." Coercive interrogation, as opposed to post-conviction punishment, might be excluded altogether.[32] In addition, the applicability of Eighth Amendment cases to preventive interrogation is unclear.[33]

Other positions of the government call into question its commitment to banning torture.[34] Perhaps most significantly, the President's signing statement accompanying his signature on the Detainee Treatment Act seems to reserve the right to ignore the legislation to the extent he deems it necessary. The signing

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27 Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2680, 2739 (West).

28 *See* MICHAEL JOHN GARCIA, CRS REPORT FOR CONGRESS: INTERROGATION OF DETAINEES: OVERVIEW OF THE MCCAIN AMENDMENT 2 (2006), *available at* http://www.fas.org/sgp/crs/intel/RL33655.pdf.

29 U.S. ARMY FIELD MANUAL FM 2-22.3 (FM 34–52): HUMAN INTELLIGENCE COLLECTOR OPERATIONS at 5-21, § 5-75 (2006), *available at* http://www.fas.org/irp/doddir/army/fm2-22-3.pdf.

30 Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1.

31 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(d), 119 Stat. 2680, 2739–40.

32 *See, e.g.*, Keller, *supra* note 1, at 557–59.

33 *See* GARCIA, *supra* note 28, at 4–6 (discussing precedents from the criminal justice system).

34 This article does not address the U.S. practice of extraordinary rendition, i.e., "outsourcing torture" to other countries by extrajudicially capturing (usually abroad) and rendering subjects to other countries known to use torture. For an excellent analysis of this violation of international law in the U.S. War on Terror, see Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006).

statement provides:

> The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective . . . of protecting the American people from further terrorist attacks.[35]

In addition, the Detainee Treatment Act provides for a good-faith defense for interrogators and, as amended by the Military Commissions Act, requires the government to pay for counsel and court costs, bail, and other incidental expenses for the accused.[36] The Military Commissions Act specifies that the good-faith defense applies retroactively to cover the entire period from 9/11 to the passage of the Detainee Treatment Act.[37] The Military Commissions Act also appears to allow evidence, but not statements, obtained via torture to be admitted in military trials of enemy combatants.[38] Statements obtained through coercion short of clear torture are admissible in certain circumstances.[39] It is striking that the Military Commissions Manual specifically states, "Statements obtained by torture are not admissible (10 U.S.C. § 948r(b)), but statements 'in which the degree of coercion is disputed' may be admitted if reliable, probative, and the admission would best serve the interests of justice."[40] Given the disputed definition of torture and the circumstances of preventive interrogation, it is likely that most, if not all, proffers of statements will involve disputes regarding the degree of coercion. Because the admissibility of statements hinges on the distinction between torture and cruel treatment, it seems absurd to expect that the level of coercion would not be disputed.

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35 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#.

36 GARCIA, *supra* note 28, at 7–10.

37 *Id.* at 9.

38 Stephen F. Rohde, Partner at Rohde & Victoroff and Former President of ACLU of Southern California, 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).

39 JENNIFER K. ELSEA, CRS REPORT, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 22 (2006), *available at* http://www.fas.org/sgp/crs/natsec/RL33688.pdf (discussing standards for admitting statements obtained through coercion not constituting torture).

40 U.S. SEC'Y OF DEF., MILITARY COMMISSIONS MANUAL ¶ 1(g), at I-1 to I-2, *available at* http://jurist.law.pitt.edu/pdf/militarycommissionsmanual.pdf (citation omitted) (quoting the Military Commissions Act, 10 U.S.C. § 948r(c)).

Finally, the Detainee Treatment Act does not criminalize the acts it prohibits. In fact, the Military Commissions Act strips the federal courts of jurisdiction to hear claims of torture from War on Terror detainees. It provides that "no court . . . shall have jurisdiction to hear . . . action[s] against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of alien enemy combatants.[41] "Thus, the Act eliminates existing means of challenge while not providing for alternative means of enforcing whatever prohibitions against torture it incorporates."[42]

Moreover, laws predating the passage of the Detainee Treatment Act and Military Commissions Act that criminalize torture are insufficient. The two major statutes regarding prosecution of torture are the Federal Torture Statute and the War Crimes Act.[43] The Federal Torture Statute, 18 U.S.C. § 2340, criminalizes the commission or attempted commission of torture outside U.S. territories, commonwealths and possessions.[44] The War Crimes Act criminalizes certain acts, committed inside or outside the United States, by or against members of the Armed Services.[45] As amended by the Military Commissions Act, the War Crimes Act prohibits certain violations of Common Article 3 of the Geneva Conventions, including torture.[46] But the War Crimes Act had not been used as of 2006.[47] The first and only prosecution under the Federal Torture Statute charged Charles Taylor, Jr. with torture for acts committed in Liberia.[48]

The Detainee Treatment Act's new defense for interrogators, as described above, relates to possible prosecution under the

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41 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2636.

42 W. Michael Reisman, Editorial Comment, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L. L. 852, 854 (2006).

43 For a more extensive discussion of U.S. legislation related to torture, including immigration law, see Gail H. Miller, *Defining Torture*, 3 FLOERSHEIMER CENTER OCCASIONAL PAPERS SERIES 25 (2005), *available at* http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf. Although some military prosecutions have also dealt with mistreatment of detainees, for example at Abu Ghraib, very few have been held accountable. *See, e.g.*, Bassiouni, *supra* note 24, at 406–11 (discussing the lack of investigations and prosecutions for war crimes or torture within the military justice system).

44 18 U.S.C. §§ 2340, 2340A (2006).

45 *Id.* § 2441.

46 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2633 (amending 28 U.S.C. § 2441).

47 *See* R. Jeffrey Smith, *War Crimes Act Changes Would Reduce Threat of Prosecution*, WASH. POST, Aug. 9, 2006, at A1 (discussing Military Commissions Act amendments restricting the scope of crimes covered by the War Crimes Act, particularly the exclusions of humiliating or degrading treatment).

48 *See* Siobhan Morrissey, *Torture Law Gets First Test*, ABA JOURNAL EREPORT, Dec. 15, 2006, http://www.abanet.org/journal/ereport/d15taylor.html.

Federal Torture Statute or the War Crimes Act. Yet, given the lack of prosecutions under either piece of legislation, it is hard to imagine a sudden spurt of charges against interrogators accused of going too far in the War on Terror. But if such prosecutions do arise, the meaning of "torture" will be crucial. The definitions of torture under both Acts are similar to the CAT definition, as modified by the U.S. conditions attached to the treaty.[49]

III. TRUTH SERUM AS TORTURE

As noted above, the United States has ratified CAT with a package of conditions requiring certain interpretations of terms in the treaty. The definition of torture under CAT, as modified by the United States, does not eliminate the ambiguity of the terms of the statute. This Part explores one possible form of mental torture to illustrate the complexity of the position that "difficult interrogation" is acceptable but "torture" is not. This Part posits a scenario of preventive interrogational truth serum—truth serum used to obtain information in order to prevent another terrorist attack.[50] It shows that the current understanding of torture leads to an untenable conclusion: the threat of using truth serum constitutes torture, but the actual use of truth serum does not.

The Court in *Miranda* was concerned with the unknowing, incompetent, or coerced waiver of the right to remain silent. Its warnings aimed at ensuring that statements made while in custody were the result of an independent decision to speak, rather than the coercive atmosphere.[51] This ability to make an independent decision to speak is destroyed during the administration of a truth serum that lives up to its name.

Although it may seem that the discussion of truth serum belongs in the realm of science fiction rather than legal analysis, it is not as far-fetched as it seems. For example, after 9/11, it was stated that it was "[t]ime to [t]hink [a]bout [t]orture"—including truth serum.[52] This call came from *Newsweek*'s columnist, Jonathan Alter, who also stated, "Short of physical torture, there's

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49 *See* Military Commissions Act of 2006 § 5, 120 Stat. at 2633; *see also* GARCIA, *supra* note 28, at 6–7 (discussing minor distinctions regarding the level of pain and suffering and the intent requirement for torture and cruel treatment under the War Crimes Act as amended by the Military Commissions Act); Keller, *supra* note 1, at 548–49 (pointing to the value of determining U.S. torture in terms of mobilizing shame against such practices).

50 Keller, *supra* note 1, at 533–34. Although cruel, inhuman and degrading treatment is also banned by CAT, the questions raised by this related issue are beyond the scope of this article. *See id.* at 566–69.

51 Miranda v. Arizona, 384 U.S. 436, 465 (1966).

52 Jonathan Alter, *Time to Think about Torture*, NEWSWEEK, Nov. 5, 2001, at 45.

always sodium pentothal ('truth serum'). The FBI is eager to try it, and deserves the chance."[53] Former CIA and FBI director William Webster urged the Pentagon to use truth serum drugs on terror detainees if necessary to obtain information that "would save lives or prevent some catastrophic consequence."[54] And there have been allegations that various governmental agencies took his advice. For example, Jose Padilla—the so-called dirty-bomber mentioned earlier—alleges that truth serum was used on him while he was being held incommunicado as an enemy combatant.[55]

Truth serum is a fascinating example for several reasons. First, the hostile use of truth serum is often assumed to be something less than torture. Second, it provides an opening to explore mental rather than physical torture. Finally, it illustrates some shortcomings in the way torture is currently defined. For purposes of discussion, imagine an actual "truth serum," a next-generation sodium pentothal that lives up to the term "truth drug." This truth serum would not cause any physical pain, but would render a subject unable to resist while interrogated—she would be helpless to tell a lie or remain silent. She would answer questions with what she believes to be the truth, her will overcome by the perfect truth serum.

There is no evidence that such a drug exists now. But it is likely that the government is working on it, as it has in the past. For example, the U.S. government has tested truth serums and other substances on unwitting subjects in notorious projects like MKULTRA.[56] Scientists differ on whether various drugs could ever wholly overcome the will of a person. But for purposes of discussion, assume that those scientists who predict that such a thing is possible are correct. If truth serum does not work, that in and of itself argues against its use. This article posits a physically safe and reliable truth drug in order to limit the discussion

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53 *See id.* (describing the 9/11 attacks as so horrifying that the U.S. should consider using methods of interrogation formerly deemed unconscionable, but not physical torture).

54 *See, e.g.*, Ann Scott Tyson, *US Task: Get inside Head of Captured bin Laden Aide*, CHRISTIAN SCI. MONITOR, Apr. 4, 2002, at 11 (noting that former FBI and CIA director William Webster and others indicated that the United States is justified in using sodium pentothal and other truth drugs, but not physical torture, to prevent catastrophic terrorist attacks), *available at* http://www.csmonitor.com/2002/0404/p01s03-uspo.html. For other calls to consider the use of torture, see Keller, *supra* note 1, at 522–28.

55 Richard A. Serrano, *Padilla Terror Case Gets Closer Look*, L.A. TIMES, Dec. 17, 2006, at A18 (describing claims of brutal mistreatment including that Padilla was "injected with truth-serum drugs to coerce him to talk").

56 The CIA's Project MKULTRA tested various drugs aimed at behavior modification, including the use of LSD on unwitting subjects; the project allegedly ended after one subject died as a result of the experiment. *See* Keller, *supra* note 1, at 532.

to potential mental harm.[57]

As noted above, many commentators have assumed that truth serum is not torture.[58] But the complex definition of torture requires more in-depth exploration of the possibility that the use or threatened use of truth serum constitutes torture. CAT defines torture as

> any act
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> by which severe pain or suffering, whether physical or mental,
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> is intentionally inflicted on a person
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> for such purposes as
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> > obtaining from him or a third person information or a confession,
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> > punishing him for an act he or a third person has committed or is suspected of having committed,
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> > or intimidating or coercing him or a third person,
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> > or for any reason based on discrimination of any kind,
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> when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[59]

When the United States ratified CAT, it attached several conditions, known as Reservations, Understandings and Declarations ("U.S. RUDs"), including an "Understanding" regarding the interpretation of "mental pain or suffering" in CAT.[60] The United States interpreted mental harm as follows:

> mental pain or suffering refers to prolonged mental harm caused by or resulting from:
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> (1) the intentional infliction or threatened infliction of severe physical pain or suffering;
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> (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
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> (3) the threat of imminent death;

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57 *See, e.g.*, David Brown, *Some Believe 'Truth Serums' Will Come Back*, WASH. POST, Nov. 20, 2006, at A8 (discussing the history of the development of truth serum and differing opinions on whether current efforts are ongoing or succeeding); *see also* Keller, *supra* note 1, at 531–32 (describing the unreliability of publicly-known truth serums like sodium pentothal and CIA efforts to create an actual truth serum).

58 *See supra* notes 53–54; *see also* Keller, *supra* note 1, at 527–28.

59 CAT, *supra* note 3, at art. 1 (formatting altered).

60 *See* 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990). Although this article accepts the U.S. RUDs regarding the interpretation of torture, there are serious questions as to whether the U.S. RUDs are improper and severable reservations and/or violative of customary international law. *See, e.g.*, Keller, *supra* note 1, at 540–44 (examining the validity of the U.S. RUDs); Alvarez, *supra* note 24 (contending that the U.S. interpretation of torture is at odds with the treaty's object and purpose of preventing torture).

or

(4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administratio[n] or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.[61]

In other words, the Understanding itself seems to open the door to finding that truth serum is torture. A perfect truth serum would be a mind-altering drug that disrupts the personality of the subject by negating the core of the person—her ability to control her own mind and act on her beliefs.[62] This ability is worth protection, as the *Miranda* Court recognized. A decision to speak to interrogators should be an independent judgment, rather than a product of compulsion.[63]

But would truth serum inflict "severe" mental pain or suffering, causing "prolonged mental harm"? While at first glance it might not appear likely, consider this example. Think of a high-level FBI agent who knows of an al Qaeda sleeper cell in the United States that is planning a future attack on a large U.S. city. Before the government can take action, al Qaeda kidnaps the agent and injects truth serum. The agent reveals the government's plan to arrest the cell and thwart its attack. Armed with the knowledge gained from the use of truth serum, the cell evades arrest and immediately detonates a dirty bomb at the Sears Tower in Chicago. Tens of thousands are killed and maimed through shrapnel, radiation, and the resulting panic. The contamination shuts down the city, throwing the nation's economy into a tailspin. While undergoing the waking nightmare of the truth serum session, the agent realizes that his coerced "confession" will lead to the deaths of thousands of innocent people.[64]

Will the FBI agent suffer severe, prolonged mental harm? I would say that it is very likely. The agent might well suffer significant emotional trauma from both the hostile mind control and the horrific results of his inability to withhold the information. The loss of personal integrity will likely have long-lasting detrimental effects.[65] In a different context, the Supreme Court stated, "Our whole constitutional heritage rebels at the thought

61 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) (formatting altered).

62 *See* Keller, *supra* note 1, at 589–93.

63 *Cf.* Miranda v. Arizona, 384 U.S. 436, 465 (1966) (discussing the need for an independent decision to speak).

64 Keller, *supra* note 1, at 586.

65 *See* Keller, *supra* note 1, at 585–88 (discussing the mental trauma of coerced speech as being tantamount to mental rape); *id.* at 603–05 (discussing Supreme Court opinions regarding autonomy).

of giving government the power to control men's minds."[66] In the international context, acts that have been found to inflict severe mental pain include making the victim believe that family members will be harmed if he fails to cooperate, or forcing him to watch another person being harmed.[67] Compared to these precedents, the hostile use of truth serum might well cause severe mental pain lasting more than a fleeting moment. Given the harm that his words have caused, the emotional trauma is likely to result in post-traumatic stress disorder ("PTSD") or similar mental harm—trauma that the U.S. government has cited as examples of sufficiently prolonged mental pain and suffering.[68] Thus, the use of truth serum is likely to meet the mental harm requirement. Furthermore, based on the U.S. interpretation of mental harm, the *threatened* administration might also meet the severe mental pain or suffering requirement.[69]

In order to constitute torture, however, this severe mental pain must be intentionally inflicted for certain purposes by official actors. The latter part is easy in preventive interrogational truth serum—truth serum is clearly being used by U.S. officials for the purpose of obtaining information or a confession. The intent requirement, by contrast, is more difficult. The CAT definition specifically requires that the harm be inflicted for the purpose of obtaining the information.[70] Moreover, the United States requires "specific intent"[71]—ruling out accidental or incidental pain. This is where a major shortcoming of the definition comes into play. By requiring intentional infliction of pain *in order to* obtain the information, CAT rules out some interrogation methods that should be considered torture.

Specifically, although the hostile administration of truth serum might cause severe mental harm, the harm is not intentionally inflicted to obtain the confession. The harm is a mere side effect. The truth serum, not the pain, is intended to fulfill the purpose. The hostile use of truth serum is therefore likely not an "act by which severe pain or suffering . . . is intentionally in-

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66 Stanley v. Georgia, 394 U.S. 557, 565, 568 (1969) (striking down criminalization of private possession of obscene materials).

67 See Keller, *supra* note 1, at 581–82, and cases cited therein. For an excellent analysis of relevant definitions and precedents from international tribunals, see William A. Schabas, *The Crime of Torture and the International Criminal Tribunals*, 37 CASE W. RES. J. INT'L L. 349 (2005).

68 *See* Keller, *supra* note 1, at 587–88.

69 For a more extensive discussion of threatened administration of mind-altering drugs and severe mental pain or suffering, see Keller, *supra* note 1, at 593–95.

70 *See* CAT, *supra* note 4, at 197.

71 *See* 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) ("[A]n act must be specifically intended to inflict severe physical or mental pain or suffering . . . .").

flicted" for the purpose of obtaining information.[72] The pain is not designed to extract the confession, the truth serum is. If there were some way to eliminate the anticipated side effect of mental pain, the interrogator would still get the necessary information because the truth serum causes the divulgence, irrespective of any simultaneous mental pain.[73]

Paradoxically, the lesser act of *threatening to* administer truth serum would meet the intentional infliction requirement. The threat is an act by which the interrogator deliberately inflicts mental pain in order to achieve her purpose. The pain itself is the main objective, the driving force behind the confession, whether it is the pain of intense anxiety or the pain of anticipated mind invasion. Without it, the interrogator will not obtain the information. The whole idea behind a threat—"we have ways of making you talk"—is to terrify and traumatize the subject into talking.[74]

Thus, there seems to be a strange loophole in the definition of torture—one that allows the use of truth serum, but not the threat of it. Of course, this creates a perverse incentive for interrogators to go straight to the use of truth serum. I believe that a better understanding of torture would also cover methods like truth serum, where the substance causes the subject to speak, but mental anguish is an anticipated side effect. There are many other reasons why the hostile use of truth serum and other coercive interrogation tactics should be banned; reasons ranging from moral theory to fear of reprisals to reputational damage to the fact that they are banned by other international law.[75] The current lacuna in the definition of torture only adds to the conclusion that coercive tactics should be abandoned.

CONCLUSION

Although *Miranda* may not protect terror detainees from coerced confessions, other laws can. In particular, the United States has agreed to abide by the international prohibition against torture. The infamous—and now withdrawn—torture memos aside, the government professes to uphold the ban on torture. It can show this commitment by ruling out methods like truth serum. The recent Detainee Treatment Act prohibits some of the most outrageous methods like waterboarding,[76] but does

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72 *See* CAT, *supra* note 4, at 197.

73 *See* Keller, *supra* note 1, at 595–601.

74 *Id.* at 601–03.

75 For a more extensive discussion of other bases for banning coercive techniques, see *id.* at 603–12.

76 152 CONG. REC. S10413 (daily ed. Sept. 28, 2006) (statement of Sen. McCain) ("I

not go far enough. Similar mixed messages are evident in the President's signing statement and within the Military Commissions Act, which allows statements obtained through compulsion short of undisputed torture.[77] A more comprehensive approach is necessary to regain our reputation as a promoter, not a violator, of human rights. In order to win the "Global War on Terror," cooperation is required—cooperation that will not be forthcoming if the United States appears to waver regarding the absolute prohibition of preventive interrogational torture.[78]

am confident that the categories included in this section will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering . . . .").

[77] *See supra* Part II.

[78] *See, e.g.*, Keller, *supra* note 1, at 608–09 (discussing examples of the U.S.'s inability to achieve foreign policy goals due to criticism over alleged use of torture).