Reliability, Waterboarded Confessions and Reclaiming the Lessons of ‘Brown V. Mississippi’ in the Terrorism Cases

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Introduction

The recent announcement that Khalid Shaikh Mohammed ("KSM") and other accused terrorists will be tried in a civilian courtroom is certain to revive the debate about the use of "waterboarding" to obtain confessions from him. KSM was subjected to waterboarding 183 times. While some will contend that waterboarding is not torture, I have explained elsewhere why I agree with those who have forcefully argued that waterboarding does constitute torture. With that premise on the table, this essay seeks to draw on lessons from our past jurisprudence to illustrate that the results of waterboarded confessions cannot be used in any criminal trial nor should they be used in any other proceeding that has as its purpose ascertaining whether a person has engaged in terrorism or any other criminal act. It also argues, however, that while "waterboarded" confessions should present relatively easy cases for exclusion (especially in conventional criminal trials), current jurisprudence leaves problematic "protection gaps" that could arguably permit the introduction of torture-based confessions in trials and other contexts.

This essay traces the most problematic "protection gap" to a shift away from a concern with reliability in the Supreme Court's post-Miranda confessions jurisprudence, most clearly expressed in Colorado v. Connelly where the Court maintained that a confession's potential unreliability did not make its admission unconstitutional. While that case involved the confession of a person suffering from psychotic delusions, this essay argues that Connelly has significant implications for the terrorism and national security cases. In order to avoid results that are plainly inconsistent with the Supreme Court's repudiation of the use of a torture-based confession almost 75 years ago in the important case of Brown v. Mississippi, notions of due process need to be interpreted more broadly, consistent with Brown's recognition of an absolute prohibition on torture in our adversarial system.

The Supreme Court spoke powerfully, clearly and unanimously in rejecting torture in 1936. The insight of Brown is that it is unthinkable for a system such as ours to rely on torture in adducing guilt. Even ten years ago, torture was not part of our national debate. That has changed since 9/11. Indeed, no longer is torture unthinkable. We know it has occurred. The Abu Ghraib scandal revealed that American soldiers had badly mistreated detainees. American agents have

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repeatedly waterboarded suspects. Some suspects have died in custody. We must reclaim a history that categorically rejects torture.

Torture is sometimes debated in deontological terms, and sometimes on utilitarian grounds. In the former context, arguments are made about the *wrongness* of torture, even if it "sometimes works." The latter debate instead asks *whether torture works* (by yielding reliable evidence) and *whether using torture is worth it*. The history of our jurisprudence reveals that from the standpoint of the law, at least, the question of *whether torture yields reliable evidence* has been settled. In *Brown v. Mississippi* the Court denounced torture, declaring that confessions wrought through brutality are unreliable. That proposition should remain settled. The Court in *Brown* also displayed a keen concern for judicial integrity, hinging its finding of a due process violation on the *use* of the confession at trial. Reliability of proceedings was an animating concern of the *Brown* Court.

Historically, the Court has emphasized that, regarding confessions, reliability is necessary, but not sufficient, in order for a confession to be admissible into evidence. Because tortured confessions have been considered, under the law, to be unreliable, they are per se excluded. Reliance on such evidence undermines the integrity of any system that purports to be fairly adjudicating guilt or innocence, and institutional integrity was of central importance to the Brown Court. My focus is not whether torture may have extracted reliable information in a particular case (e.g., the case of KSM), but instead I focus on torture as a practice that has been properly rejected as a matter of institutional integrity.

Following this introduction, I will turn to the Court’s pre-*Miranda* confessions jurisprudence, which developed under the Due Process Clause. *Miranda v. Arizona* marked a turning point in this area of the law. While intended to be a progressive decision that would further protect defendants’ rights, the decision had the unfortunate effect, during the development of a grudging post-*Miranda* jurisprudence, of de-emphasizing reliability. This jurisprudential shift has unfortunate implications in the post-9/11 era. Thus, I will discuss the *Miranda* case and the post-*Miranda* cases in order to illuminate fissures that have left suspects vulnerable to a return to the days when guilt could be determined on the strength of torture-based confessions. While the terrorism cases present a myriad of difficult issues, I aim to demonstrate that reliability is absolutely necessary, though not sufficient, and that the lessons of *Brown* have important implications for a robust understanding of the demands of due process. As all three branches of government grapple with how to deal with the terrorism cases, we would be wise to learn the lessons of our own history.

I. Reliability during the development of confessions law under the due process regime

Prior to its landmark decision in *Miranda v. Arizona*, the Supreme Court developed a confessions jurisprudence under the Due Process Clause of the Fourteenth Amendment, which provides that no State may "deprive any person of life, liberty, or property, without due process of law." (The parallel provision of the
Fifth Amendment constrains the federal government.) In determining whether a confession violated the Due Process Clause, the Court focused historically on the question of “voluntariness.”

As the Court explained almost fifty years ago, “a complex of values” underlay the Court’s prohibition on the use of confessions deemed “involuntary.”15 One key consideration under the voluntariness test was preventing the introduction into evidence of false, or unreliable, confessions,16 including those obtained through physical coercion.

A. Brown v. Mississippi and the condemnation of torture

In Brown v. Mississippi,17 the Court unequivocally condemned a state court’s reliance on torture-based confessions as being inconsistent with the Due Process Clause, overturning a conviction obtained through the use of confessions elicited through brute force.18 Officials, accompanied by an angry mob, extracted a confession from one suspect after hanging him from a limb of a tree with a rope, tying him to the tree, whipping him, then whipping him again on a separate occasion.19 Two other suspects were whipped with a leather strap and buckle.20 The facts relating to the defendants’ torture and abuse were undisputed.21 With regard to the first defendant:

They hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.22

Accounts of “waterboarding” are also horrifying. As a United States aviotor subjected to the practice by Japanese captors described it:

I was put on my back on the floor with my arms and legs stretched out, one guard holding each limb. The towel was wrapped around my face and put across my face and water poured on. They poured water on this towel until I was almost unconscious from strangulation, then they would let up until I’d get my breath, then they’d start over again.23

As described by a journalist who voluntarily underwent the experience during recent debates about the practice:

Inhalation brought the damp cloths tight against my nostrils, as if a huge wet paw had been suddenly and annihilatingly clamped over my face. Unable to determine whether I was breathing in or out, and flooded more with sheer panic than with mere water, I triggered the pre-arranged signal and felt the unbelievable relief of
being pulled upright . . . [Following a second episode], I was an abject prisoner of my gag reflex. The interrogators would hardly have had time to ask me any questions and I would quite readily have agreed to supply any answer.24

In a unanimous decision 73 years ago in Brown, the Court found a "clear denial of due process" where torture was relied upon,25 noting further that its decision did not depend upon the application of the self-incrimination clause (which did not yet apply to the states).26 The court explained that the self-incrimination clause is directed to "the process . . . by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."27 It is significant that the Court recognized a due process right to procedures involving confessions, wholly apart from the right against self-incrimination.

While noting that the individual states had expansive freedom to regulate their own court procedures, the Court explained that there are limits to those freedoms. The states' processes cannot offend fundamental principles of justice: "the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. 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."28

The Court described a trial as "mere pretense" when state authorities "have contrived a conviction resting solely upon confessions obtained by violence."29 Applying those principles to the case before it, the Court found that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners"; the use of such confessions at trial "was a clear denial of due process."30 The Supreme Court found it significant the trial court both knew of how the confessions had been obtained and that there was no other evidence upon which to base a conviction. The ensuing conviction and sentence were thus "void for the want of the essential elements of due process."31

Reliability was a central concern of the Brown Court. As Laurie Magid has noted, "[I]n Brown and other early cases, the Court clearly believed that innocent persons had been convicted, and that their confessions were unreliable."32

In an important article exploring the difference between the illegal procurement of evidence and the illegal use of evidence, Arnold Loewy notes that Brown involved a case in which the confession was unconstitutionally obtained. In his words, "[f]or an extreme example, consider Brown v. Mississippi, in which the defendants were severely beaten and were threatened with continuous beatings unless they confessed. Such police conduct is clearly wrong in itself, regardless of whether any confession is used or even obtained. Consequently, defendants like Brown, but unlike Miranda, can sue the police officers for violating their constitutional rights."33 While Loewy is almost certainly correct that officers engaged in the conduct at issue in Brown would currently be subject to suit, that issue was not before the Brown Court. Moreover, while the Brown Court...
condemned the actions of the law enforcement officers, its holding also spoke to the wrongful use of the tortured confessions and the complicity of the trial court in knowingly permitting their introduction. *Brown* is not just a case about the wrongful extraction of a confession, but a case about the violence done to due process by the later use of those confessions. This fact has implications for current debates about bringing suspected terrorists to justice.

**B. Reliability in the post-Brown era**

In terms of the Court’s due process confessions jurisprudence, the role of reliability in post-*Brown* cases was less plain. Rather, “[e]ven though reliability was clearly uppermost in the Court’s mind when it decided *Brown* v. Mississippi, the Court gave mixed and confusing signals in subsequent cases about the precise rationale for the voluntariness requirement.” In *Lisenba* v. *California*, for example, the Court noted that “[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.” In *Lisenba* the Court affirmed the conviction, finding that the conduct of law enforcement in obtaining a confession was not “grave” enough to warrant reversal.

In most of the post-*Brown* cases, however, reliability was implicitly considered to be of fundamental importance. Moving beyond *Brown*, the Court made clear that some police methods falling short of the rank brutality of *Brown* were also inconsistent with due process. *Brown* was a floor but not a ceiling. In the same way, even if not explicitly stated, reliability was generally a floor but not a ceiling: a confession could be deemed “involuntary” and thus inadmissible even if there was no real concern with reliability.

In *Spano* v. *New York*, for example, the Court analyzed psychological pressures used on a suspect, suggesting that the methods were abhorrent beyond any concern that the methods might yield unreliable confessions. It found a due process violation when police ignored the defendant’s refusals to talk in a series of interrogation sessions spanning almost eight hours.

In focusing on the “police methods” used, Chief Justice Warren explained that society’s “abhorrence” of the use of “involuntary confessions” is based not just on their “inherent untrustworthiness” but also on the “deep-rooted feeling that the police must obey the law while enforcing the law.” He acknowledged that in the days since *Brown* v. Mississippi the Court had not been confronted with such a case of brute force, nor had any subsequent case approached “the 36 consecutive hours of questioning” at issue in an earlier case. In that case, Spano’s will was “overborne by official pressure, fatigue and sympathy falsely aroused.” In emphasizing Spano’s “overborne will,” Chief Justice Warren’s uppermost concern did not appear to be “reliability” *per se*. Rather, he seemed chiefly concerned that the state had interfered with the defendant’s freedom to choose whether to confess, not a concern that it extracted a factually false confession from him.
Indeed, in Rogers v. Richmond,45 the Court went even further, expressly rejecting the notion that reliability per se was at the heart of the voluntariness inquiry. The Supreme Court chided the trial court for admitting a confession based on its reliability without focusing on whether law enforcement acted “such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.”46

Rogers thus illustrates that reliability, while implicitly necessary, was not sufficient to warrant introduction. Put another way, a finding that a confession was unreliable was sufficient but not necessary to exclusion under the Court’s developing due process jurisprudence. Rather, if officers acted so as to overbear a suspect’s will even through methods that were unlike the torture at issue in Brown, the confession could still be deemed “involuntary.”

In writing about the history of confessions law, Steven Penney identifies three themes that dominate the Court’s opinions: concerns with the unreliability of confessions extracted under questionable circumstances,47 a desire to deter abusive police practices,48 and a concern with protecting the autonomy of the individual suspect.49

While reliability during this period may not have been the Court’s only concern, it was an important concern. Indeed, where the Court criticized the trial court in Rogers for relying on reliability, it was to make clear that reliability was not sufficient—even though implicitly reliability was necessary. However, with the Court now confronted more often with psychological ploys rather than the abject brutality of Brown, the unanimity of Brown was replaced by “bitter divisions” as the Court struggled to answer the question of how much pressure on a subject is “too much.”50 Importantly, however, the Court never abandoned its condemnation of torture.

II. The problematic shift away from the essential importance of reliability

A. The Self-Incrimination Clause and due process

With its decision in Miranda v. Arizona, the Court made the Fifth Amendment Self-Incrimination Clause the centerpiece of its analysis of future confessions, at least of those in routine interrogation cases. In Miranda, of course, the Court held that “custodial interrogation” is inherently coercive and that any confession taken in police custody will be presumed coerced unless the now-famous Miranda warnings are given.51 Because the Fifth Amendment explicitly provides that no one shall be required in “any criminal trial” to be a witness against him/herself, the protections of the Fifth Amendment are triggered, in the custodial interrogation context, only when there is a criminal trial. It does not apply in other contexts and does not act as a “check” on abusive police conduct itself, as illustrated in the recent case Chavez v. Martinez.52

In Chavez, the Court held that the Fifth Amendment did not apply in circumstances where a suspect shot by the police was later questioned relentlessly in a
hospital. Because the statements were never used against Martinez at a criminal trial, his claims under the Fifth Amendment were unavailing. The Supreme Court left open the possibility, however, that police had violated Martinez's due process rights, and the Ninth Circuit ultimately held that the facts indeed suggested a due process violation:

The Fourteenth Amendment's Due Process Clause protects individuals from state action that either "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty." Martinez alleges that Chavez brutally and incessantly questioned him, after he had been shot in the face, and back and leg and would go on to suffer blindness and partial paralysis, and interfered with his medical treatment while he was "screaming in pain . . . and going in and out of consciousness." . . . A clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation . . . . Under the facts alleged by Martinez, Chavez violated Martinez's clearly established due process rights.53

The difference between the use of a confession at trial in derogation of the Fifth Amendment and the wrongful extraction of a confession that might violate the Due Process Clause but not the Self-Incrimination Clause is illustrated in Justice Marshall's dissenting opinion in New York v. Quarles.54 In that case, police asked a suspect about the location of a gun, without first providing Miranda warnings. The Court, in a majority opinion written by Justice Rehnquist, found that Miranda's "doctrinal underpinnings" did not require that it "be applied in all its rigor" to questions reasonably motivated by public safety concerns. The Court created a "public safety" exception to Miranda.55

Justice Marshall forcefully argued that the creation of such an "exception" was inconsistent with the underlying rationale of Miranda, which held that custodial interrogation is inherently coercive (and is no less coercive when "emergency questioning" might be justified). If there is a threat to the public safety, Marshall agreed, the police should by all means question a suspect, but the results of the questioning cannot be introduced at trial. Questioning is itself not constitutionally infirm; rather, it is the use of the presumptively coerced confession at trial that implicates the Fifth Amendment. The Due Process Clause sets limits on police conduct, but the Fifth Amendment's Self-Incrimination Clause, standing alone, does not. In Marshall's words:

If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. . . . If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in Miranda v. Arizona proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.56

Marshall's understanding of the limits of Fifth Amendment protections was precisely at issue in Chavez. Regardless of the brutality that may be employed, the Fifth Amendment Self-Incrimination Clause does not "kick in" unless and until such tortured confessions are used at trial. Rather, due process is the only real limit on law enforcement tactics themselves.
The intersection of the Self-Incrimination and the Due Process Clauses yields problematic “protection gaps” not only regarding possible mistreatment, but even regarding conviction or imprisonment. Specifically, suspects are vulnerable to being subject to convictions or other deprivations of liberty based upon unreliable confessions, including even those extracted by the type of torture that was unanimously condemned by the Court almost 75 years ago in Brown. That is because the Court’s later jurisprudence has de-emphasized reliability.

By its terms, the Fifth Amendment Self-Incrimination Clause should prevent the introduction of any “truly compelled statements” at trial, whether or not those statements are extracted by United States law enforcement officers or by foreign agents in the terrorism context.57 Under an appropriately robust interpretation of the Fifth Amendment’s prohibition of compelled self-incrimination, waterboarded statements would be forbidden in a trial. Other interpretations of the Fifth Amendment’s proscription of self-incrimination, however, suggest that that particular constitutional protection is not directed at forbidding the results of brutality. As the Brown Court itself stated when deciding that case on due process grounds: the self-incrimination clause is directed to “the process . . . by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.”59

By the time Miranda was decided, the Court was more concerned with psychological than physical intimidation and was struggling to simplify its confessions jurisprudence, which had become tangled and unclear during the development of the due process voluntariness test, post-Brown. Few cases since Brown have dealt with instances of police brutality, and where confessions are rejected on that basis, the Court has continued to rely on the Due Process Clause, which serves as a “backup” test that is increasingly difficult to meet.59

B. The Court’s enervated due process jurisprudence after Colorado v. Connelly

At first blush, it might not appear that Colorado v. Connelly60 is problematic from the perspective of ensuring that there are limits on what can be done to terrorism suspects. The police in that case were responsible for no harsh treatment of a suspect whatsoever. Rather, a suspect literally approached a police officer on the street and said that he wanted to discuss a murder he had committed. The officer gave the defendant Miranda warnings, but the suspect persisted in his stated desire to confess, provided information about a murder, and took the police to the alleged location of the murder.61 The Court focused on the lack of any misconduct by officers and the underlying “deterrence” rationale of excluding evidence.

In the course of deciding the case, however, the Court denigrated reliability concerns, narrowing the focus of the earlier Brown Court’s concern about reliable process. This severing of “reliability” from the considerations of due process is deeply problematic from the perspective of ensuring that trials and trial-like proceedings are not tainted by the use of unreliable evidence.
At a pretrial hearing in *Connelly*, a state psychiatrist testified that Connelly was "suffering from chronic schizophrenia," had experienced "command hallucinations," and that his confession was motivated by psychosis.62 The Colorado trial court suppressed the statements as "involuntary" and the Colorado Supreme Court affirmed, finding that the introduction of the statements alone was sufficient "state action" to implicate the Due Process Clause of the Fourteenth Amendment.63

The Supreme Court, in a majority opinion written by Chief Justice Rehnquist, disagreed with the state courts, finding that a due process violation depends upon a finding of "coercive police activity," which was not present in *Connelly* because the defendant had walked up to an officer on the street to confess. The Court emphasized that "coercive police misconduct" was the "catalyst" for the Court's decision in *Brown v. Mississippi*,65 where the brutal police conduct contrasted sharply with the benign conduct of officers in *Connelly*.

Implicitly criticizing the Colorado Supreme Court for finding that "the very admission of the evidence in a court of law was sufficient state action to implicate the Due Process Clause," Chief Justice Rehnquist noted that the Court's cases since *Brown* "have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."66

Focusing on the deterrence rationale of the exclusionary rule and the lack of any wrongful conduct on the part of police, the Court declined to "require sweeping inquiries into the criminal mind of a criminal defendant who has confessed."67 Conceding that a confession such as Connelly's might prove "quite unreliable," it determined that such issues were matters for the laws of evidence and did not implicate the Constitution.68 Reducing the purpose of the exclusionary rule simply to deterrence, the Court asserted that "[t]he purpose of the excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."69 Because there was no misconduct of law enforcement to deter in this case, the Court essentially found that to be the end of the inquiry.

In his dissenting opinion, Justice Brennan emphasized that the voluntariness inquiry regarding confessions has historically been concerned not just with police misconduct but also with a suspect's free will and reliability.70

In that opinion, Brennan tacitly addressed the issue that, prior to *Connelly*, a finding of reliability was necessary but not sufficient in order for a confession to be admitted:

The instant case starkly highlights the danger of admitting a confession by a person with a severe mental illness. The trial court made no findings concerning the reliability of Mr. Connelly's involuntary confession, since it believed that the confession was excludable on the basis of involuntariness. However, the
overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. . . .

Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. . . . To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.71

As I have argued elsewhere, the majority's almost exclusive focus on deterrable police misconduct leaves suspects vulnerable to having confessions introduced against them if those confessions were extracted by, for example, foreign agents over whom the United States has no control. But, importantly, the seminal decision in Brown did not simply turn on the fact that the sheriffs and his deputies abominably abused the defendants. Rather, the Court focused on the use of the confession at a trial, finding that it was the use of the confession itself that violated due process. Chief Justice Rehnquist's quote of just a phrase of Brown, i.e., that the police action at issue was "revolting to the sense of justice," overlooks that the Brown Court went on to say that it was the confession's "use" that violated due process.72

To be sure, the conduct of the police officers in Connelly appears to be above reproach and dramatically different than the abusive conduct of the Brown law enforcement officers. But it is an overly narrow reading of Brown to suggest that that was just a case about "misconduct" by law enforcement officers. It was also a case about trial integrity and the expectation that trial judges should serve as gatekeepers to prevent the introduction of patently unreliable evidence obtained through torture. Indeed, the eminent confessions law scholar Yale Kamisar has opined that the outcome in Brown would have been the same if the confessions in that case had been obtained by "torturous acts of the Ku Klux Klan" rather than through official brutality.73 A close reading of Brown reveals that the Court seemed particularly concerned that a judge would participate in a "pretense of a trial" that relied upon such evidence. As Mark Godsey has pointed out regarding Connelly, "[i]n holding that there was no 'state action' in the case, because the officer did nothing to induce Connelly's confession, the Court ignored the admission into evidence of the confession as a possible basis for state action. The admission into evidence of a false confession had the been the predicate 'state action' in Brown v. Mississippi.74

The Connelly Court's cramped view of the State's responsibilities with respect to the use of unreliable confessions is particularly problematic in light of later jurisprudence taking a more expansive view of "state action." In Edmonson v. Leesville Concrete Co.,75 for example, the Court held that a private litigant's exercise of racially discriminatory peremptory strikes against jurors amounted to state action because it arose in the context of a trial in which even private litigants act pursuant to state rules and procedures. If a private litigant's acts can implicate the Fourteenth Amendment, surely the introduction into trial of an unreliable confession should as well.
Of course, the author of Connelly, Chief Justice Rehnquist, joined O’Connor’s dissenting opinion in Edmonson, which argued that “[n]ot everything that happens in a courtroom is state action.”

The Connelly case has been much criticized, and most of the focus is on the case’s implication for mentally incompetent defendants. I believe there are troubling implications in the terrorism context, as well, and that the case results in “protection gaps” for terrorism suspects.

III. Implications of Historic Jurisprudence in the Terrorist Cases

A. Confessions Obtained by U.S. Agents

1. Conventional Criminal Trials

The announcement that KSM and others would be tried in conventional criminal trials was controversial, in part, because of the “expansive protections” that are normally accorded to defendants in conventional criminal courts. Under either a Fifth Amendment Self-Incrimination Clause or due process analysis, “waterboarded” confessions should provide easy cases for exclusion. In a conventional criminal court, terrorism suspects may even be able to claim Miranda rights. I have argued elsewhere that Miranda both over-protects and under-protects in the terrorism context, and have argued that terrorism suspects should not have the benefit of Miranda warnings. Even leaving aside the Court’s Miranda jurisprudence, however, a confession obtained by waterboarding at the hands of United States agents fails the due process inquiry. Since Brown it has been well established that confessions obtained through torture should be categorically forbidden.

Upon a closer look, however, the case for excluding a waterboarded confession may not be as straightforward as it should be. When one looks at Connelly’s focus on the need for deterrence, the question of exclusion of such confessions gets tangled in the question of whether agents who administered waterboarding acted illegally. This question, in turn, is complicated by the fact that former Administration lawyers wrote lengthy memoranda seeking to justify tactics such as waterboarding for particular detainees. Most notoriously, the Bybee-Yoo Torture and Power Memorandum (“BYTAP”) opined that an interrogation method would not constitute “torture” unless the pain inflicted was tantamount to the pain consistent with “a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of bodily functions.” While I believe that waterboarding constitutes torture even under this narrow BYTAP definition, that proposition remains unsettled, and agents acting under the authority of BYTAP would argue that they believed in good faith that waterboarding was permitted. Indeed, later Administration legal memoranda specifically permitted waterboarding, including that used against KSM. If agents used waterboarding in “good faith” reliance upon legal memoranda, was there “misconduct” to “deter” under the rationale of Connelly? Connelly’s narrow focus on the lack of “wrongdoing” by law enforcement in that case and its complete deconstruction of issues of reliability, standing alone, suggest that it is not inconceivable that
arguments could be made to support the use of waterboarded confessions even in conventional criminal trials.

To be sure, the current Attorney General is on record that “waterboarding” constitutes torture, but we have seen this Administration retreat from other civil liberties positions relevant to the War on Terror since the election. Moreover, fundamental human rights protections should not be subject to the vagaries of who inhabits the White House. The strong message of Brown—that a trial lacks integrity if it relies in any way upon torture—is an enduring lesson that risks being undermined by Connell.

2. Proceedings Outside of the Conventional Court System

Some detainees will be tried before military commissions, rather than in conventional criminal courts.83 Proceedings before military commissions provide fewer formal rights than do trials. The Military Commissions Act of 2006 (“MCA”) provides “vastly more limited protections than do either ordinary criminal trials or traditional military courts martial.”84 While purporting to ban “torture,” again, United States agents could plausibly argue that they understood waterboarding not to constitute torture. The MCA includes a “good-faith defense” that applies retroactively to cover the period between September 11, 2001 and the passage of the Detainee Treatment Act of 2005 (“DTA”).85 Moreover, statements can be introduced in military commission proceedings when the amount of “coercion” used is subject to dispute.86

Even more troubling is the fact that detainees can be held indefinitely as “enemy combatants” based merely on flawed Combatant Status Review Tribunals (“CSRTs”). CSRTs specifically permit holding detainees based upon information obtained through torture.87 While the DTA (also known as the McCain Amendment)88 purported to deal with the torture problem, its anti-torture provision applies only to future CSRTs, not to those held before the passage of the Act.89 The DTA bans interrogation techniques that are not authorized by the Army Field Manual (which prohibits waterboarding) but it does not ban other disputed techniques, such as “forced standing.”90 Linda Keller has recently pointed out other gaps in the protections provided by the DTA.91

The fact that the DTA does not apply retroactively, and provides for a “good faith defense” for those who may have waterboarded before its passage, means that detainees could be held based upon the results of brutality. Yet the lesson of Brown is that we can have no confidence, as an institutional matter, if decisions regarding guilt or indefinite detention are based upon tortured confessions.

B. Confessions Obtained by Foreign Agents

Connell has even more dire implications for the use of confessions obtained by foreign agents against whom the United States exercises no control. Connell’s focus on deterrence and deconstitutionalization of reliability means that a tortured confession obtained abroad by foreign agents could be introduced into an American court consistent with Connell’s interpretation of due process. Notably, I am
not referring here to the practice of "extraordinary rendition," which presents a wholly different problem. In cases where the United States deliberately renders a suspect abroad on the understanding that he will be tortured, there is "deter-
"rable" misconduct if United States officials participated in the rendering, and arguably such conduct could run afield even of Connelly's narrow view of due process (although questions of "good faith" outlined above would still apply).
Where confessions are obtained with no involvement by U.S. agents, however, Connelly would suggest that confessions could be used despite unreliability. This is deeply problematic.

Conclusion

The lesson of Brown is that courts should act as gatekeepers to forbid the use of tortured confessions in court. Even beyond conventional criminal courts, any system designed to adjudicate guilt or innocence with integrity cannot rely on tortured confessions. Our own Supreme Court recognized that due process is offended by torture almost 75 years ago. The due process violation it identified was not just the torture inflicted by law enforcement, but the systematic offense to due process wrought by the reliance on torture at the "pretense" of a trial.

After 2001, we are in danger of failing the lessons of Brown. A more robust interpretation of due process, with a focus on both reliability of confessions and the integrity of judicial and quasi-judicial proceedings, is truer to our history and values than the notion that exclusion serves no goal other than deterrence and that reliability serves no part of the Constitution.

NOTES

1. Charles Savage, U.S. To Try Avowed 9/11 Mastermind Before Civilian Court In New York, N.Y. TIMES AL (Nov. 14, 2009). Since this announcement was made, there has been particular resistance to holding the trial in New York City.

2. See Mark Mazzetti, Portrait of 9/11 'Jackal' Emerges As He Awaits Stage in New York, N.Y.
 Times A1, A22 (Nov. 15, 2009).

3. Id. at A22.

4. Cf. id. (noting that Attorney General Eric H. Holder Jr. has described the "near-drowning" technique as "torture" but that advocates have said that C.I.A. methods "produced a trove of information").


6. 479 U.S. 157 (2003). I note that the term "protection gap" has been used frequently by others in a variety of contexts.


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12. Portions of this section are adapted from Darmer, supra note 7, at 329-30, 334-37.
13. In one significant nineteenth century decision, Bram v. United States, 168 U.S. 532 (1897), the Court addressed the admission of a confession under the Fifth Amendment. For a further discussion of Bram, see Darmer, supra note 7, at 325-327. Following Bram, however, "the Court began to ignore the privilege against self-incrimination as a basis for finding confessions inadmissible and focused instead on the Due Process Clauses of the Fifth and Fourteenth Amendments." 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, 1715 (2002).
14. U.S. Const. amend. XIV; see Dickerson v. United States, 530 U.S. 428, 433 (2000) (explaining that "notions of due process" prohibited coerced confessions before Miranda); Michigan v. Tucker, 417 U.S. 433, 441 (1974) ("In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary."); Spano v. New York, 360 U.S. 315, 315 (1959) (describing case as "another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."); see also Catherine Hancock, Due Process Before Miranda, 70 TUL. L. REV. 2195, 2196 (1996) (stating that due process had a "constitutional reign of thirty years").
17. 297 U.S. 278. For a fuller discussion of the case, see Morgan Cloud, Torture and Truth, 74 Tex. L. R. 1211 (1996).
18. See Hancock, supra note 14, at 2203 (describing police conduct in the case as torture).
20. Id. at 282.
21. Id. at 281; see also id. at 284-85 (noting that three witnesses who participated in whippings, including the deputy, were introduced, and "not a single witness was introduced who denied it").
22. 297 U.S. at 281-82 (quoting dissenting opinion from state court decision, 161 So. 465, 470-71).
24. Christopher Hitchens, Believe Me, It's Torture, VANITY FAIR, August 2008; see also Darmer, supra note 5, at 649-50.
26. The Fifth Amendment was applied to the states almost 30 years later, in Malloy v. Hogan, 378 U.S. 1 (1964), and then extended to questions of custodial interrogation in Miranda v. Arizona, 384 U.S. 436 (1966).
28. Id. at 285-86.
29. *Id.* at 286.
30. *Id.* at 286.
31. *Id.* at 287.
33. *Id.* at 933-34 (citations omitted).
36. 314 U.S. 219, 236 (1941).
38. *Id.* at 315. The defendant’s repeated requests to consult with his attorney were denied. He finally confessed after a close childhood friend, who was then attending the police academy, falsely told Sponzo that Sponzo’s situation had gotten the friend “in a lot of trouble” and that he was concerned for the financial welfare of himself, his pregnant wife, and his three children. *Id.* at 319. The “friend” prevailed upon Sponzo on three occasions without success. “Inevitably,” however, “[i]n the fourth such session . . . lasting a full hour, petitioner succumbed to his friend’s prevarications and agreed to make a statement.” *Id.*
39. As Professor Yale Kamisar points out, *Sponzo* illustrates “[t]hat the Court was applying a ‘police methods—as well as a ‘trustworthiness’ test.’” YALE KAMISAR, WAYNE R. LAFAYE, ET AL., *MODERN CRIMINAL PROCEDURE* 545 (12 ed. 2008).
41. 297 U.S. 278 (1936).
42. *Sponzo*, 360 U.S. at 321 (citing *Ashcraft v. Tennessee*, 322 U.S. 143 (1944)). For a discussion of the *Ashcraft* decision, see Darmer, *supra* note 7, at 330-31. In *Sponzo*, Chief Justice Warren noted that the more “sophisticated” methods being used currently to “extract confessions” only make more difficult the Court’s “duty to enforce federal constitutional protections” because of “the more delicate judgments to be made.” 360 U.S. at 321.
43. *Id.* at 323.
44. See, *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 973 (1966) (due process inquiry focusing on defendant’s state of mind “assumes that the constitutionally protected interest of the accused is the right to decide, free from unfair pressure, whether he wants to confess’”). The difficulty, of course, comes in determining when pressure is “unfair.” *Id.* (noting evolution of definition of “unfair pressure” in thirty years leading up to 1966).
46. *Id.* at 544.
48. Most commentators have focused on some version of Penney’s first two concerns. See Joseph D. Grano, *Confessions, Truth, and the Law* 65 (1993) (“In the view of most commentators, courts have had two real reasons for excluding confessions as involuntary: (1) a desire, surviving from the common-law approach, to eliminate untrustworthy confessions and (2) a desire to control offensive police practices.”).
49. See Penney, *supra* note 47, at 313. Penney argues forcefully that the third concern, which he refers to as the “self-determination theory,” is “morally suspect” because “the idea that criminal suspects should have an intrinsic, deontological right to silence fails to accord with widely-held views of political and personal morality.” *Id.*
51. A suspect must be told that s/he has the right to remain silent, that anything s/he says can be used against him/her, that s/he has a right to an attorney and that if s/he cannot afford one, an attorney will be provided.

52. 538 U.S. 760 (2003).

53. Martinez v. City of Oxnard, 337 F.3d 1091 (9th Cir. 2003). Prior to the Supreme Court’s holding in Chavez, 538 U.S. 760, the Ninth Circuit had held that Martinez also had a viable Fifth Amendment claim. For a further discussion, see Darmer, Confessions Law in an Age of Terrorism, supra note 7, at 349-51.


55. Id. at 656.

56. Id. at 686 (Marshall, J., dissenting) (citations omitted).

57. See Darmer, supra note 5, at 645-47; Darmer, supra note 7, at 354.

58. 297 U.S. at 285; see also Larry Rosenthal, Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect, 10 CHAP. L. REV. 579, 589 (2007) (noting that “the most natural reading of the term ‘compulsion’ is the threat of adverse consequences—such as the historically paradigmatic sanction of conviction or contempt—as a form of coercive pressure on a suspect to become a ‘witness’ against himself”).

59. Darmer, supra note 7, at 357; see also generally id. at 357-360 (discussing use of due process test post-Miranda).

60. 479 U.S. 157 (1986).

61. See id. at 160-61. As pointed out in the dissent, the record was “burdened” of any corroboration of Connelly’s confession. Id. at 183 (Brennan, J., dissenting). “No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim’s body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there.” Id.

62. Id. at 161-62.

63. Id. at 162-63.

64. Id. at 522.

65. Id. at 163.

66. Id. at 163-64 (footnote omitted).

67. Id. at 165-67.

68. See id. at 167.

69. Id. at 167.

70. See id. at 176 (Brennan, J., dissenting). Justice Marshall joined Justice Brennan’s dissent.

71. Id. at 183 (Brennan, J., dissenting).

72. See notes 30-31, supra and accompanying text.

73. Lawrence Herman, The Unexplained Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confessions Rule (Part II), 53 OHIO ST. L. J. 497 n.647(1992) (counting private conversation with Professor Kamisar).


76. Id. at 632 (O’Connor, J., dissenting).

77. See generally, e.g., Godsey, supra note 74.

78. See Darmer, supra note 7 (proposing “foreign interrogation” exception to Miranda.) Darmer, Miranda Warnings, Torture, the Right to Counsel and the War on Terror, 10 CHAP. L. REV. 631, 642 (2007) (arguing for broad application of “public safety” exception to Miranda in terrorism cases).
79. See Darmer, supra note 5.
81. See Darmer, supra note 79, at 650; Wallach, supra note 23, at 506.
82. See Memorandum from Steven G. Bradbury for John A. Rizzo, Senior Deputy General Counsel, CIA, 37 (May 30, 2005).
83. See Savage, supra note 1, at A1.
84. Darmer, supra note 78, at 651.
86. Darmer, supra note 78, at 651-52; see also Keller, supra note 85, at 751 (further explicating provision of the MCA).
87. See Darmer, supra note 78, at 651.
88. Keller, supra note 85, at 749.
89. Darmer, supra note 78, at 651 and n.118.
90. Keller, supra note 85, at 749-50.
91. See id. at 748-53.
92. See generally Darmer, supra note 5, at 639 (quoting Richard Cohen).