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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

MARK A. GODSEY†

ABSTRACT

In recent years, the FBI and other federal law enforcement agencies have greatly expanded their presence abroad, investigating everything from narcotics trade and Internet fraud schemes to terrorism. Where this law enforcement activity includes custodial interrogation of non-American citizens abroad, must American law enforcement officials provide Miranda *warnings to such suspects? In 2001 in* United States v. Bin Laden*, a federal district court held that the Fifth Amendment's privilege against self-incrimination applies to non-American citizens interrogated abroad, thus requiring* Miranda *warnings in this context. This Article criticizes the* Bin Laden *court's*

† Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. E-mail: godseym@nku.edu. Although I was employed as a prosecutor by the United States Attorney's Office for the Southern District of New York during the time that the *Bin Laden* case was handled by that office, I was not assigned to that prosecution. The views reflected in this Article are solely my own, and in no way reflect the views of the United States Department of Justice or the United States Attorney's Office for the Southern District of New York. I would like to thank Professors Lawrence Herman, John Valauri, and Mark Stavsky for reviewing earlier drafts and making suggestions that greatly improved the quality of the Article. I also would like to thank my wife, Kristin D. Godsey, for applying her editing skills and other journalistic talents to this piece.

strict application of Miranda *and suggests that* Miranda *should be interpreted as a flexible prophylactic rule that can be modified or discarded abroad where its application is illogical. The Article then argues that the policies behind* Miranda *do not always support its application abroad in the same way that it is systematically applied in the domestic setting. As a result, an FBI agent abroad should be required to advise a non-American suspect only of the rights that he enjoys in the country where the interrogation takes place, to the extent such rights can be reasonably determined by the agent under the circumstances surrounding the interrogation. In addition, if the FBI agent makes a mistake in interpreting the rights available to a given suspect under foreign law, and does not advise the suspect of a right which he in fact had, the exclusionary rule should not be employed as long as the agent misinterpreted the foreign law in good faith.*

TABLE OF CONTENTS

INTRODUCTION

With increasing frequency in recent years, the Federal Bureau of Investigation (FBI) and other federal law enforcement agencies have found it necessary to travel to foreign nations to investigate violations of American criminal laws committed by non-American citizens.[1] If these investigations are successful, the suspects are often arrested abroad and brought to the United States to stand trial. As Justice Brennan observed in 1990 in *United States v. Verdugo-Urquidez*:

> Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws,

1. *See* Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 51–52 (1990) ("Violent attacks on United States citizens have . . . drawn the FBI overseas in recent years. Not only has the number of terrorist incidents and politically motivated killings involving Americans risen, but the United States has asserted greater jurisdiction over such crimes."). Since 1985, "FBI agents have lent their forensic skills in assorted criminal investigations, including the 1985 hijacking of the Achille Lauro, the mid-1988 airplane accident in Pakistan that killed President Zia, and the crash of a Pan Am flight in Scotland in late 1988." *Id.* at 52; *see also* Carrie Truehart, Comment, United States v. Bin Laden, *Is There A Foreign Intelligence Exception to the Warrant Requirement for Searches of "United States Persons" Abroad?*, 82 B.U. L. REV. (forthcoming 2002) (manuscript at 1–2, on file with the *Duke Law Journal*) (documenting expansion of American investigations into criminal activity abroad, particularly in response to acts of terrorism).

For purposes of this Article, the term "non-American" refers to an individual who is not a citizen of the United States.

> our antitrust laws, our securities laws, and a host of other federal criminal statutes. The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law."[2]

As new technologies make national borders less of an obstacle to criminal enterprises engaging in everything from Internet fraud schemes to narcotics trade, and in light of the ongoing threat of terrorist attacks against American targets, this upward trend will undoubtedly continue.[3] This heightened activity of American law enforcement officials abroad will compel American courts to confront two closely related questions of constitutional significance. Does the Fifth Amendment's[4] privilege against self-incrimination[5] apply to non-American citizens who confess to American authorities abroad and who are later tried in the United States? And if the Fifth Amendment does apply, does an FBI agent conducting an investigation abroad

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2. United States v. Verdugo-Urquidez, 494 U.S. 259, 279–81 (1990) (Brennan, J., dissenting) (quoting V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW**.** 257, 257 (1980)) (citations omitted).

3. *See* Nadelmann, *supra* note 1, at 38:

> [T]oday, terrorism, arms and high tech smuggling, and securities, tax and commercial fraud all contribute to this trend. In general, as the scope and volume of international interactions ranging from trade to tourism increase, so too do the criminal activities that inevitably accompany them. Numerous criminal justice concerns . . . grow out of the extensive United States diplomatic presence abroad as well as the stationing of 300,000 troops overseas.

See also United States v. Bin Laden, 132 F. Supp. 2d 168, 185 (S.D.N.Y. 2001) ("Our next inquiry [the application of *Miranda* overseas] focuses on an issue imbued with significant consequence, not the least of which is its inevitable impact on American law enforcement officials who, in furtherance of their duties and with increasing regularity, are dispatched and stationed beyond our national borders."); RICHARD A. BEST, JR., CONG. RESEARCH SERV., INTELLIGENCE AND LAW ENFORCEMENT: COUNTERING TRANSNATIONAL THREATS TO THE U.S. 12 (2001) (stating that beginning in 1996 the FBI commenced a plan to double the number of agents serving in legal attaché offices in American embassies by the year 2000).

4. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

5. Although the details of the Fifth Amendment's privilege against self-incrimination will be explored later in this Article, it is based upon the following language in the text of the Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*; *see infra* notes 43–63 and accompanying text.

have to provide *Miranda* warnings[6] to a non-American citizen before interrogating him?[7]

Although the answers to these two questions will impact every category of American criminal investigations abroad from narcotics to fraud, they have assumed greater importance in the aftermath of the September 11, 2001, terrorist attacks in New York City and Washington, D.C. Indeed, in mid-December 2001, a host of FBI agents were sent to Afghanistan to interrogate captured members of the al Qaeda network, the group that was allegedly behind the attacks.[8] And as the United States and its allies continue to fight the "War Against Terrorism" and seek out "cells" of terrorist activity located in countries around the globe, interrogations of non-American citizens by American officials will undoubtedly increase

6. The intricacies of the *Miranda* doctrine will be developed in detail later in this Article. *See infra* notes 54–63 and accompanying text. In short, "*Miranda* warnings" are recitations of a suspect's constitutional rights, including the right to remain silent and the right to counsel, which must be administered before a law enforcement officer can "interrogate" a suspect who is in police "custody." Miranda v. Arizona, 384 U.S. 436, 469 (1966) (describing the warnings required prior to "in-custody interrogation").

7. Because *Miranda* warnings are required only for "custodial interrogation," *see infra* note 56 and accompanying text, this Article assumes that a custodial environment is present whenever it explores whether or not *Miranda* warnings are required prior to an interrogation that occurs abroad.

8. *See A Nation Challenged*, N.Y. TIMES, Dec. 19, 2001, at B2 ("Eight F.B.I. agents arrived . . . in Kandahar to begin interrogating captured [a]l Qaeda fighters . . . ."). In addition, the FBI in Afghanistan interviewed John Walker Lindh, an American who is facing numerous federal charges for joining the Taliban in its defense of Afghanistan. Josh Meyer, *FBI Agents Land in Desert to Interrogate American Talib*, L.A. TIMES, Dec. 13, 2001, at A3. At the time this Article went to press, it was not clear whether the captured al Qaeda members would be tried in the United States civilian court system or in military tribunals. If some of the prisoners are tried in military tribunals, it is quite possible that *Miranda* and other pretrial constitutional safeguards would not apply therein. *See* Department of Defense, Military Commission Order No. 1 (March 21, 2002) (establishing procedures for trials by military commissions of certain non-American citizens in the War Against Terrorism, and stating that any and all probative evidence shall be admissible in such trials). Thus far, however, the one member of al Qaeda that has been charged with participating in the events of September 11, 2001, has been indicted in federal district court in Virginia, and his trial before a civilian jury has been scheduled for October 2002. *Terrorist Suspect Arraigned*, WASH. POST, Jan. 6, 2002, at C2. The United States also has indicated that John Walker Lindh would be tried in a civilian court in the United States. *See FBI Agents Land in Desert to Interrogate American Talib*, *supra*. Civilian courts moved to the forefront of the war on terrorism recently, when a federal grand jury in New Jersey indicted a British national for the kidnapping and murder of *Wall Street Journal* reporter Daniel Pearl. Dan Eggen, *U.S. Indicts Militant in Pearl's Death*, WASH. POST, March 15, 2002, at A1.

both in number and importance.[9] But regardless of the criminal context, the central questions remain: are non-Americans entitled to the protection of the privilege against self-incrimination when they are interrogated by American officials beyond the borders of the United States, and if so, must they be Mirandized before they are interrogated?

Complicating these issues further is the fact that the laws of many foreign nations do not provide criminal suspects with the panoply of rights embodied in *Miranda*, such as the right to remain silent or the right to speak to an attorney.[10] For example, if an FBI agent conducting an interrogation abroad were to inform a suspect that he has the right to remain silent and the right to an attorney—but the law of that country did not recognize the right to remain silent and dictated that criminal suspects were not entitled to an attorney until trial—the FBI agent would be, in essence, misleading the suspect. Indeed, the FBI agent in such a scenario would be hard pressed to make good on his end of the deal if the suspect heeded the *Miranda* warnings by demanding an attorney. If, on the other hand, the FBI agent chose to forego the standard *Miranda* warnings, any confession he thereafter obtained from that suspect—regardless of whether the confession was voluntary or not—would be inadmissible at trial under existing law if that suspect were later prosecuted in the United States.[11]

This quandary recently was presented to the United States District Court for the Southern District of New York in the 2001 case of *United States v. Bin Laden*.[12] The *Bin Laden* court, facing an issue of first impression, held that the privilege against self-incrimination attaches to non-American citizens who are interrogated abroad by American law enforcement officials.[13] The court further held that *Miranda* warnings must be provided to these suspects to replicate "to

9. *See* Karen DeYoung, *"Sleeper Cells" of Al Qaeda Are Next Target*, WASH. POST, Dec. 3, 2001, at A1 (referring to President George W. Bush's statement that the war against the Taliban and al Qaeda in Afghanistan was "only the beginning of a years-long battle against terrorism"); *see also* Naftali Bendavid, *Obstacles Abound in Global Probe*, CHI. TRIB., Sept. 30, 2001, at C3 (stating that the FBI had already begun to investigate the events of September 11, 2001, in at least thirty countries around the world).

10. *See infra* notes 271–272 and accompanying text.

11. *See infra* note 59 and accompanying text.

12. 132 F. Supp. 2d 168 (S.D.N.Y. 2001).

13. *See id.* at 181 (holding that the privilege against self-incrimination applies to non-Americans who are interrogated abroad but tried in the United States).

the maximum extent reasonably possible . . . what rights would be present if the interrogation were being conducted in America."[14]

This Article explores in detail the Fifth Amendment issues that confronted the *Bin Laden* court.[15] As modern crime becomes increasingly international in scope, other federal courts, and ultimately the Supreme Court, will undoubtedly be forced to confront these issues in the future. Part I provides a detailed examination of the recent *Bin Laden* decision. Part II briefly explores the history of constitutional confession law and the *Miranda* doctrine. Part III addresses whether the Fifth Amendment's privilege against self-incrimination applies to non-American citizens who are tried in this country after being interrogated and making statements abroad, and concludes that the *Bin Laden* court—although its analysis was incomplete—correctly held that it does.

Having concluded that the privilege attaches to such suspects, Part IV examines whether this fact mandates a strict adherence to the domestic dictates of *Miranda* abroad or whether the *Miranda* doctrine can be modified when appropriate to accommodate differences in international law and custom. This Part contends that *Miranda* should be interpreted as a flexible, prophylactic rule, which can in fact be modified or discarded in situations abroad in which its application is illogical. Part V, therefore, critiques the analysis of the *Bin Laden* court, and concludes that the *Bin Laden* court's holding on this point was fundamentally flawed. In this respect, this Part asserts that the *Bin Laden* court did not adequately recognize the balance of competing policies that supports *Miranda* and its exclusionary rule, nor did it acknowledge the prophylactic and flexible nature of the *Miranda* doctrine that naturally flows from this balance. As a result,

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14. *Id.* at 188.

15. This Article does not address whether *Miranda* warnings are required when foreign law enforcement officials, as opposed to American law enforcement officials, conduct the interrogation abroad and the suspect is later brought to the United States to stand trial. *See, e.g.*, United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983) (holding that *Miranda* does not apply when foreign officers conduct an interrogation, but setting aside whether foreign officers could conspire with American officials in a "joint willful attempt to evade the strictures of *Miranda*"); Kilday v. United States, 481 F.2d 655, 656 (5th Cir. 1973) (holding that *Miranda* does not apply when foreign officers conduct interrogation); United States v. Hensel, 509 F. Supp. 1364, 1375 (D. Me. 1981) (holding that where American "agents do not actively participate in the arrest and interrogation, the failure to give *Miranda* warnings does not invoke the Fifth Amendment exclusionary rule"). This Article also does not address whether American law enforcement officials must administer *Miranda* warnings to American citizens abroad. Thus, this Article focuses solely on interrogations conducted by American law enforcement, outside the boundaries of the United States, when the suspect is not an American citizen.

the court established a *Miranda* scheme in the international context that is impractical, unworkable, and unduly burdensome of law enforcement without offering sufficient countervailing protections to civil liberties.

Accordingly, Part VI sets forth an alternative framework—a modification to *Miranda* in the international context—for future cases. This Part proposes a *Miranda* exception in which American law enforcement agents acting abroad must simply inform alien suspects of the rights that they enjoy in the country where the interrogation takes place, to the extent such rights can reasonably be determined by the agents under the exigencies of the circumstances. Thus, if the interrogation takes place in China, where neither the right to remain silent nor the right to counsel during an interrogation is recognized by law,[16] then no *Miranda*-type warnings would be required. The only requirement for admissibility in such a circumstance would be that the confession was made voluntarily. Furthermore, as long as the federal agents advise their suspects of their rights under foreign law in good faith, any mistakes made by the agents in interpreting those rights would not result in the application of the exclusionary rule.

I. *UNITED STATES V. BIN LADEN*

Bin Laden involved the prosecution of several members of the al Qaeda network who were allegedly responsible for the terrorist attacks on American embassies in Kenya and Tanzania on August 7, 1998,[17] which killed 213 people, twelve of whom were Americans.[18] Following the bombing in Kenya, which violated both Kenyan and American law,[19] a team of FBI agents and other American law enforcement officers proceeded to Nairobi, Kenya, to investigate.[20] On August 12, 1998, FBI agents received a tip that led them to the Nairobi hotel room of defendant Mohamed Rashed Daoud Al-'Owhali.[21] Upon finding Al-'Owhali in his room, the Kenyan National Police, who had accompanied the FBI, arrested Al-'Owhali without a

16. *See infra* notes 271–272 and accompanying text.

17. *Bin Laden*, 132 F. Supp. 2d at 172–73, 179–81.

18. *Death Penalty Sought For Convicted Bomber*, MILWAUKEE J. SENTINEL, June 20, 2001, at A5.

19. *Bin Laden*, 132 F. Supp. 2d at 174.

20. *Id.* at 172.

21. *Id.* at 173.

warrant due to his lack of identification papers.[22] Under Kenyan law, the absence of identification papers was a valid basis for arrest.[23]

Upon transporting Al-'Owhali to the headquarters of the Kenyan National Police, an FBI agent administered to him the following *Miranda* warnings, which had been modified from the standard domestic *Miranda* warnings to reflect the fact that the interrogation was taking place in Kenya and in accordance with Kenyan law:

> We are representatives of the United States Government. Under our laws, you have certain rights. Before we ask you any questions, we want to be sure that you understand those rights.
>
> You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now.
>
> If you do speak with us, anything that you say may be used against you in a court in the United States or elsewhere.
>
> In the United States, you would have the right to talk to a lawyer to get advice before we ask you any questions and you could have a lawyer with you during questioning. In the United States, if you could not afford a lawyer, one would be appointed for you, if you wish, before any questioning.
>
> *Because we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning.*
>
> If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.
>
> You should also understand that if you decide not to speak with us, that fact cannot be used as evidence against you in a court in the United States.
>
> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.[24]

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22. *Id.*

23. *Id.*

24. *Id.* at 173–74 (emphasis added). This warning was read to Al-'Owhali from a standard advice of rights form that frequently has been used by American law enforcement overseas. *Id.*

After indicating that he understood these rights, Al-'Owhali agreed to speak to the investigators.[25] Between August 12 and August 21, while in the custody of the Kenyan National Police, Al-'Owhali was interviewed by the FBI on several occasions, and he continually denied his involvement in the bombing.[26] On August 21, however, FBI agents confronted Al-'Owhali with all the evidence they had collected linking him to the Kenyan bombing.[27] "[A]cknowledging that the agents 'knew everything,'" Al-'Owhali stated that he would tell the truth about his role in the bombing if he could be tried in the United States rather than in Kenya.[28] At that point, an Assistant United States Attorney, who was assisting the FBI in its questioning of Al-'Owhali, administered from memory the standard domestic *Miranda* warnings—without making reference to the modified Kenyan version of the warnings that had been administered to him previously.[29] Al-'Owhali proceeded to implicate himself in the Kenyan bombing in detail.[30]

After being brought to the United States for trial, Al-'Owhali moved to suppress all the statements he had made to the American investigators in Kenya on the ground that the modified *Miranda* warnings that had been administered to him when he was first taken into Kenyan custody were deficient under American law.[31] He argued, in essence, that the modified warnings advised him of the limited right to counsel in light of the uncertainties of Kenyan law rather than the unambiguous American right to counsel as required by the *Miranda* decision.[32] The government responded that, as a non-American whose only connection to America was hostile, Al-'Owhali was not protected by the Fifth Amendment's privilege against self-incrimination, and thus, he was not entitled to *Miranda* warnings in the first place.[33] As a result, the government contended the failure to

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at 173. It was first read to him in English, of which he had some comprehension, and was then translated into Arabic, his native tongue. *Id.* at 173–74.

25. *Id.* at 174.

26. *Id.* at 175.

27. *Id.* at 175–76.

28. *Id.* at 176.

29. *Id.* at 176–77.

30. *Id.* at 177.

31. *Id.* at 171–72, 181.

32. *Id.* at 181.

33. *See* Letter from Mary Jo White, United States Attorney, to Hon. Leonard B. Sand 1 (Dec. 11, 2000) (concerning United States v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001) (No. S(7) 98 Cr. 1023)) (on file with the *Duke Law Journal*).

give correct *Miranda* warnings could not be a basis for suppression. The government argued alternatively that even if the court were to rule that the Fifth Amendment attached to Al-'Owhali, the modified warnings that he received were sufficient to satisfy *Miranda* under the circumstances.[34]

The *Bin Laden* court disagreed with the government on both points. First, the court held that the Fifth Amendment's privilege against self-incrimination did in fact apply to Al-'Owhali.[35] Second, the court held that *Miranda*'s requirements must be satisfied in overseas interrogations just as they must be satisfied in domestic interrogations.[36] In doing so, the *Bin Laden* court interpreted *Miranda* and its progeny to require four "warnings" in all international cases. According to the decision, a suspect must be told that: he has the right to remain silent and anything that he does say may be used against him in a court of law; if he were in the United States, he would have an absolute right to counsel before and during any questioning; because he is not in the United States, his right to an attorney depends on foreign law, but the United States government will do its best to help him obtain retained or appointed counsel, if the suspect desires, by making that request of the host country; and if the foreign authorities will not provide him with a lawyer, he does not have to speak with United States authorities, and if he does choose to speak, he may stop at any time.[37] The *Bin Laden* court further required FBI agents abroad to make "a detailed inquiry into a specific nation's law"[38] regarding what *Miranda*-type rights are available to the suspect, and speak to local authorities to determine whether they will allow the suspect to consult with an attorney.[39] This process must be undertaken in an attempt to provide the suspect with the same rights he would enjoy if he were being interrogated in the United States.[40] Because the modified *Miranda* warnings did not

34. *Id.* at 5–6.

35. *Bin Laden*, 132 F. Supp. 2d at 181. *Bin Laden* also dealt with a suppression motion brought on similar grounds by a codefendant of Al-'Owhali's. *Id.* at 172. That part of the court's decision, however, will not be addressed in this Article because it does not add to the relevant analysis.

36. *Id*. at 181.

37. *See id.* at 187–88, 188 n.16. Although the *Bin Laden* court did not set forth its requirements in a numeric order, these four warnings can be synthesized from the court's discussion.

38. *Id.* at 192 n.23.

39. *Id.* at 188 n.16 and accompanying text.

40. *Id.* at 188.

accomplish all of these things, the court suppressed the statements made by Al-'Owhali following these warnings.[41] The court further ruled that the statements made by Al-'Owhali after the Assistant United States Attorney later recited the full domestic warnings to him could be admitted into evidence, as these warnings cured the deficiencies in the previously administered modified version of the *Miranda* warnings.[42]

As set forth in the remaining sections of this Article, the *Bin Laden* court was correct in holding that the privilege against self-incrimination protects non-Americans interrogated abroad but tried in the United States. The court's analysis of the warnings required pursuant to *Miranda* was flawed, however. The court utterly failed to recognize the flexible, prophylactic nature of the *Miranda* doctrine, and in creating the warnings required in the international context, the court did not analyze the competing interests and the balancing test that determine *Miranda*'s applicability to new scenarios. Consequently, the court established an unworkable international *Miranda* framework that is unduly burdensome on law enforcement interests without offering countervailing protections to civil liberties.

II. A BRIEF HISTORY OF CONSTITUTIONAL CONFESSION LAW AND THE *MIRANDA* DOCTRINE

The Fifth Amendment reads, in pertinent part, "No person . . . shall be compelled in any criminal case to be a witness against himself."[43] This privilege against compulsory self-incrimination means, in its simplest form, that a criminal defendant cannot be compelled to testify about the acts that he is charged with committing or about anything else that might incriminate him.[44] In 1897, the Supreme Court in *Bram v. United States*[45] first held that a pretrial

41. *Id.* at 192.

42. *Id.* at 192–94.

43. U.S. CONST. amend. V.

44. *See* Kastigar v. United States, 406 U.S. 441, 444–45 (1972) ("[The Fifth Amendment privilege against compulsory self-incrimination] protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); *see also* Brian R. Boch, *Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 J. CRIM. L. & CRIMINOLOGY 883, 888–89 (1994) (observing that the Fifth Amendment's privilege against self-incrimination protects individuals from being forced to "testify" against themselves).

45. 168 U.S. 532 (1897).

confession made "involuntarily" is inadmissible pursuant to the privilege against self-incrimination.[46] The rationale behind this extension of the privilege from trial testimony to pretrial confessions is that if the police pressure a suspect to give a confession against his will, and if that confession is later used against him at trial, the suspect has essentially been compelled to testify against himself at trial.[47]

After *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.[48] As the Supreme Court summarized in *Dickerson v. United States*,[49] "for the middle third of the 20th century our cases based the rule against admitting coerced confessions primarily, if not exclusively, on notions of due process. We applied the due process voluntariness test in 'some 30 different

46. *Id.* at 565. Although the privilege against self-incrimination protects against the admission into evidence of incriminating statements of any type that were made "involuntarily," this Article refers to all such statements with the generic term "confession" for the sake of simplicity.

47. Miranda v. Arizona, 384 U.S. 436, 461–66 (1966); *see also* Michigan v. Tucker, 417 U.S. 433, 440 (1974) ("Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited."); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) ("The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1844 n.97 (1987) (discussing the rationale behind the extension of the privilege against self-incrimination to pretrial interrogations).

48. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 515–20 (1963) (finding a confession involuntary under a due process "voluntariness" test); Chambers v. Florida, 309 U.S. 227, 235–42 (1940) (same).

49. 530 U.S. 428 (2000).

cases decided during [that] era.'"[50] The Supreme Court summarized its due process voluntariness jurisprudence in *Schneckloth v. Bustamonte*:[51]

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two-hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."
>
> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the

50. *Id.* at 433–34 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)). As a result, it was unclear during that time whether *Bram* was still good law, and whether the privilege against self-incrimination was applicable during a pretrial interrogation. In *Haynes*, for example, the defendant was arrested for robbing a gas station and was taken into police custody. 373 U.S. at 505. Although he orally admitted his guilt, the local police refused to allow the defendant to call his wife, to contact an attorney, or to be arraigned before a magistrate until he agreed to sign a written confession. *Id.* at 507–11. Finally, after being held incommunicado with the outside world for more than sixteen hours, the defendant agreed to sign the written confession. *Id.* at 504. At trial, the defendant was convicted after the government introduced his written confession into evidence. *Id*. After the defendant appealed his conviction to the Supreme Court, the Court held that the due process test for whether a confession is admissible is whether it was made "'freely, voluntarily and without compulsion or inducement of any sort.'" *Id.* at 513 (quoting Wilson v. United States, 162 U.S. 613, 623 (1896)). To determine whether a confession is voluntarily made, a court must consider "all of the attendant circumstances." *Id*. The Court held that the defendant "was alone in the hands of the police, with no one to advise or aid him, and he had 'no reason not to believe that the police had ample power to carry out their threats,' to continue, for a much longer period if need be, the incommunicado detention." *Id*. at 514 (quoting Lynumn v. Illinois, 372 U.S. 528, 534 (1963)). Because the confession in *Haynes* "was obtained in an atmosphere of substantial coercion and inducement created by statements and actions of state authorities," *id.* at 513, the Court ruled that it had not been made voluntarily and should not have been admitted into evidence pursuant to the Due Process Clause of the Fourteenth Amendment. *Id.* at 515–18. Accordingly, the defendant's conviction was overturned. *Id.* at 520. The Court in *Haynes* did not mention the privilege against self-incrimination.

51. 412 U.S. 218 (1973).

> repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.[52]

This due process "voluntariness test" was the governing inquiry for the admissibility of pretrial confessions until the *Miranda* decision in 1966.[53]

In *Miranda v. Arizona*,[54] the Supreme Court changed the initial inquiry from a voluntariness standard to a warning/waiver presumption, and simultaneously altered much of the focus of confession law from due process back to the privilege against self-incrimination.[55] *Miranda* made clear once and for all that the privilege against self-incrimination—in addition to the Due Process Clause—protects suspects from police coercion during pretrial interrogations. *Miranda* established the now familiar principle that, before engaging a suspect in "custodial interrogation,"[56] law enforcement officials must inform the suspect that he has the right to remain silent, that his statements may be used against him at trial, and that he may have retained or appointed counsel during the interrogation.[57] The prophylactic *Miranda* safeguards were designed to protect the suspect from coerced self-incrimination by counteracting the inherently compelling and intimidating pressures of custodial interrogation, thereby creating an environment where a suspect can freely and knowingly invoke his constitutional rights if he so desires.[58] The

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52. *Id.* at 225–26 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)) (citations omitted).

53. *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997) (discussing the history of the privilege against self-incrimination and the voluntariness test).

54. 384 U.S. 436 (1966).

55. Both *Miranda* and *Malloy v. Hogan*, 378 U.S. 1 (1964) (overturning a state gambling conviction when the defendant was held in contempt because he refused to answer questions about the charge), returned the focus to the privilege against self-incrimination. *Miranda*, 384 U.S. at 457–58; *Malloy*, 378 U.S. at 5–14; *see also* Dickerson v. United States, 530 U.S. 428, 434 (2000) ("[O]ur decisions in *Malloy* . . . and *Miranda* changed the focus of much of the inquiry in determining the admissibility" of confessions from a due process inquiry to a focus on the privilege against self-incrimination); Michigan v. Tucker, 417 U.S. 433, 442–44 (1974) (noting that *Miranda* returned much of the focus of confession law to the privilege against self-incrimination).

56. *Miranda*, 384 U.S. at 444.

57. *Id.* at 444–45; *see also* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT NO. 1: THE LAW OF PRETRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 485–91 (1989) (discussing the obligations that *Miranda* places on police officers).

58. *Miranda*, 384 U.S. at 467; *see also* David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 806–07 (1992) (explaining that *Miranda* warnings

Supreme Court employed the exclusionary rule as a means of deterring police officers from ignoring the mandates of *Miranda*: if the police do not disclose to a suspect his rights before the interrogation begins, the prosecution may not use the suspect's subsequent incriminating statements against him during its case-in-chief.[59]

The Supreme Court subsequently made clear that *Miranda*, and its focus on the privilege against self-incrimination, were not intended to completely abandon the due process voluntariness test, but rather were intended to add a new layer of analysis on top of the preexisting standard.[60] If, for example, a suspect waived his *Miranda* rights, but his confession were nevertheless made involuntarily as a result of undue police coercion, the confession would still be suppressed under the former due process "voluntariness" test.[61]

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were designed to counteract the compelling pressures of custodial interrogation). Although the *Miranda* decision established that suspects have a right to counsel during a custodial interrogation, the Court derived this right from the privilege against self-incrimination rather than the separate right to counsel embodied in the Sixth Amendment. The *Miranda* court reasoned that the presence of defense counsel during an interrogation would lessen the coercive atmosphere of an interrogation. *Miranda*, 384 U.S. at 465–67, 469–70.

59. *Miranda*, 384 U.S. at 476–77; *see also* Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 9 (2001) (discussing the fact that "the conventional case for the exclusionary rule rests on deterrence").

60. *Dickerson*, 530 U.S. at 434 (stating that "[w]e have never abandoned this due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily," and noting that *Miranda* added an additional layer of protection based upon the privilege against self-incrimination).

61. *Id.*; *see also* Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984) ("We do not suggest that compliance with *Miranda* conclusively establishes the voluntariness of a subsequent confession. But cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). In the 1930s, when the Supreme Court began overturning state convictions in which involuntary confessions had been introduced, the Court used the Due Process Clause of the Fourteenth Amendment, rather than the textually more appropriate privilege, because the privilege had not yet been incorporated through the Fourteenth Amendment to apply to the states. Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Pt. 2)*, 53 OHIO ST. L.J. 497, 519–20 (1992). Thus, the only option that the Court had at its disposal to exclude a confession was to find a corollary to the privilege within the Due Process Clause of the Fourteenth Amendment. However, when the Court finally ruled in 1964 in *Malloy v. Hogan*, 378 U.S. 1, 3 (1964), that the privilege applies to the states through the Fourteenth Amendment, it seemed logical that the Court would have soon thereafter substituted the privilege against self-incrimination for the Due Process Clause as the primary basis for excluding confessions that offend the Constitution. This, however, did not occur. *Dickerson*, 530 U.S. at 434; Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("The Court has retained [a] due process focus, even after holding, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States.").

Thus, *Miranda* created a presumption that if the suspect were adequately advised of his rights and knowingly waived those rights, any statements by the suspect that followed were made voluntarily. Like all presumptions, however, this presumption could be rebutted. Furthermore, the Supreme Court has carved out exceptions to *Miranda* by ruling that certain circumstances exist where a police officer does not have to Mirandize a suspect.[62] Whenever *Miranda* does not apply, however, the confession will still be suppressed if it were made involuntarily pursuant to the due process voluntariness test.[63]

Thus, the due process voluntariness doctrine and the *Miranda* doctrine work in tandem. If *Miranda* warnings were not given, then the confession must be suppressed pursuant to the privilege against self-incrimination unless the facts fit within an exception to *Miranda*. If, on the other hand, *Miranda* was satisfied (either because the proper warnings were given or the facts fit within a *Miranda* exception) the confession may still be inadmissible under the Due Process Clause if, due to police coercion, it was made involuntarily. It is axiomatic that because *Miranda* is a presumption designed to protect the privilege against self-incrimination, *Miranda* warnings must be administered only to those individuals who may properly claim Fifth Amendment protection. The first step in determining whether *Miranda* warnings must be administered to non-Americans abroad, therefore, is to determine whether such individuals may properly claim protection of the privilege against self-incrimination.

III. THE APPLICABILITY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION TO NON-AMERICANS ABROAD WHO ARE LATER TRIED IN THE UNITED STATES

A. The Ascending Scale of Rights Test

Prior to the decision of the *Bin Laden* court, no court had directly addressed the application of the privilege against self-incrimination to non-Americans who were interrogated abroad and

62. *See infra* Part IV.B.

63. *See infra* Part IV.B.

then tried in the United States.[64] Finding no controlling precedent, the government argued in *Bin Laden* that the defendant, Al-'Owhali, was

64. United States v. Bin Laden, 132 F. Supp. 2d 168, 181 (S.D.N.Y. 2001) (noting that it was addressing an issue "of first impression"). A handful of cases purport at first glance to address the issue, but upon closer examination provide limited guidance. In *United States v. Welch*, 455 F.2d 211 (2d Cir. 1972), for example, the defendant was arrested by the Bahamian police at a bank in the Bahamas where he was attempting to deposit a United States treasury bill that had been stolen from a bank in New York City. *Id.* at 212. After being taken to police headquarters, the defendant made incriminating statements to the Bahamian police without first having been advised of his complete *Miranda* rights. *Id.* at 212–13. After being brought to the United States for trial, the defendant moved to suppress those statements pursuant to *Miranda*. *Id.* at 212. In upholding the district court's denial of the defendant's motion to suppress, the Second Circuit ruled that "since the *Miranda* requirements were primarily designed to prevent United States police officers from relying upon improper interrogation techniques and as the requirements have little, if any, deterrent effect upon foreign police officers, the *Miranda* warnings should not serve as the *sine qua non* of admissibility." *Id.* at 213. Because *Miranda*'s exclusionary rule was designed to deter American police officers from ignoring the dictates of that decision, applying the rule to the Bahamian police—who may not be aware of the *Miranda* decision and who are not bound by American law—would have little additional impact in protecting the privilege. The *Welch* decision was in accord with a line of cases from various circuits holding that *Miranda* does not apply to interrogations abroad that are conducted by foreign—as opposed to American—law enforcement officials. *See supra* note 15; *infra* note 321; *see also* Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444, 454–55 (1990) (discussing the line of cases holding that *Miranda* does not apply to interrogations conducted by foreign police). Having dispensed with *Miranda*, the *Welch* court then went on to note, without significant discussion, that the defendant's confession was voluntary and thus the admission of his confession at trial did not run afoul of the privilege against self-incrimination. 455 F.2d at 213. By applying the privilege's voluntariness test to the facts of that case, the *Welch* court suggested—or, more correctly, assumed for argument's sake—that the privilege applies abroad.

Similarly, both the Fifth Circuit in *Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973), and the Ninth Circuit in *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967), agreed with the Second Circuit in *Welch* that *Miranda*'s exclusionary rule does not apply to interrogations conducted by foreign police, and noted in dicta that the confessions in those cases were voluntary and did not run afoul of the privilege against self-incrimination. *Kilday*, 481 F.2d at 655–56; *Brulay*, 383 F.2d at 348. *Welch*, *Brulay*, and *Kilday*, however, hardly can be said to constitute definitive rulings on the application of the privilege to non-Americans abroad. First, the defendant in *Brulay* was an American citizen. 383 F.2d at 349. The other two decisions did not even mention the nationality of their respective defendants. Given the facts of *Kilday* and *Welch*, where significant parts of the crimes in question occurred in the United States, it is quite possible that those courts did not address the citizenship issue because the defendants in each case were Americans. *Kilday*, 481 F.2d at 655; *Welch*, 455 F.2d at 212. In none of the aforementioned cases was there any credible suggestion that the confessions were involuntary, and therefore, these courts simply mentioned in passing that the privilege against self-incrimination would not provide an additional basis for relief. These cases did not directly address the issue or offer a level of analysis suggesting that the courts were ruling squarely on the tricky issue of the extraterritorial application of the privilege to non-Americans abroad. It is perhaps for these reasons that the *Bin Laden* court cited this line of cases in a footnote and correctly noted that they provided only "limited" guidance in determining whether the privilege applies to aliens abroad. 132 F. Supp. 2d at 182 n.9.

not protected by the privilege against self-incrimination because he was not an American citizen and his only contacts with the United States were hostile in nature.[65] This argument was based upon two Supreme Court cases, *Johnson v. Eisentrager*[66] and *United States v. Verdugo-Urquidez*,[67] both of which held that certain constitutional rights do not apply extraterritorially to non-Americans who have little or no connection to the United States. In *Eisentrager*, twenty-one German nationals petitioned a federal court in the United States for writs of *habeas corpus* on the ground that their trial, convictions, and imprisonment had not comported with the Due Process Clause of the Fifth Amendment.[68] The German nationals, who had served in China in the German armed forces during World War II, had been convicted by an American military commission in China, and they were serving their sentences in China under the control of American military authorities.[69] After the United States District Court for the District of Columbia dismissed the petitions, the court of appeals reversed, holding that the Fifth Amendment's seemingly all-inclusive language—"No *person* shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law"—means that its application is not limited to American citizens.[70] The Supreme Court reversed, stating that "[t]he Court of Appeals has cited no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever

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Furthermore, in the 1897 case of *Bram v. United States*, 168 U.S. 532 (1897), the defendant, a crewman on an American vessel, allegedly committed a murder upon the high seas and was interrogated by Canadian police when his ship arrived in Halifax, Nova Scotia. *Id.* at 537. The defendant made incriminating statements to the Canadian officers during the interrogation, and was eventually transported back to Massachusetts to stand trial for murder. *Id.* After appealing his conviction to the United States Supreme Court, the Court reversed his conviction on the ground that the defendant had made the incriminating statements involuntarily as a result of pressure applied by the Canadian police. *Id.* at 562–65. The Court did not discuss the extraterritorial application of the privilege against self-incrimination in the decision, but simply analyzed the facts of the case as if it were assumed that the privilege applies in Canada where the interrogation took place. Because the defendant in that case was an American citizen, however, *Bram* also provides limited guidance in determining the application of the privilege to non-Americans interrogated abroad.

65. 132 F. Supp. 2d at 181.

66. 339 U.S. 763 (1950).

67. 494 U.S. 259 (1990).

68. 339 U.S. at 767.

69. *Id.* at 765–67.

70. *Id.* at 781.

their offenses."[71] The Court noted that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society."[72] Presence in the country confers certain rights upon aliens, which expands once citizenship is obtained.[73] Because the petitioners were non-Americans who were located in China and had "remained in the service of the enemy," they were not entitled to the due process protections of the Fifth Amendment.[74]

In *Verdugo-Urquidez*, agents of the Drug Enforcement Administration (DEA) arrested a Mexican citizen and transported him to the United States to stand trial for smuggling narcotics into the United States.[75] Following his arrest, DEA agents searched the defendant's Mexican home without a warrant and found incriminating evidence therein.[76] Prior to trial, the defendant moved to suppress the evidence found during the search on the ground that the DEA agents violated his Fourth Amendment rights by searching his home without a warrant.[77] After the district court and court of appeals both agreed with the defendant and suppressed the evidence,[78] the Supreme Court reversed.[79] Central to its holding were the facts that the defendant was not an American citizen and the search in question took place beyond the borders of the United States.[80] The Court distinguished a line of cases that had extended

71. *Id.* at 783.

72. *Id.* at 770.

73. *Id*.

74. *Id*. at 776. In contrast, the Supreme Court has held that when the U.S. government acts with respect to American citizens located abroad, those citizens are entitled to the protections of the U.S. Constitution. Reid v. Covert, 354 U.S. 1, 6 (1957).

75. United States v. Verdugo-Urquidez, 494 U.S. 259, 262 (1990).

76. *Id.* at 262–63.

77. *Id.* at 263.

78. *Id*.

79. *Id.* at 274–75.

80. *Id*.

certain constitutional rights to non-Americans[81] on the ground that the alleged constitutional violations in those cases had all occurred within the United States.[82] The Court recognized that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[83] But because the defendant was "an alien who has had no previous significant voluntary connection with the United States," his claim for Fourth Amendment protection was denied.[84]

Thus, in *Eisentrager* and *Verdugo-Urquidez*, the Supreme Court set forth a test by which aliens are granted certain constitutional protections to the extent that they have voluntarily connected themselves with the United States. In the *Bin Laden* case, Al-'Owhali was not a citizen of the United States, was not present in the United States when he was interrogated, and his only connection to the United States was hostile in nature—his attack against the American embassy in Kenya. If one were to apply this test to Al-'Owhali, as the government urged the *Bin Laden* court to do, one would have to conclude that he was not protected by the Fifth Amendment, and thus, he was not entitled to *Miranda* warnings. Accordingly, his motion to suppress presumably would have been summarily denied.

B. Rejecting the Ascending Scale of Rights Test for the Privilege Against Self-Incrimination

As set forth in this Article, the ascending scale of rights test does not apply to the Fifth Amendment's privilege against self-incrimination for two reasons. Most importantly, the privilege against

81. Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (confirming that illegal aliens are protected by the Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (determining that a resident alien is a "person" within the meaning of the Fifth Amendment); Bridges v. Wixson, 326 U.S. 135, 148 (1945) (reminding courts that resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931) (allowing that "alien friends" on the high seas are protected by the Just Compensation Clause of the Fifth Amendment when the United States has taken their property); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (inferring from prior case law that resident aliens are entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (finding that resident aliens are entitled to Fourteenth Amendment protection).

82. *Verdugo-Urquidez*, 494 U.S. at 271 ("These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and develop substantial connections with this country.").

83. *Id.* (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953)) (emphasis and internal citations omitted).

84. *Id.*

self-incrimination is a trial right only; it is triggered at the time of trial in the United States, not at the time of the pretrial interrogation in a foreign country. In addition, the Fifth Amendment employs the expansive language "no person" rather than the limiting phrase "the people" that appears in the Fourth Amendment.

1. *The Privilege Against Self-Incrimination Is a Trial Right*. Based upon a strict interpretation of the text of the Fifth Amendment ("No person . . . shall be compelled to be a *witness*") the Supreme Court has ruled that the privilege against self-incrimination applies only if and when the defendant becomes a witness against himself at his criminal trial.[85] Therefore, if a law enforcement officer were to use brute force and torture to extract an involuntary confession from a suspect, the officer would not at that time have violated the privilege because the suspect would not yet have testified against himself at trial.[86] If, however, the suspect were later prosecuted and the government introduced his involuntary confession into evidence against him, he would then be considered a witness against himself, and the Fifth Amendment violation would occur.

This distinction is made clear in the line of federal cases dealing with governmental grants of immunity to witnesses. In *Kastigar v. United States*,[87] for example, the petitioners had been subpoenaed to testify as witnesses before a federal grand jury.[88] The petitioners invoked the privilege against self-incrimination and refused to testify.[89] In response, the government applied to the district court for an order, pursuant to a federal statute, that granted the petitioners immunity from prosecution.[90] After the district court immunized the

85. *Id.* at 264.

86. It should be noted, of course, that police conduct that "shocks the conscience" would violate the Fifth Amendment's guarantee against deprivation of "life, liberty, or property, without the due process of law." Harbury v. Deutch, 233 F.3d 596, 602 (D.C. Cir. 2000) (citing Rochin v. California, 342 U.S. 165, 172–73 (1952)). This police conduct would also violate the due process "voluntariness" test. *See supra* notes 48-53 and accompanying text.

87. 406 U.S. 441 (1972).

88. *Id.* at 442.

89. *Id*.

90. *Id*. In response to the government's request, the district court granted immunity to the petitioners, *id.*, pursuant to the authority vested in it by 18 U.S.C. § 6002 (1994), which states:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—(1) a court or grand jury of the United States, (2) an agency of the United States, or (3) either House of Congress, a joint committee of the two Houses, or a committee or subcommittee of either House, and the person presiding over the proceeding

petitioners, however, they still refused to testify and were held in contempt and detained until they agreed to do so.[91] In discussing the constitutionality of statutes that authorize the government to immunize a witness and then compel his testimony, the Supreme Court made clear that the "sole concern" of the privilege was not the forcible extraction of testimony, but rather the use of such testimony to inflict criminal penalties upon the witness.[92] Once a witness has been granted immunity and, as a consequence, cannot be prosecuted based upon his testimony, the privilege against self-incrimination no longer prohibits the government from forcibly extracting incriminating statements from that witness.[93] The Supreme Court concluded in *Kastigar* that when witnesses are granted immunity and still refuse to testify, the government may forcibly compel their testimony—without violating their Fifth Amendment rights—by detaining them until they agree to take the witness stand. [94]

In contrast, the Fourth Amendment protects privacy rights by prohibiting "unreasonable searches and seizures" *regardless* of whether the evidence collected during the search is later introduced at a criminal trial in the United States.[95] The defendant in *Verdugo-Urquidez* argued that the government had violated this protection when the DEA agents searched his home without a warrant.[96] The defendant asserted that because he was present in the United States during his trial, and the government was attempting to introduce evidence obtained during its warrantless search at that trial, he should

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> communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

91. 406 U.S. at 442.

92. *Id.* at 453.

93. *Id.*; *see also* Mahoney v. Kesery, 976 F.2d 1054, 1061–62 (7th Cir. 1992) (noting that the Fifth Amendment privilege against self-incrimination does not protect a witness after he or she has been granted immunity).

94. 406 U.S. at 442.

95. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (holding that the Fourth Amendment prohibits unreasonable searches and seizures "whether or not the evidence is sought to be used in a criminal trial"); Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (noting that, in contrast to the Fifth Amendment, "[t]he protections of the Fourth Amendment are of a wholly different order . . . and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial").

96. *Verdugo-Urquidez*, 494 U.S. at 262–63.

be protected by the Fourth Amendment.[97] The Supreme Court ruled in *Verdugo-Urquidez*, however, that a violation of the Fourth Amendment is "fully accomplished" at the time of the unlawful search in question—not when the evidence is introduced later at trial.[98] The defendant's home was located in Mexico, and, as a result, the government conduct that was alleged to be unconstitutional occurred solely outside of the United States.[99] Since the defendant was a non-American who could only claim an alleged violation outside of the United States, he had no Fourth Amendment protection.[100] Thus, the Fourth and Fifth Amendments are different in the sense that a Fourth Amendment violation occurs, if at all, when the "unreasonable" search takes place and not at trial when the evidence collected during the search is introduced. The Fifth Amendment's privilege against self-incrimination, on the other hand, is a trial right, and can be triggered only in a courtroom setting when the defendant's confession is introduced and he becomes a "witness" against himself.

In light of this distinction, whether the interrogation occurs within the borders of the United States or abroad becomes immaterial to the applicability of the privilege if the suspect later stands trial in the United States. In the *Bin Laden* case, for example, the defendant Al-'Owhali was interrogated in Kenya. Despite the government's arguments to the contrary, this fact plays no part in the legal analysis. Indeed, the alleged constitutional violation against Al-'Owhali—the introduction of his confession—occurred *within the territory of the United States* in the courtroom in New York City where he was tried. It is for this reason that the *Bin Laden* court chastised the government because it:

> incorrectly frame[d] the legal issue as one dependent on the extraterritorial application of the Fifth Amendment. Whether or not Fifth Amendment rights reach out to protect individuals while they are situated outside the United States is beside the point. This is because any violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant's involuntary statements are actually used against him at an American

97. *Id*.
98. *Id.* at 264.
99. *Id.* at 274–75.
100. *Id*.

> criminal proceeding . . . . The violation of the Defendant's rights here, if any, is clearly prospective, and so the relevant question is the scope of the privilege against self-incrimination as to non-resident aliens presently inside the United States and subject to domestic criminal proceedings. . . .[101]

The court added in a footnote: "It is for this reason that the Government's heavy reliance on [the ascending scale of rights test set forth in *Verdugo-Urquidez*, *Eisentrager* and *Harbury*[102]] is fundamentally misplaced. In all three cases, the putative constitutional injury occurred entirely abroad, thereby necessarily raising the issue of a specific Amendment's extraterritorial effect."[103]

Thus, once it is understood that a violation of the privilege does not occur until trial in the United States, the Fifth Amendment's privilege against self-incrimination can be distinguished from the rights at stake in those cases in which the Supreme Court adopted the ascending scale of rights approach. In *Verdugo-Urquidez* and *Eisentrager*, if constitutional violations actually occurred, they occurred outside of the United States.[104] In fact, in connection with the privilege against self-incrimination, it becomes apparent that the location of the trial, not the location of the interrogation, is the dispositive factor. If a non-American who confessed abroad is later tried in the United States, the question is not whether the privilege against self-incrimination applies abroad, but whether non-Americans located *within the boundaries of the United States*, for the purpose of

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101. *Bin Laden*, 132 F. Supp. 2d 168, 181–82 (S.D.N.Y. 2001) (citations omitted).

102. In *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), *cert. granted sub nom.* Christopher v. Harbury, 122 S. Ct. 663 (2001), the plaintiff, a United States citizen, brought suit in federal court against the United States alleging that American officials of the Central Intelligence Agency located in Guatemala had participated in the torture and murder of her husband, a Guatemalan citizen. *Id.* at 598. She alleged that such conduct violated her husband's right to due process under the Fifth Amendment. *Id.* The D.C. Circuit rejected this claim on that ground that the plaintiff's husband, as a non-American, could not claim Fifth Amendment protection outside of the United States. *Id.* at 603. The prosecution in *Bin Laden* had relied on this case in arguing that Al-'Owhali was not protected by the Fifth Amendment. 132 F. Supp. 2d at 182 n.10. Because the injury to Al-'Owhali occurred at trial inside the United States, however, *Harbury* is distinguishable.

103. *Bin Laden*, 132 F. Supp. 2d at 182 n.10 (citations omitted). Although Al-'Owhali's statements were voluntary, it was necessary for the *Bin Laden* court to perform this Fifth Amendment analysis. Indeed, as set forth *supra* at notes 43–63 and accompanying text, the first step in determining whether *Miranda* applies is to determine whether the suspect is entitled to the protections of the privilege against self-incrimination.

104. In *Eisentrager* the alleged constitutional injury was "fully accomplished" in China. *See infra* note 116 and accompanying text. In *Verdugo-Urquidez*, however, the alleged injury was fully accomplished in Mexico. *See supra* notes 99–100 and accompanying text.

attending their criminal trial, are protected by the privilege. Although the Supreme Court has not ruled on the applicability of the Fifth Amendment's privilege against self-incrimination to non-Americans who are located within the United States, it has ruled that they are entitled to equal protection rights,[105] First Amendment rights,[106] just compensation rights under the Fifth Amendment,[107] and certain due process rights under the Fourteenth and Fifth Amendments.[108] As the Supreme Court expressed in *Mathews v. Diaz*[109] in connection with the application of the Due Process Clause of the Fifth Amendment:

> There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of them from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[110]

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105. Plyler v. Doe, 457 U.S. 202, 211–12 (1982) (holding that illegal aliens are protected by the Equal Protection Clause); *see generally* Monroe Leigh, Recent Case, Plyler v. Doe, *102 S. Ct. 2382 (1982)*, 77 AM. J. INT'L L. 151 (1983).

106. Bridges v. Wixon, 326 U.S. 135, 148 (1945) (holding that aliens have First Amendment rights); *see generally* Maryam Kamali Miyamoto, *The First Amendment After* Reno v. American-Arab Anti-Discrimination Committee: *A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000) (discussing the application of the First Amendment to aliens).

107. Russian Volunteer Fleet v. United States, 282 U.S. 481, 491–92 (1931).

108. Wong Wing v. United States, 163 U.S. 228, 238 (1896) (holding that resident aliens are protected by the Fourteenth Amendment and stating in dicta that they also are protected by the Fifth and Sixth Amendments); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment protects resident aliens).

109. 426 U.S. 67 (1976).

110. *Id.* at 77 (citations omitted). A line of Supreme Court cases known as the "Insular Cases" appear at first glance to contradict the cases discussed *supra* notes 105–108 and accompanying text, but, upon closer inspection, these cases are distinguishable. In the Insular Cases, the Supreme Court held that certain constitutional rights do not apply to citizens of certain territories of the United States. *See* Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) (holding that the Sixth Amendment right to a jury trial was inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91, 98 (1914) (holding that the Fifth Amendment grand jury provision was inapplicable in the Philippines); Dorr v. United States, 195 U.S. 138, 149 (1904) (holding that the right to a jury trial was inapplicable in the Philippines); Hawaii v. Mankichi, 190 U.S. 197, 215–18 (1903) (holding that the provisions on indictment by grand jury and jury trial were inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244, 287 (1901) (holding that the Revenue Clauses of the Constitution were inapplicable to Puerto Rico). In these cases, however, the question was whether Congress, in territorializing such places as the Philippines and Puerto Rico, intended to make them so incorporated into the United States that the entire Constitution would apply therein. In each of these cases, the Supreme Court interpreted the treaties and laws in question that gave the United States a degree of sovereign power over these areas, and answered the question in the negative. *E.g.*, *Ocampo*, 234 U.S. at 98–99. Thus,

The *Bin Laden* court, however, was the first to rule on the application of the privilege against self-incrimination to aliens who are tried within the United States. The court correctly held that because the privilege against self-incrimination is a unique right that can be violated only at trial in the United States, the ascending-scale of rights test does not apply to that clause.

2. *The Scope of the Privilege Against Self-Incrimination is Not Limited to "the People."* The *Bin Laden* court was further persuaded that the privilege protects non-Americans during interrogations abroad because of the seemingly expansive language of the Fifth Amendment. Based upon the language of the amendment that "No *person* shall . . . be compelled in any criminal case to be a witness against himself," the court held that the privilege applies to any "person" prosecuted by the United States, regardless of nationality.[111] The court relied upon the Supreme Court's *Verdugo-Urquidez* decision, which held that the Fourth Amendment does not apply to a search of an alien's home located beyond the borders of the United States,[112] as the basis for its ruling.[113] The Supreme Court in *Verdugo-Urquidez* was persuaded by the fact that the Fourth Amendment expressly limits its application to "the people." After analyzing the use of the phrase "the people" in other parts of the Constitution and the Framers' intent in enacting the Fourth Amendment, the Supreme Court held that this phrase refers "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United States] to be considered part of that community."[114] The *Bin Laden* court, as a result, contrasted the Framers' use of the phrase "the people" in the Fourth Amendment

citizens of the Philippines, for example, were not intended by Congress to be considered so a part of the United States that they could claim protection of the U.S. Constitution. *Id.* In contrast, when a non-American is present within the borders of the United States, as in *Plyler*, *Bridges*, *Russian Volunteer Fleet*, *Wong Wing*, and *Yick Wo*, his position is markedly better, as the application of the Constitution to such an individual does not turn on the interpretation of treaties or congressional intent. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (discussing the Insular Cases); *see also* Michael A. Cabotaje, Comment, *Equity Denied: Historical and Legal Analyses in Support of the Extension of United States Veteran Benefits to Filipino World War II Veterans*, 6 ASIAN L.J. 67, 88–96 (1999) (discussing the Insular Cases).

111. United States v. Bin Laden, 132 F. Supp. 2d 168, 183 (S.D.N.Y. 2001).

112. *See supra* notes 75–80 and accompanying text.

113. *Bin Laden*, 132 F. Supp. 2d at 183.

114. *Verdugo-Urquidez*, 494 U.S. at 265.

with the seemingly broader term "person" in the Fifth Amendment and stated:

> The crucial phrase is "no person" and it neither denotes nor connotes any limitation in scope, in marked contrast to the use of "the people" in most of the other Amendments contained within the Bill of Rights. From the outset, then, these protections [the privilege against self-incrimination and *Miranda*] seemingly apply with equal vigor to all defendants facing criminal prosecution at the hands of the United States, and without apparent regard to citizenship or community connection.[115]

The *Bin Laden* court unfortunately stopped there, however, and did not address *Eisentrager* in its textual analysis. *Eisentrager* held that the Fifth Amendment did not apply to German nationals who were tried by an American military commission in China for war crimes against the United States.[116] The Supreme Court in *Eisentrager* expressly focused on the phrase "no person" in the text of the Fifth Amendment and held that it would be impractical to suggest that this language "confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offense."[117] To do so would vest non-Americans abroad with First Amendment rights,[118] Second Amendment rights,[119] and other important constitutional rights traditionally thought to apply within the borders of the United

115. 132 F. Supp. 2d at 183 (citations omitted); *see also* Lowenfield, *supra* note 64, at 452–54 (contrasting the use of the phrase "the people" in the Fourth Amendment and the phrase "No person" in the Fifth Amendment).

116. Johnson v. Eisentrager, 339 U.S. 763, 790 (1950); *see also supra* notes 68–74 and accompanying text. The *Bin Laden* court addressed *Eisentrager* in a footnote in connection with its holding that the privilege against self-incrimination is not implicated until trial, *see supra* notes 64–67, 102–104 and accompanying text, but failed to focus on *Eisentrager* in its discussion of the phrase "No person."

117. *Eisentrager*, 339 U.S. at 783.

118. The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

119. The Second Amendment to the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Since the Second Amendment employs the phrase "the people," it is difficult to understand how the *Eisentrager* Court believed that an expansive interpretation of the phrase "No person" in the Fifth Amendment would necessarily mean that non-Americans abroad could claim protection of the Second Amendment—particularly in light of *Verdugo-Urquidez's* limited interpretation of "the people."

States.[120] The Supreme Court expressed that "such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view."[121] Forty years later in *Verdugo-Urquidez*, when interpreting the limited meaning of "the people" as found in the text of the Fourth Amendment, the Court cited *Eisentrager* favorably and suggested in dicta that the Fifth Amendment's introductory phrase "no person" does not necessarily render the protections of the Fifth Amendment universally applicable.[122]

An argument can be made, however, that *Eisentrager* was intended to be limited to its wartime facts. The Supreme Court's primary concern in extending the civil liberties contained in the Bill of Rights to wartime enemies seemed to be the potentially crippling effect it would have on the ability of the United States to conduct warfare.[123] The Court explored in detail the American tradition of vesting the power to deal with citizens of enemy nations exclusively in the executive branch of government, and noted, "Executive power over enemy aliens, *undelayed and unhampered by litigation*, has been deemed, throughout our history, essential to war-time security."[124] The Court held that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[125] To vest nonresident alien enemies with the right to bring suit in the United States alleging violations of the Bill of Rights would "hamper the war effort and bring aid and comfort to the enemy."[126]

Once it is understood that the privilege against self-incrimination is not triggered until trial, the *Eisentrager* case can be distinguished

120. *Eisentrager*, 339 U.S. at 784.

121. *Id*.

122. United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990).

123. *Eisentrager*, 339 U.S. at 773–81.

124. *Id.* at 774 (emphasis added).

125. *Id.* at 776.

126. *Id.* at 779. The *Eisentrager* Court also noted that American servicemen are stripped of certain constitutional rights when they enter the armed services. To allow wartime enemies to claim constitutional rights would thereby put them in a better position than our own servicemen. *Id.* at 783.

not simply because it dealt with nonresident enemy aliens, but also because the petitioners were tried by a military commission in China and never came within the territory of the United States.[127] Indeed, the Supreme Court held in *Wong Wing v. United States*,[128] albeit in the context of the Due Process Clause, that the phrase "no person" in the text of the Fifth Amendment renders the Due Process Clause applicable "to all persons *within the territorial jurisdiction*, without regard to any differences of race, of color, or nationality."[129] Because the privilege against self-incrimination begins with the same "no person" language as does the Due Process Clause, and because the privilege can be violated only at trial when the suspect is "within the territorial jurisdiction" of the United States, *Wong Wing*'s interpretation of the phrase "no person" should control.

Thus, the holdings of *Verdugo-Urquidez*, *Eisentrager*, and *Wong Wing* together suggest that the Fifth Amendment's use of the phrase "no person" renders it applicable to all aliens who are within the territory of the United States when the constitutional violation occurs. The only limitation established thus far deems the privilege against self-incrimination inapplicable to suspects who are wartime enemies tried outside of the United States.[130] Any non-American who is interrogated abroad and then tried in the United States, such as Al-'Owhali in the *Bin Laden* case, would therefore be considered a "person" within the meaning of the privilege against self-incrimination.[131]

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127. *Id.* at 763.

128. 163 U.S. 228 (1896).

129. *Id*. at 238 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)) (emphasis added).

130. An argument perhaps could have been made in the *Bin Laden* case that there should be a "terrorism exception" to the *Miranda* rule, given that terrorism is a war-like act and seems to some extent to be replacing traditional warfare. An individual who is suspected of a terrorist act against the United States could arguably be considered analogous to an "enemy alien" as the petitioners were labeled in *Eisentrager*. This argument, however, was not made in that case.

131. There is perhaps another distinct reason why the privilege against self-incrimination should apply to aliens tried in the United States, although the *Bin Laden* court did not address it. The Supreme Court made clear in *Oregon v. Elstad*, 470 U.S. 298 (1985), that confessions taken in violation of the privilege against self-incrimination are excluded from evidence based upon the "twin rationales" of protecting civil liberties and ensuring that all confessions admitted into evidence are trustworthy. *Id.* at 308. Regarding the "trustworthiness" rationale, when a confession has been extracted through undue coercion, there is a serious risk that the suspect may have confessed not because he is guilty, but rather because he could not withstand additional pressure. As a result, the confession cannot be considered reliable. *See* Bram v. United States, 168 U.S. 532, 546 (1897) ("[P]ain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on.") (quoting GEOFFREY GILBERT, THE LAW ON EVIDENCE (2d ed. 1760)).

One could argue that the privilege against self-incrimination should extend to non-Americans tried in the United States regardless of their connection to this country simply because of this "trustworthiness" rationale. Indeed, if the privilege against self-incrimination is viewed as a derivative of the "civil liberties" rationale alone, the privilege could be considered analogous, at least in underlying policy, to the rights embodied in the Fourth Amendment. The Fourth Amendment, as explained earlier, is based upon a single rationale (protecting civil liberties) and therefore provides protection only to citizens and noncitizens with a significant connection to the United States. In *Verdugo-Urquidez*, DEA agents seized evidence from the alien-defendant's home and later introduced that evidence at trial. *Verdugo-Urquidez*, 494 U.S. at 262–63. The fact that the DEA did not follow the requirements of the Fourth Amendment in that case, however, did not render that evidence unreliable. The evidence (drug-dealing notes and ledgers) did not suddenly change in form or otherwise become less probative of the fact that the defendant was a drug dealer simply because the DEA seized it without a warrant. As the Supreme Court has noted previously, "The protections of the Fourth Amendment are of a wholly different order [than the Fifth Amendment], and have nothing to do with promoting the fair ascertainment of truth at a criminal trial . . . . '[T]here is no likelihood of unreliability or coercion present in a search-and-seizure case.'" Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (quoting Linkletter v. Walker, 381 U.S. 618, 638 (1965)). The Supreme Court in *Verdugo-Urquidez* presumably allowed the introduction of the evidence seized without a warrant not only because the defendant was a non-American who could not claim Fourth Amendment protection beyond the borders of the United States, but also because the admission of that evidence did not raise reliability concerns. *See Verdugo-Urquidez* 494 U.S. at 264 ("Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation."). In contrast, when a confession is extracted through force and coercion in violation of the privilege against self-incrimination, the confession's reliability becomes suspect because the defendant may have confessed simply to avoid further punishment. This concern does not suddenly disappear when the defendant on trial is not a citizen of this country, as the United States has an interest in the proper administration of its courts regardless of the nationality of the defendant on trial.

In *Colorado v. Connelly*, 479 U.S. 157 (1986), however, the Supreme Court arguably undercut this argument. In *Connelly*, the defendant was a schizophrenic who unexpectedly walked up to a police officer and confessed to a murder after he heard "voices from God" commanding him to confess or kill himself. *Id.* at 160–61. Connelly argued that despite the fact that the police did not coerce or otherwise apply any pressure to him, the confession should be excluded pursuant to the privilege against self-incrimination because it was "compelled" against his will by a mental defect, and as a result, it was not trustworthy. The Supreme Court rejected this argument. In doing so, the Court simply could have stated that the privilege is triggered only through state action. The Court seemed to go out of its way, however, to suggest that "trustworthiness" was not a concern of the privilege, and that "[t]he *sole* concern of [the privilege] is governmental coercion." *Id.* at 170 (emphasis added). This ruling followed on the heels of *Allen v. Illinois*, 478 U.S. 364 (1986), in which the Court stated: "The privilege against self-incrimination enjoined by the Fifth Amendment is not designed to enhance the reliability of the factfinding determination; it stands in the Constitution for entirely independent reasons." *Id.* at 375. The language of *Connelly* and *Allen* suggests that the Supreme Court has limited the basis of the privilege against self-incrimination solely to the "civil liberties" rationale, and has removed the "trustworthiness" underpinnings of that clause.

Professor Herman, however, offers an alternative interpretation of these cases:

> The Court's [statement in *Connelly*], that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion," should be read to mean only that governmental action is an essential trigger for Fifth Amendment analysis. It should not be read to mean that the constitutional

IV. THE APPLICATION OF THE PRIVILEGE ABROAD DOES NOT MANDATE A STRICT ADHERENCE TO *MIRANDA* IN THE INTERNATIONAL ARENA, AS *MIRANDA* IS A PROPHYLACTIC RULE THAT CAN BE CONTOURED TO FIT NEW SCENARIOS

Having concluded that the privilege against self-incrimination protects non-Americans interrogated abroad who are later tried in the United States, the next question is how the protections of the privilege operate in the international arena.[132] This is a tricky question: if the privilege operates abroad in the same manner in which it operates at home, American law enforcement officials overseas would be required to Mirandize suspects prior to custodial interrogation even though the laws of many foreign nations do not provide criminal suspects with the same set of constitutional rights embodied in *Miranda*.[133] If, for example, an FBI agent conducting a custodial interrogation abroad were to inform a non-American that he has the right to an attorney during the interrogation, and if the law of that country dictated that criminal suspects were not entitled to an attorney until trial, the FBI agent would be misleading the suspect while fulfilling *Miranda*'s mandate.

Miranda and its supporting cases operate upon two basic assumptions that are not entirely applicable in the international arena. Namely, the assumptions that all suspects enjoy the rights embodied in the Bill of Rights and that the protections to civil liberties provided by the rule are effective and, on balance, outweigh any countervailing costs to the police and to society. However, the Supreme Court has held that in circumstances in which enforcing the

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> privilege has no concern for reliability, even in cases in which there is governmental coercion. Thus, *Connelly*, in common with *Tehan* and *Allen*, should be read as saying no more than that the privilege has no free-standing concern for reliability, that is, a concern that is independent of governmental coercion.

Herman, *supra* note 61, at 515. Although Professor Herman offers a plausible route for the Court to limit its language in *Connelly* and *Allen*, if it so desired, the Supreme Court has not yet expounded upon the seemingly unambiguous statements in these two decisions. Thus, it is not clear at this time whether the "twin rationales" doctrine espoused in *Oregon v. Elstad* remains viable. If the Supreme Court interprets its recent decisions as Professor Herman suggests it should, then the "trustworthiness" rationale could be considered an independent reason to extend the protections of the privilege to non-Americans who are interrogated abroad and tried in the United States.

132. This question assumes that the intent of the investigation is to prosecute the non-American culprits in the United States. Of course, if a foreign nation ultimately prosecutes the suspects, then the Fifth Amendment is not implicated.

133. *See infra* notes 247–248, 271–272 and accompanying text.

Miranda doctrine would not create the same type of balance between competing social policies that the *Miranda* decision envisioned, exceptions to the rule can be made.

The operation of the privilege against self-incrimination ultimately depends upon whether the *Miranda* doctrine is a constitutional mandate such that it must be followed in virtually every situation where the privilege attaches, or whether it is a flexible, prophylactic rule that may be modified or dispensed with when appropriate. Section A below discusses *Miranda*'s status as a prophylactic rule instead of a constitutional mandate. Section B explores some of the exceptions to the *Miranda* doctrine and demonstrates how these exceptions illustrate *Miranda*'s prophylactic nature. Section C focuses on the effect that the Supreme Court's recent decision in *Dickerson v. United States*[134] will have on courts' ability to make exceptions to the *Miranda* doctrine and concludes that *Miranda* remains flexible and prophylactic—albeit constitutionally based—after *Dickerson*. Consequentially, courts have the authority to carve an exception to the *Miranda* doctrine in the international context if appropriate.

A. Miranda: *Inflexible Textual Mandate or Flexible Prophylactic Rule?*

To determine whether exceptions and modifications to *Miranda* can be made in the international arena, it is first necessary to determine whether *Miranda* is a constitutional mandate or a constitutional prophylactic rule that can be modified to fit new scenarios not envisioned by the *Miranda* decision itself. Before turning to the merits of this issue, it is necessary to define some terms that will be used in the remainder of this Article. A "constitutional mandate," as the phrase is used in the Article, means an interpretation by the Supreme Court that a provision of the Bill of Rights invariably requires a particular outcome. For example, the notion that no law can be upheld which criminalizes a peaceful statement of one's political views on a public street corner is derived from the constitutional mandate in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech."[135] Similarly, the rule that the government cannot force a defendant to

134. 530 U.S. 428 (2000).

135. U.S. CONST. amend. I.

testify at his own criminal trial is a constitutional mandate of the text of the Fifth Amendment's privilege against self-incrimination.

On occasion, however, the Supreme Court has encountered difficulty in enforcing certain provisions of the Bill of Rights or has found enforcement measures taken by other branches of the federal government and by the states to be lacking. As a result, the Court has created what have become commonly referred to as prophylactic rules. A prophylactic rule has been defined as a "preventive measure . . . to safeguard against a potential constitutional violation" that "does not announce a requirement mandated by the underlying constitutional provision, but a requirement adopted in the Court's exercise of its authority to draft remedies and procedures that facilitate its adjudicatory responsibility."[136] To adequately protect the underlying right, a prophylactic rule will usually "sweep more broadly" than required by the Constitution's text. In some cases, the prophylactic rule will require that evidence be suppressed when no actual constitutional violation occurred.[137] The Supreme Court views this drawback as a necessary trade-off for a clear rule that protects the underlying constitutional right better than does mere reliance on the strict interpretation of the text.[138]

A perfect example of a judicially created prophylactic rule is the *Miranda* doctrine. Nowhere in the Bill of Rights does it say that a suspect must be advised of his right to remain silent or of his right to an attorney prior to custodial interrogation. In 1966, rather, the Supreme Court believed that the due process voluntariness test was largely ineffective because it was too difficult, after the fact, to reconstruct the totality of the circumstances surrounding an

136. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.9(e), at 672–73 (2d ed. 1999) (citations omitted). Professor Susan Klein defines a prophylactic rule as a "judicially-created doctrinal rule or legal requirement" that is appropriate for determining "whether an explicit or 'true' federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but provides approximately the same result as a showing that the explicit rule was violated." Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001). Another scholar, Professor Brian Landsberg, refers to such rules as "risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules." Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999).

137. *See* Klein, *supra* note 136, at 1033 (noting that "a prophylactic rule will prohibit some governmental behavior that would otherwise be declared constitutional").

138. *See id*. at 1037 (explaining that the Court uses bright line rules to guide officials making "snap judgments" without legal training).

interrogation to determine if a confession was voluntary.[139] In addition, the voluntariness test was somewhat vague and provided little guidance to police, and the police violated the rule time and time again.[140] Seeing the rule violated repeatedly, and recognizing that Congress and the states had never implemented any law enforcement rules or procedures to protect against involuntary confessions, the Court was compelled to create a new system that was effective and provided clear guidance to police officers.[141] As a result, the Court switched the focus of pretrial confession law from a due process analysis back to the privilege against self-incrimination, which had been dormant since not long after the *Bram* decision in 1897, and created the now-famous warnings/waiver procedure.[142] Although the text of the Fifth Amendment does not state that "warnings" are required, the *Miranda* Court judicially created the warnings/waiver mechanism to protect the privilege against self-incrimination. The Court believed that requiring the universal administration of *Miranda* warnings would lessen the coercion inherent in custodial interrogations, consequently ensuring that suspects would not confess involuntarily.[143] Under *Miranda*, unwarned confessions are inadmissible regardless of whether they were made "involuntarily" in the traditional sense of that term. Thus, *Miranda* is a judicially created procedure, not mandated by the text of the Constitution, which is designed to protect an underlying constitutional right. As such, it is a quintessential prophylactic rule.[144]

B. The Exceptions to Miranda *Demonstrate Its Prophylactic Nature*

The Supreme Court has created several exceptions to the *Miranda* doctrine. This observation alone demonstrates *Miranda*'s prophylactic nature because, by definition, the Court cannot fashion exceptions to a constitutional mandate. In addition, in carving these

139. Donald Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,* Miranda*, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 9–16 (2001) (describing the Supreme Court's dissatisfaction with the voluntariness test and its deliberate efforts to find the right set of cases with which to impose an alternative standard).

140. *See id*. at 9–10 (explaining the consequences of the voluntariness standard's vagueness).

141. *See id*. at 9–14 (noting that the Court sought a means to regulate police on a wholesale basis).

142. Miranda v. Arizona, 384 U.S. 436, 458–65 (1966).

143. *See supra* note 58 and accompanying text.

144. *See* LAFAVE ET AL., *supra* note 136, at 676 (stating that *Miranda* has come to be "viewed as paradigmatic of prophylactic" procedural rules).

Miranda exceptions, the Supreme Court has expressly labeled *Miranda* as a prophylactic tool created by the Court to protect the privilege against self-incrimination.

In the 1984 case of *New York v. Quarles*,[145] for example, a young woman approached two police officers on the street and told them that she had been raped by a man who had just entered a nearby grocery store.[146] She provided the officers with a detailed description of the man and informed them that he was carrying a gun.[147] The officers entered the grocery store with guns drawn and found a man who matched the description that the victim provided.[148] Upon frisking him, the officers discovered that the suspect was wearing a gun holster and that the holster was empty.[149] Without administering *Miranda* warnings, an officer asked the suspect where the gun was and the suspect nodded in the direction of some empty cartons and answered, "the gun is over there."[150] The suspect was placed under arrest and later charged with criminal possession of a weapon.[151]

At trial, the prosecution attempted to admit into evidence the statement "the gun is over there."[152] The trial court and the New York Court of Appeals both agreed that this statement had to be suppressed because it was provided in response to a "custodial interrogation" without *Miranda* warnings,[153] and the prosecution appealed. The United States Supreme Court's decision initially observed that *Miranda* warnings were a "practical reinforcement"—a "prophylactic" mechanism designed to protect the privilege against self-incrimination.[154] A failure to follow the precise guidelines of *Miranda*, therefore, did not necessarily amount to a violation of the privilege against self-incrimination. In the case at hand, the incriminating statement had been made voluntarily and not as a result of any undue coercion or force by the police.[155] Thus, even though the officers had not advised the suspect of his *Miranda* rights, the

145. 467 U.S. 649 (1984).
146. *Id.* at 651–52.
147. *Id.* at 652.
148. *Id*.
149. *Id*.
150. *Id*.
151. *Id*.
152. *Id.* at 652–53.
153. *Id.* at 653.
154. *Id.* at 654.
155. *Id.* at 654–55.

underlying constitutional policy embodied in the privilege against self-incrimination had not necessarily been frustrated.

Having acknowledged *Miranda*'s prophylactic nature, the *Quarles* Court then recognized that the *Miranda* doctrine is based upon a balancing test.[156] On one side of the scale is the public's need to obtain confessions to ensure that criminal perpetrators can be prosecuted effectively; on the other side of the scale is the need to protect the civil liberties embodied in the privilege against self-incrimination.[157] In the typical situation contemplated by the *Miranda* court—where a suspect is interrogated in a custodial setting such as a police station—the benefits that the warnings provide in ensuring that constitutional rights are enforced outweigh the burden to the government and the public in having some reliable confessions suppressed from evidence and some guilty individuals decline to confess when they otherwise might have. This was the basic balance that the *Miranda* Court originally struck in crafting its prophylactic

156. *Id.* at 657–58. For discussion of the Fifth Amendment's balancing test, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 971 (1987) (noting Fifth Amendment cases in which balancing was applied); Steven Andrew Drizin, Note, *Will the Public Safety Exception Swallow the* Miranda *Exclusionary Rule?*, 75 J. CRIM. L. & CRIMINOLOGY 692, 701–02 (1984) (recounting the use of balancing by the Court); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 842 n.11 (1989) (noting the use of balancing in weighing the rights of suspects versus the interests of law enforcement).

157. *Quarles*, 467 U.S. at 657–58; *see also* Drizin, *supra* note 156, at 701–02 (discussing the Court's balancing in *Quarles*).

rule.[158] The *Quarles* Court acknowledged, however, that not all situations fit within the typical scenario envisioned by the *Miranda* Court. Law enforcement officers face "kaleidoscopic situation[s]" where "spontaneity rather than adherence to a police manual is necessarily the order of the day."[159]

In *Quarles*, the public and the police had an additional concern weighing in on its side of the balance—the overriding need to secure the gun as quickly as possible. An accomplice, or even a customer, could have stumbled upon the gun in the grocery store and caused injury to himself or others. Administering *Miranda* warnings in this situation could have caused the suspect to invoke his right to remain silent, which would have delayed locating the gun and increased the danger to the public. Thus, because the safety of the public was at risk, the balance shifted toward the public's side of the scale and outweighed the protection of civil liberties afforded by *Miranda*'s prophylactic warnings. In *Quarles*, the Court used the *Miranda* balancing test to create a "public safety" exception to the *Miranda* doctrine.[160]

Based on the rationale that *Miranda* is not a "constitutional mandate," the Supreme Court has carved out three additional exceptions to the doctrine in the last three decades. In *Michigan v.*

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158. Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 407 (2001) (discussing the fact that in the *Miranda* decision the Supreme Court balanced law enforcement interests against civil liberties in crafting its prophylactic rule); Dripps, *supra* note 139, at 19–22 (same). The Supreme Court has described the delicate balance it struck in *Miranda* as follows:

> Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable," they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

Moran v. Burbine, 475 U.S. 412, 426–27 (1986) (citations omitted).

159. *Quarles*, 467 U.S. at 656.

160. For a more detailed discussion of the Supreme Court's decision in *Quarles*, see generally Drizin, *supra* note 156.

Tucker,[161] the prosecution introduced witness testimony that incriminated the defendant. The prosecution discovered the testifying witness's identity, however, by questioning the defendant without administering *Miranda* warnings.[162] After recognizing that the *Miranda* warnings were prophylactic rules created to "provide practical reinforcement"[163] for the privilege against self-incrimination, the Supreme Court ruled that the "fruits" of a *Miranda* violation (in *Tucker*, the testimony of the witness whose identity was obtained from the defendant in violation of *Miranda*) could be used against a defendant without running afoul of the privilege against self-incrimination as long as the defendant's statement that revealed the "fruits" was made voluntarily.[164] The rationale espoused by the Court for not suppressing the fruits of a *Miranda* violation was that because a defendant's own statements taken in violation of *Miranda* must always be suppressed, the deterrence purpose of the exclusionary rule is adequately served at that point.[165]

Based on similar reasoning, the Court ruled in *Harris v. New York*[166] that the government may impeach a defendant who testifies at trial with his own statements taken in violation of *Miranda*.[167] The Court ruled that excluding such statements from the government's case-in-chief was sufficient to deter future *Miranda* violations because the police cannot know at the time of an interrogation if there will be a trial or if the defendant will opt to testify at trial.[168] And in *Oregon v. Elstad*,[169] the Court ruled that an initial confession obtained in violation of *Miranda* did not taint a subsequent confession obtained from the same defendant after *Miranda* warnings had been properly administered.[170] The Court stated that the *Miranda* doctrine "sweeps more broadly than the Fifth Amendment itself,"[171] and this

161. 417 U.S. 433 (1974).

162. *Id.* at 437.

163. *Id.* at 444.

164. *Id.* at 444–45.

165. The Court stated that "[w]hatever deterrent effect on future police conduct the exclusion of [the defendant's own] statements may had had, we do not believe it would be significantly augmented by excluding the testimony of the witness . . . as well." *Id.* at 448.

166. 401 U.S. 222 (1971).

167. *Id.* at 225–26.

168. *Id.* at 225; *see* Dripps, *supra* note 139, at 26–28 (explaining how the Court circumscribed the *Miranda* exclusionary rule).

169. 470 U.S. 298 (1985).

170. *Id.* at 318.

171. *Id.* at 306.

statement—reinforced by the judicial creation of a public safety exception, a fruits of the statement exception, and a subsequent confession exception—reveals *Miranda*'s prophylactic nature.

C. Miranda *Is A Constitutional Prophylactic Rule:* Dickerson v. United States

Two years after *Miranda* was decided, Congress enacted 18 U.S.C. § 3501.[172] This statute was intended to overrule *Miranda* by once again making voluntariness, rather than the recitation of warnings, the touchstone for the admissibility of confessions.[173] Section 3501 set forth a nonexclusive list of factors (including whether the suspect was advised of his constitutional rights) that courts could consider in determining voluntariness.[174] Although this statute was enacted in 1968, federal prosecutors had largely ignored it, and thus *Miranda* remained the law of the land simply by default.[175]

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172. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501 (1994)).

173. Dickerson v. United States, 530 U.S. 428, 436 (2000) ("[W]e agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*.").

174. 18 U.S.C. § 3501 (1994):

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

175. *See* Brooke B. Grona, Case Note, United States v. Dickerson: *Leaving* Miranda *and Finding a Deserted Statute*, 26 AM. J. CRIM. L. 367, 367 (1999) (discussing the fact that § 3501 had not been invoked by prosecutors prior to *Dickerson*); *see also* United States v. Dickerson, 166 F.3d 667, 671–72 (4th Cir. 1999) (raising the issue of § 3501's application and stating that "the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it"), *rev'd*, 530 U.S. 428 (2000).

In the 2000 case of *Dickerson v. United States*,[176] however, the long-awaited confrontation between *Miranda* and § 3501 finally emerged. The *Dickerson* defendant was charged with bank robbery and other offenses.[177] Prior to trial, he moved to suppress certain statements made to FBI agents on the ground that he had not received *Miranda* warnings before being interrogated.[178] After the district court granted the motion, the prosecution took an interlocutory appeal to the Court of Appeals for the Fourth Circuit.[179] The court of appeals reversed on the ground that the district court had failed to consider whether the confession was admissible pursuant to 18 U.S.C. § 3501 despite the lack of *Miranda* warnings.[180] The court of appeals concluded that § 3501 was valid because Congress has the authority to overrule *Miranda* given that *Miranda* handed down a mere prophylactic rule rather than a constitutional mandate.[181]

The Supreme Court granted certiorari and noted that it may use its supervisory authority over the federal courts to prescribe "rules of evidence and procedure that are binding in those tribunals."[182] The power to judicially create such nonconstitutional rules, however, "exists only in the absence of a relevant Act of Congress."[183] Congress retains "the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."[184] On the other hand, when the Supreme Court establishes a rule that interprets or applies the Constitution, Congress may not legislatively supersede such a decision.[185] The question in *Dickerson*, therefore, was "whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[186] If *Miranda* announced a constitutional rule, it could not be overruled by

176. 530 U.S. 428 (2000).

177. *Id.* at 432.

178. *Id*.

179. *Id*.

180. *Dickerson*, 166 F.3d at 671.

181. *Id.* at 672.

182. *Dickerson*, 530 U.S. at 437 (citing Carlisle v. United States, 517 U.S. 416, 426 (1996)).

183. *Id.* (quoting Palermo v. United States, 360 U.S. 343, 353 n.11 (1959)).

184. *Id.* (citing *Palermo*, 360 U.S. at 345–48; *Carlisle*, 517 U.S. at 426; and Vance v. Terrazas, 444 U.S. 252, 265 (1980)).

185. *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 517–21 (1997)).

186. *Id*.

statute and § 3501 was unconstitutional; if the *Miranda* decision were merely a judicially created rule of evidence or procedure, Congress had the authority to overrule that decision by enacting § 3501.

As a preliminary matter, the Court observed that language in several of its *Miranda* decisions suggests that *Miranda* was merely a judicially created rule of evidence without constitutional foundation.[187] Despite such language, the Court held that § 3501 could not be enforced because *Miranda* was in fact intended to be a constitutional ruling.[188] This holding was based in part upon the fact that the Court previously had applied the *Miranda* rule to proceedings in state courts.[189] Because the Supreme Court may impose constitutional mandates upon state courts but does not hold supervisory power over them, the Court's prior rulings applying *Miranda* to the states were tantamount to a holding that *Miranda* is a constitutional ruling.[190]

In contrast, the court of appeals had held that *Miranda* was not a constitutional decision because the Supreme Court has not always enforced the *Miranda* doctrine when the circumstances have rendered its application impractical.[191] The court of appeals apparently believed that Supreme Court decisions that create prophylactic rules are nonconstitutional in the sense that they are similar to common law rules of evidence that may be modified or overruled by an act of Congress. Only decisions that hand down "constitutional mandates" are within the Court's authority to interpret the Constitution, and only these decisions are immune to being overruled by Congress.

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187. *Id.* at 438 n.2 (citing Davis v. United States, 512 U.S. 452, 457–58 (1994); Withrow v. Williams, 507 U.S. 680, 690–91 (1993) ("*Miranda*'s safeguards are not constitutional in character."); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights."); Oregon v. Elstad, 470 U.S. 298, 306 (1985); Edwards v. Arizona, 451 U.S. 477, 492 (1981) (Powell, J., concurring in the judgment) (noting that *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution.")).

188. *Id.* at 438.

189. *Id.* at 438–39. The *Dickerson* Court also was persuaded that *Miranda* is based in the Constitution because of language in the decision suggesting that it was derived from the Constitution, *id.* at 439–40, and because previous decisions of the Court had allowed prisoners to bring habeas corpus actions in federal court alleging *Miranda* violations. *Id.* at 439 n.3.

190. *Id.* at 438–39.

191. *See* United States v. Dickerson, 166 F.3d 667, 689–90 (4th Cir. 1999) (noting that the Court has declined to exclude statements taken in violation of *Miranda* when used for the purposes of impeachment, *Harris v. New York*, 401 U.S. 222 (1971), or taken under emergency circumstances, *New York v. Quarles*, 467 U.S. 649 (1984)), *rev'd*, 530 U.S. 428 (2000)).

Citing *Quarles v. New York*[192] and *Harris v. New York*,[193] the Supreme Court responded in *Dickerson*:

> These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.[194]

Although the Supreme Court has yet to clarify its decision in *Dickerson*, several scholars have commented that, in light of *Dickerson*, *Miranda* and its exceptions have become "frozen in time."[195] In holding that Congress does not have the authority to overrule *Miranda*, *Dickerson* must stand for the proposition that *Miranda* essentially is an inflexible constitutional mandate. Because the *Dickerson* Court refused to overrule *Quarles* and the other *Miranda* exceptions, and because the Court simultaneously held that *Miranda* is constitutionally based, a proponent of the frozen-in-time interpretation would believe that the decision is inconsistent and "cannot be characterized as plausible."[196] Accordingly, *Dickerson*, in "an apparent compromise between the right and left wings of the Court," created a doctrine that does not make sense and that "holds by judicial fiat that the law is to stay exactly as it was pre-*Dickerson*."[197] A scholar or court that subscribes to this interpretation of *Dickerson* would apparently believe that no additional exceptions could be made to the *Miranda* doctrine.

This view of *Dickerson*, however, is not the only—or necessarily the best—interpretation. A second view would hold that when the Supreme Court interprets provisions in the Bill of Rights, it has the implicit constitutional power to create flexible prophylactic rules, and,

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192. *See supra* notes 145–160 and accompanying text.

193. *See supra* notes 166–167 and accompanying text.

194. *Dickerson*, 530 U.S. at 441.

195. Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to* . . ., 99 MICH. L. REV. 879, 894 (2001); *see also* Dripps, *supra* note 139, at 35 (observing that *Dickerson* maintained a status quo that was "regarded by virtually every informed observer as inconsistent and unprincipled"); Klein, *supra* note 136, at 1071 (commenting that *Dickerson* keeps the law "exactly as it was pre-*Dickerson*").

196. Kamisar, *supra* note 158, at 394 (quoting from a draft version of Klein, *supra* note 136); *see also* Klein, *supra* note 136, at 1071 (concluding that *Dickerson* is contradictory and incoherent).

197. Klein, *supra* note 136, at 1071.

when necessary, to enforce those provisions.[198] These prophylactic rules are not simply common law rules of evidence or procedure; they are constitutional rulings in the sense that they stem from the Court's interpretation of what is required to give adequate meaning to the Bill of Rights.[199] As one commentator has noted, "prophylactic is not the opposite of constitutional."[200] When Congress overrules such a prophylactic rule, it erases a procedure that the Supreme Court has deemed necessary to protect the Constitution and undermines a constitutional right. Accordingly, an act of Congress that purports to overrule a constitutionally based prophylactic rule, without providing a substitute procedure that is equally effective in protecting the underlying constitutional right, is unconstitutional and cannot be enforced.

This is not a novel theory. Indeed, as the government set forth in its briefs to the Court in *Dickerson*, the Court in several other contexts has already adopted this idea.[201] In *Anders v. California*,[202] for example, the Court created a constitutional prophylactic rule to protect the Sixth Amendment right to counsel during an appeal.[203] The Court also created a procedure for appellate counsel to use when counsel wishes to withdraw from the representation of an indigent defendant based on the conclusion that the defendant's appeal is meritless.[204] The *Anders* rule requires appellate counsel to file a brief with the appellate court stating that there are no nonfrivolous issues for appeal and to cite any place in the trial record that might support

198. Professors Kamisar and Klein, who suggest that the result of *Dickerson* will be that *Miranda* jurisprudence is now frozen in time, write that creating and enforcing prophylactic rules is a legitimate power of the Supreme Court. Kamisar, *supra* note 158, at 426–28; Klein, *supra* note 136, at 1051. For a discussion of the different interpretations that may be made of *Miranda* after *Dickerson*, see George C. Thomas III, *Separated At Birth But Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1090–91 (2001).

199. *See* Kamisar, *supra* note 158, at 426 ("Indeed, if anything, there is a stronger relationship between the *Miranda* doctrine and the explicit text of the Constitution than there is between the voluntariness rule and the constitutional text."); Klein, *supra* note 136, at 1037–1044 (listing a number of constitutional prophylactic rules and their corresponding clauses).

200. Paul Cassell & Robert Litt, Will *Miranda* Survive?: *Dickerson v. United States*: The Right to Remain Silent, the Supreme Court, and Congress, Debate at the Georgetown University Law Center (Mar. 28, 2000), *in* 37 AM. CRIM. L. REV. 1165, 1191 (2000).

201. *See* Brief for the United States at 44–47, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525) (expounding the constitutional nature of *Miranda*).

202. 386 U.S. 738 (1967).

203. *Id.* at 744–45.

204. *Id*.

an appeal.[205] The Court has explained that the *Anders* procedure is "not 'an independent constitutional command'" but a "'prophylactic framework' . . . established to vindicate the constitutional right to appellate counsel."[206] The Court recently reaffirmed in *Smith v. Robbins*[207] that the Constitution mandates that appellate counsel must adhere to a prophylactic procedure to protect the defendant's right to appellate counsel.[208] Indeed, the *Smith* Court explained that the states are free to adopt procedures to replace the *Anders* framework, but such procedures must be equally effective in protecting the right to counsel or they are unconstitutional.[209] Thus, the *Anders* procedure is an example of a rule that is simultaneously prophylactic and constitutional.

In *Michigan v. Jackson*,[210] the Court ruled that after a defendant has invoked his right to counsel under the Sixth Amendment at an arraignment or analogous proceeding, "any waiver of the defendant's right to counsel for . . . police-initiated interrogation is invalid."[211] But subsequently, in *Michigan v. Harvey*,[212] the Court held that a confession obtained in violation of the *Jackson* rule may be used for impeachment purposes despite the fact that it may not be used in the government's case-in-chief.[213] The Court grounded this distinction on the fact that the rule in *Jackson* was a "prophylactic rule"[214] "not compelled *directly* by the Constitution"[215] that was designed "to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel."[216]

In *Bruton v. United States*,[217] the Court created yet another constitutional prophylactic rule that sweeps broader than the Constitution to protect the defendant's rights under the

205. *Id*.

206. Smith v. Robbins, 528 U.S. 259, 273 (2000) (quoting Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)).

207. 528 U.S. 259 (2000).

208. *Id.* at 276–77.

209. *Id.* at 276.

210. 475 U.S. 625 (1986).

211. *Id*. at 636.

212. 494 U.S. 344 (1990).

213. *Id.* at 345–46.

214. *Id.* at 345, 346, 349, 351, 353.

215. *Id.* at 351–52 (emphasis added).

216. *Id.* at 351.

217. 391 U.S. 123 (1968).

Confrontation Clause of the Sixth Amendment.[218] In *Bruton*, the Court ruled that in joint trials, a confession by a nontestifying codefendant that incriminates his codefendant cannot be admitted.[219] The purpose of the rule was to avoid the risk that the jury would ignore a limiting instruction and convict the nonconfessing defendant based upon his codefendant's confessions.[220] The Court reasoned that although some juries might be able to adhere to the limiting instruction, the Confrontation Clause protects the nonconfessing defendant from the risk that they would not.[221] In a later case, *Tennessee v. Street*,[222] the Court balanced the competing interests underlying this prophylactic rule and held that a statement that is inadmissible under *Bruton* is nevertheless admissible for purposes of impeachment.[223]

In *North Carolina v. Pearce*,[224] the Court created a prophylactic rule, framed as a presumption of vindictiveness, that requires a judge to articulate the basis for increasing a defendant's sentence after a successful appeal and reconviction.[225] The Court later expressly labeled this rule as prophylactic and noted that although the *Pearce* presumption may favor the defendant in instances when the sentencing judge has not acted vindictively, such a rule was required to provide meaning to an important constitutional right.[226]

Anders, *Jackson*, *Bruton*, and *Pearce* created rules that are not only prophylactic; they are also constitutional in the sense that they set a constitutional floor insofar as any proposed legislative substitute

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218. *See id.* at 135–37 (discussing the scope of the rule announced).

219. *Id.* at 126.

220. *Id.* at 135–36.

221. *Id.* at 136–37.

222. 471 U.S. 409 (1985).

223. *Id.* at 417.

224. 395 U.S. 711 (1969).

225. *Id.* at 726.

226. *See* Colten v. Kentucky, 407 U.S. 104, 116 (1972) (interpreting *Pearce* as "ensur[ing] that the apprehension of . . . vindictiveness does not 'deter a defendant's exercise of the right to appeal or collaterally attack his first conviction'" (quoting *Pearce*, 395 U.S. at 725)). In addition, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court created a constitutional prophylactic rule in the First Amendment context. In providing First Amendment protection to some defamatory false statements that have no constitutional value, the Court explained that false speech must be protected to some degree to avoid a chilling effect on valuable speech. *Id.* at 269–72. This rule is prophylactic in the sense that nothing in the text of the First Amendment requires the protection of false speech, and thus the rule "goes beyond" the dictates of the First Amendment to provide adequate protection for that important right.

must satisfy this constitutional minimum. As the government expressed in its *Dickerson* brief:

> Prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication. *Miranda* is distinctive in the detail with which the Court specified particular procedural safeguards. But *Miranda's* adoption of a prophylactic rule—which has been applied where necessary but not, as *Tucker*, *Quarles*, and *Elstad* show, in categories of cases where its adverse effects would outweigh any benefits—does not uniquely depart from the Court's constitutional jurisprudence.[227]

In specifically discussing the *Miranda* exceptions, the government argued that

> [a]s those cases highlight, the Court's description of the *Miranda* rules as "prophylactic" does not mean that the rules are therefore extra-constitutional. As the Court stated in *Withrow*: "'prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right.'"[228]

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227. Brief for the United States, *supra* note 201, at 47.

228. *Id*. at 25 (emphasis omitted in original) (citation omitted). The Supreme Court's practice of creating prophylactic rules that are constitutional in nature has sometimes been called "constitutional common law," based on a seminal article by Henry P. Monaghan. *See* Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 1–3 (1975) (explaining how constitutional doctrines subject to amendment, modification, or reversal by Congress fall under the outline of an "inspired" common law rooted in the Constitution). Professor Kamisar eloquently synthesizes the rationale in support of this theory:

> [T]here is nothing inappropriate or illegitimate about prophylactic rules generally or the *Miranda* warnings in particular. . . .
>
> . . . .
>
> "The characterization of *Miranda* as a prophylactic rule that 'goes beyond' the Constitution seems to be a way of saying that *Miranda* represents [a] kind of deliberate choice to exclude some voluntary confessions, in exchange for the benefits of identifying or deterring some compelled confessions that would otherwise escape detection." The *Miranda* rules do "go beyond" the Constitution "in the sense that [they] reflect not just the values protected by the Fifth Amendment, but institutional concerns about the most effective way to secure those values." However, "[v]irtually all of the constitutional law" does.
>
> At times, prophylactic rules are "necessary to combat a substantial potential for constitutional violations." Such rules "are based on the Constitution because they are predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simply case-by-case enforcement of the core right is insufficient to secure that right."
>
> At times, as demonstrated by cases like *Miranda* and *Pearce*, the two rulings that have "come to be viewed as paradigmatic of prophylactic decisionmaking," the power to fashion prophylactic rules is the power to make constitutional guarantees more

The Supreme Court's decision in *Dickerson* has been strongly criticized by scholars because it failed to explicitly state whether *Miranda* is a prophylactic constitutional rule or an inflexible, constitutional mandate.[229] And because the Court did not specify which theory it was adopting, either interpretation is certainly defensible. When future courts interpret *Dickerson*, they must choose between two interpretations: one that makes the decision internally inconsistent and implausible and one that allows the decision to make sense. Interpreting *Dickerson* to mean that *Miranda* jurisprudence is now inflexible and "frozen in time"[230] because it is a constitutional mandate renders the decision implausible in light of the Court's simultaneous refusal to overturn its prior *Miranda* exceptions.[231] And certainly nothing in the *Dickerson* opinion can be read as ruling out the interpretation that *Miranda* remains a flexible, prophylactic rule—the Court's statement regarding *Miranda* that no constitutional

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> meaningful and more effective. This power is inherent in the art of constitutional interpretation—indeed, in the art of judging.

Kamisar, *supra* note 158, at 426–28 (citations omitted).

229. *See* Dripps, *supra* note 139, at 72 (criticizing the majority's acquiescence to *Dickerson*'s "legitimacy deficit"); Kamisar, *supra* note 195, at 895–96 (summarizing criticisms of *Dickerson* by various scholars); Klein, *supra* note 136, at 1071 ("This opinion was, in a word, terrible."). Justice Scalia used his dissenting opinion in *Dickerson* to attack the government's theory that the Court has the authority to create constitutional prophylactic rules that cannot be abrogated by Congress. Based on his view that this practice usurps Congress's constitutionally delegated power to legislate, Scalia called it a "lawless" and "anti-democratic power" that "does not exist." United States v. Dickerson, 530 U.S. 428, 446, 457 (2001) (Scalia, J., dissenting). Justice Scalia challenged the government's claim regarding the extent to which the Court has previously subscribed to this theory. *Id.* at 457–60. He argued that, for example, the holdings of *Bruton*, *Anders*, and *New York Times* did not create constitutional prophylactic rules, but rather constituted the Court's interpretation of constitutional mandates. *Id*. at 457–59. In an article responding to Scalia's dissent, Professor Kamisar persuasively undermines Scalia's interpretation of these cases, and makes a compelling case that these decisions did in fact create constitutional prophylactic rules. Kamisar, *supra* note 158, at 411–24; *see also* Klein, *supra* note 136, at 1037–44 (describing why many of these cases actually created constitutional prophylactic rules). For the purposes of this Article, it is not necessary to determine exactly how many times in the past the Court has created constitutional prophylactic rules. That issue is being hotly debated in the scholarly literature and, as the disagreement between Scalia and Kamisar illustrates, because much of this debate turns on semantics and subjective interpretations, a definitive answer would be difficult to achieve. The point is that even Justice Scalia admitted in his dissent that the practice has been approved in at least one case—*North Carolina v. Pearce*. *See Dickerson*, 530 U.S. at 459–60 (Scalia, J., dissenting) ("The Court later explicitly acknowledged *Pearce*'s prophylactic character.") And although Scalia vehemently disagrees with the validity of this practice, *Pearce* demonstrates that, even by Scalia's standards, the government was on solid ground in terms of precedent in presenting this theory to the Court.

230. Kamisar, *supra* note 158, at 397.

231. *See id*. at 394 (agreeing that Chief Justice Rehnquist's compromise opinion in *Dickerson* reaches an implausible holding by "judicial fiat").

rule is immutable seems to support this view.[232] Furthermore, the Court expressed that "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases [the *Miranda* exceptions] are as much a normal part of constitutional law as the original decision."[233] This unambiguous embrace of the *Miranda* exceptions, which together established the pre-*Dickerson* view that *Miranda* was flexible, strongly undermines the notion that the Court in *Dickerson* intended *Miranda* to suddenly become "frozen in time."[234]

The actual holding of *Dickerson* is also instructive. The Court held § 3501 unconstitutional not because it replaced *Miranda* with an alternative scheme, but because it failed to offer a substitute framework that would protect the privilege against self-incrimination as effectively as the *Miranda* warnings.[235] Thus, *Dickerson* reaffirmed the principle set forth in *Miranda* that the four warnings are not necessarily a constitutional mandate; rather, the mandate is that the privilege against self-incrimination requires *something* beyond the voluntariness test that is at least as effective as the warnings. Because § 3501 did not offer protections above and beyond the voluntariness test, it was unconstitutional.[236] This holding leaves open the possibility that equally effective legislative procedures may be created to replace *Miranda* and satisfy the requirements of the Constitution. This holding further suggests that *Miranda* established a prophylactic rule

232. *Id.* at 398.

233. *Dickerson*, 530 U.S. at 441.

234. Of course, trying to guess what the Supreme Court will do in the future is like reading tea leaves, and the Court could simply label this language in *Dickerson* dicta, overrule the *Miranda* exception cases, and hold that *Miranda* is a per se mandate of the Fifth Amendment. The fact that the Court refused to do this in *Dickerson* at the risk of making its opinion less clear on its face, however, suggests that the Court is not inclined to adopt this approach.

235. *Id.* at 440–42.

236. *Id*.

that has not been frozen in time.[237]

Justice Scalia, in his dissent, recognized that the majority's opinion is open to two interpretations. Scalia acknowledged that the first interpretation—that *Miranda* is now an inflexible constitutional mandate—does not "make sense."[238] And although he applauded the majority for not openly adopting the constitutional prophylactic rule theory that he so detests, he recognized that, in the end, "logic will out."[239] Scalia believed that *Dickerson* will come to be known as the case that establishes *Miranda* as a doctrine that is both constitutionally based and prophylactic at the same time.[240] And though the debate about the legitimacy of constitutional prophylactic rules is unlikely to subside anytime soon,[241] Justice Scalia correctly concluded that the best interpretation of *Dickerson* is that *Miranda* remains a flexible—yet constitutionally based—prophylactic rule.

D. The Application of Miranda *to Non-Americans Abroad*

The preceding analysis of the *Miranda* doctrine provides a framework for addressing the ultimate issue presented in this Article: the application of *Miranda* to non-Americans abroad. When pondering the future of *Miranda's* flexibility, it is helpful to imagine how the rigid "constitutional mandate" view of *Miranda* would unfold in the international context. Imagine an FBI agent, conducting an investigation abroad, who seeks to interrogate a suspect in custody who has committed a series of crimes against the United States. The agent hopes ultimately to charge the suspect and, with the permission of the host country, bring him to the United States to stand trial. If the host country does not recognize the right to counsel during an initial interrogation, an inflexible interpretation of *Miranda* would

237. Furthermore, by examining the language of the *Miranda* decision and many of the subsequent decisions that have hinted at the constitutional nature of the doctrine, the *Dickerson* opinion suggested not that the Supreme Court intended to change its prior *Miranda* jurisprudence in light of some newfound constitutional basis for that doctrine, but rather that its prior *Miranda* rulings—including *Quarles* and the balancing test—have been constitutionally based all along. The Court's observations that *Miranda* was "a constitutional decision of this Court," *id.* at 432, has a "constitutional basis," *id.* at 439 n.3, is a "constitutional rule," *id.* at 439, and has "constitutional underpinnings," *id.* at 440 n.5, are also instructive. Terms such as "underpinnings" and "basis" seem to suggest a rule that is not directly mandated by the text of the Fifth Amendment, but one that, like a prophylactic rule, is one step further removed.

238. *Id.* at 455 (Scalia, J., dissenting).

239. *Id.* at 461 (Scalia, J., dissenting).

240. *Id.* (Scalia, J., dissenting).

241. *See supra* notes 228–229, 234.

require the FBI agent to mislead the suspect by informing him that he has the right to counsel during the interrogation. Because most courts would not condone this troubling result, some modification to *Miranda* in this context appears inevitable.[242] Part V critiques the *Bin*

242. In considering whether the Supreme Court will adhere to a "frozen in time" view of *Miranda*, it might also be helpful to imagine if the Supreme Court were asked to confront the tricky issue of whether *Miranda* applies to conversations between prisoners and prison guards. This issue was expressly addressed by the Court of Appeals for the Fourth Circuit in *United States v. Conley*, 779 F.2d 970 (4th Cir. 1985). The defendant in *Conley*, a prison inmate, was suspected of killing another inmate. *Id.* at 971. When prison guards found evidence connecting him to the murder, the defendant was handcuffed and questioned in a prison "control center" and later in the prison infirmary. *Id*. The defendant proceeded to make statements about the incident that were later used against him at his murder trial. *Id.* at 972. The defendant contended at trial and on appeal that the statements should have been suppressed because he had been interrogated in custody without *Miranda* warnings. *Id*. The court of appeals recognized that the defendant technically should have been given the warnings if *Miranda* were interpreted literally. *Id*. As a prisoner who was not free to leave his immediate environment, the defendant was in "custody" in the same sense of the word as the custodial interrogation that the *Miranda* decision envisioned, in which a suspect is taken off the street and interrogated in a police station interrogation room. *Id*. To apply the same general *Miranda* definition of "custody" in all contexts, however, would "torture" the *Miranda* doctrine because it would "seriously disrupt prison administration by requiring, as a prudential measure, formal warnings prior to many of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial." *Id.* at 973. Acknowledging that it was making a "pragmatic" modification to *Miranda*'s custody analysis, the court held that "[p]risoner interrogation simply does not lend itself easily to analysis under the traditional formulations of the *Miranda* rule." *Id*. Accordingly, the Fourth Circuit ruled that *Miranda* warnings were not required before the defendant was questioned. *Id.* at 974. For a more detailed discussion of *Conley* and the application of *Miranda* to the prison context, see generally Steve Finizio, *Prison Cells, Leg Restraints, and "Custodial Interrogation":* Miranda*'s Role in Crimes That Occur in Prison*, 59 U. CHI. L. REV. 719, 920 (1992) (tracing the evolution of the *Miranda* doctrine as it relates to prisoners and observing that while some of those cases reached the correct result, the proper inquiry is "whether the institution has turned its coercive powers against the individual inmate"); Laurie Magid, *Questioning the Question-Proof Inmate: Defining* Miranda *Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883 (1997) (arguing that prisoners should be determined to be in "*Miranda* custody" only when restraint additional to that normally encountered in prison is imposed).

On three different occasions the Supreme Court has declined to review cases raising this issue. *See* Bradley v. Ohio, 497 U.S. 1011 (1990) (denying certiorari to application of the prison exception by the Ohio Supreme Court); Conley v. United States, 479 U.S. 830 (1986) (denying certiorari to a case creating a prison exception on appeal from the Fourth Circuit Court of Appeals); Inmates of Attica Corr. Facility v. Rockefeller, 404 U.S. 809 (1971) (denying certiorari to a case involving certification of the prison exception issue to the Second Circuit Court of Appeals). In *Mathis v. United States*, 391 U.S. 1 (1968), the Supreme Court held *Miranda* applicable to an interview of a prison inmate by an IRS agent. *Id.* at 5. The Supreme Court seemed to accept a per se "in custody" approach for prisoners in that case. *Mathis* can be distinguished from *Conley*, however, because Mathis was interrogated by a federal agent, not a prison guard, and thus the difficulty of applying *Miranda* to conversations between prisoners and prison guards recognized by the court of appeals in *Conley* was not present in *Mathis*. *See*

Laden court's rigid approach to this dilemma, and Part VI proposes a new *Miranda* framework for the international arena.

Before turning to the *Bin Laden* court, though, it is important to succinctly set forth three lessons from the prior discussion that will be applied in this analysis. First, *Miranda* should be interpreted as a flexible, prophylactic rule. Second, because the *Miranda* rule is prophylactic, it is governed by a balancing test. To determine *Miranda*'s applicability in factual scenarios of first impression, a court must weigh the costs to the police and society in enforcing the rule against the protection of civil liberties that is provided by the application of the rule. This balancing test was the basis of the *Miranda* decision and was further reflected in *Quarles*.[243] Third, *Miranda's* applicability is intimately intertwined with the deterrent rationale behind the exclusionary rule. As illustrated in *Tucker* and *Harris*,[244] when an application of the *Miranda* exclusionary rule would not adequately further the policy of deterrence, an exception to the doctrine may be made.

V. CRITIQUING THE *BIN LADEN* COURT: *MIRANDA* IN THE INTERNATIONAL ARENA

In ruling on the extraterritorial application of *Miranda* to non-Americans abroad, the *Bin Laden* court was essentially writing on a clean slate.[245] The court framed the issue and its holding as follows:

> Assume for purposes of this discussion these generalized facts: An individual held in the custody of foreign police is suspected of having violated both local and U.S. criminal law. As a matter of global comity, U.S. law enforcement representatives are permitted inside the foreign stationhouse to pose their own questions to the

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Finizio, *supra* at 725 ("Lower courts have limited *Mathis* to its facts: Mathis was questioned by a government agent who was not a member of the prison staff about a matter not under investigation within the prison itself."). If the Supreme Court were to address the issue in *Conley*, it is hard to imagine that it would stick to an inflexible, "constitutional mandate" view of *Miranda* and hold that the warnings must be administered before each time a prison guard asks a question of a prisoner that is "reasonably likely to evoke an incriminating response." *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (setting forth a test for interrogation under the *Miranda* standard). To do so would, as the court of appeals pointed out, result in a difficult scenario in which prison guards would be required to Mirandize inmates before virtually every conversation they have with them.

243. *See supra* notes 145–160 and accompanying text.

244. *See supra* notes 161-168 and accompanying text.

245. *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 185 (S.D.N.Y. 2001) (observing that the court faced an issue of first impression).

> suspect. U.S. agents eventually succeed in extracting inculpatory statements, and the suspect is thereafter transported to the United States for prosecution, with the consent of foreign authorities. By what standards should a domestic court admit the above statements as governmental evidence at trial? We believe that a principled, but realistic application of *Miranda*'s familiar warning/waiver framework, in the absence of a constitutionally-adequate alternative, is both necessary and appropriate under the Fifth Amendment.[246]

The court then addressed the type of *Miranda* warnings that are required. Without expressly addressing the issues of *Miranda*'s flexibility (or lack thereof) after *Dickerson*, the court acknowledged that a strict requirement that United States law enforcement officials abroad must administer the four domestic *Miranda* warnings would not be feasible in light of the different rights afforded by the United States and foreign countries.[247] Thus, the court set out to determine what warnings should be administered in all future interrogations taking place outside of the United States.

The court divided its analysis into two parts: the right to remain silent and the right to counsel. Regarding the right to remain silent, a non-American suspect "must be told that he has the right to remain silent, effective even if he has already spoken to the foreign authorities. He must also be told that anything he does say may be used against him in a court in the United States or elsewhere."[248] The court called this requirement "uncontroversial."[249] In connection with the right to counsel, the court imposed two requirements: first, the suspect must be advised what his right to counsel would be if he were located in the United States, and second, American law enforcement officials must be "clear and candid as to both the existence of the right to counsel [in the foreign nation] and the possible impediments to its exercise."[250] In this respect, the court stated:

> The goal is to convey to a suspect that, with respect to any questioning by U.S. agents, his ability to exercise his right to the presence and assistance of counsel—a right ordinarily unqualified—hinges on two external considerations arising from the fact of his

246. *Id.* at 185–86.
247. *Id.* at 187–89.
248. *Id.* at 187–88.
249. *Id.* at 188.
250. *Id*.

> foreign custody. First, since there exists no institutional mechanism for the international provision of an American court-appointed lawyer, the availability of public counsel overseas turns chiefly on foreign law. Second, foreign law may also ban all manner of defense counsel from even entering the foreign stationhouse, and such law necessarily trumps American procedure. Given these eventualities, U.S. law enforcement can only do the best they can to give full effect to a suspect's right to the presence and assistance of counsel, while still respecting the ultimate authority of the foreign sovereign. And if an attorney, whether appointed or retained, is truly and absolutely unavailable, and that result remains unsatisfactory to the suspect, he should be told that he need not speak to the Americans so long as he is without legal representation. Moreover, even if the suspect opts to speak without a lawyer present, he should know that he still has the right to stop answering questions at any time.[251]

The court then offered the following sample right to counsel warnings, to supplement the right to remain silent warning, which it deemed necessary to satisfy the dictates of *Miranda*:

> Under U.S. law, you have the right to talk to a lawyer to get advice before we ask you any questions and you can have a lawyer with you during questioning. Were we in the United States, if you could not afford a lawyer, one would be appointed for you, if you wished, before any questioning.
>
> Because you are not in our custody and we are not in the United States, we cannot ensure that you will be permitted access to a lawyer, or have one appointed for you, before or during any questioning.
>
> However, if you want a lawyer, we will ask the foreign authorities to permit access to a lawyer or to appoint one for you. If the foreign authorities agree, then you can talk to that lawyer to get advice before we ask you any questions and you can have that lawyer with you during questioning.
>
> If you want a lawyer, but the foreign authorities do not permit access at this time to a lawyer or will not now appoint one for you, then you still have the right not to speak with us at any time without a lawyer present.[252]

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251. *Id.* at 188–89.

252. *Id.* at 188 n.16.

Although the *Bin Laden* court did not set forth its requirements in numeric order, the holding can be crystallized into four basic warnings that must be administered to a non-American suspect in the international context:

> Warning One: You have the right to remain silent and anything that you say may be used against you in court.[253]
>
> Warning Two: If you were in the United States, you would have an absolute right to counsel before and during any questioning.[254]
>
> Warning Three: Because you are not in the United States, your right to an attorney depends upon foreign law, but the United States government will do its best to help you obtain retained or appointed counsel if you so desire by making that request of the foreign hosts.[255]
>
> Warning Four: If the foreign authorities will not provide you with a lawyer, you do not have to speak to U.S. authorities, and if you do choose to speak without an attorney, you may stop at any time.[256]

The modified *Miranda* warnings that were administered to Al-'Owhali were deemed insufficient because, under Warning Three, they did not inform him that the United States would make an attempt to obtain counsel for him if he so desired.[257] The *Bin Laden* court held that the modified *Miranda* warnings were insufficient because they "prematurely foreclose[d] the significant possibility that the foreign authorities themselves [would have], if asked, either suppl[ied] counsel at public expense or permit[ted] retained counsel inside the stationhouse."[258]

It is important to note that the *Bin Laden* court was not suggesting the best or fairest manner in which American law enforcement officials abroad should advise alien suspects prior to custodial interrogation. Instead, the court set forth what it deemed to be the absolute minimum requirements for custodial interrogations

253. *See id.* at 187–88.
254. *See id.* at 188.
255. *See id.* at 188–89.
256. *See id.* at 189.
257. *Id.* at 191–92.
258. *Id.* at 190.

abroad. Falling short of these minimum requirements would render any subsequent confession inadmissible at trial in the United States.[259]

It is difficult to understand, however, how Warning Two (which requires that FBI agents advise the suspect of what his right to counsel would be if he were in the United States) sufficiently advances the privilege against self-incrimination such that the failure to administer it would dictate the application of the exclusionary rule pursuant to the *Miranda* balancing test. The *Miranda* warnings were designed to counteract the inherently coercive atmosphere of custodial interrogation. By advising a suspect of his rights, the police alleviate some of the compulsion associated with custodial questioning and provide an atmosphere in which a suspect could knowingly and freely invoke those rights if he so desires.[260] In the *Miranda* balancing test, therefore, advising a suspect of his actual rights that he *presently enjoys and may invoke at will* adds significant weight to the civil liberties side of the scale because it injects those rights into the forefront of the suspect's mind in a way that he can understand and use to his benefit. This procedure demonstrates to the suspect that his civil liberties are not simply obscure promises in the text of the Constitution, thus lessening the coercive atmosphere of the interrogation. But advising a suspect hypothetically of what his rights would be in a different country—rights that he is simultaneously informed have no bearing on his current situation—can hardly have such an effect.[261] Indeed, such a warning would enhance the coercive atmosphere by reinforcing that the suspect's fate is ultimately in the hands of the laws of a host country that does not honor civil liberties as does the United States.

Warning Three, which requires that FBI agents advise suspects that their right to counsel depends upon the decision of the foreign

259. *Id.* at 189.

260. *See supra* notes 55–59 and accompanying text.

261. An argument that this rule would further *Miranda*'s policies because it would allow the suspect to demand that he be extradited to the United States, where he could obtain counsel, is unrealistic. Such an extradition would often require extensive negotiations between the United States and the host nation (assuming there is an extradition treaty between the two nations), and in many cases, the host country simply would not consent to the extradition. In many other cases, the time required to complete the extradition would hinder the law enforcement purposes of the interrogation. Implicitly recognizing this problem, the *Bin Laden* court assumed that suspects would remain in the custody of the host nation and did not argue that this warning was justified on the basis of a possible extradition. In addition, extradition would not be possible if formal charges have not been brought against the suspect in the United States, a situation that would be common in the pretrial interrogation stage.

country, presents a similar problem. In the United States, informing a suspect of his right to counsel protects the privilege against self-incrimination and adds weight to the civil liberties side of the scale.[262] When the right to counsel is guaranteed, informing a suspect of that right dissipates the coercive atmosphere because it informs the suspect that he has an ally—a champion for his rights—if he wants one. The implicit theory of the *Miranda* Court was that even if a suspect does not invoke his right to counsel, the unequivocal warning gives the suspect an "ace in the hole" to play at will and changes the dynamics in a way that empowers the suspect and decreases the likelihood that he will feel compelled to incriminate himself. And when a suspect invokes this right, the coercive nature of the interview is dissipated almost completely by the presence of counsel. In contrast, when the right to counsel is conditional upon the agreement of the host country, the impact of this warning loses its force. Indeed, advising a suspect of a speculative right to counsel that is afforded only if the suspect's captors agree would hardly have the coercion-dissipating effect of a warning that is absolute, easy to understand, and that can be triggered without complication. In addition, some non-Americans abroad, to whom such notions of constitutional rights might seem counterintuitive or even fanciful and whose suspicions of the American government and/or the host country might run high, would likely take this noncommittal statement with a grain of salt.

The following hypothetical demonstrates a more serious problem with Warning Three. A suspect in Nation X commits an offense that is prosecutable under the laws of both the United States and Nation X (as in the *Bin Laden* case). An FBI agent located in Nation X fails to follow the holding of *Bin Laden*; he does not advise the suspect that his right to counsel depends upon the law of Nation X and thus cannot be guaranteed, nor does he inform the suspect that the United States will try to arrange counsel for him through the host nation if he desires. The suspect proceeds to make a voluntary confession that does not infringe the constitutional right that *Miranda* was designed to protect—the privilege against self-incrimination. At trial in the United States, the suspect moves to suppress his confession due to a lack of Warning Three pursuant to *Bin Laden*. Suspects in Nation X do not have the right to counsel until they have been indicted, and the suspect had not been indicted at the time of the interrogation. At trial, the government submits an affidavit from the head law

262. *See supra* notes 57–61 and accompanying text.

enforcement representative of Nation X stating that if the FBI agent in question had asked his agency to provide an attorney for the suspect, his agency would have declined the request pursuant to local law and custom. Under *Bin Laden*, the confession in this case would be suppressed even though the suspect would not have obtained an attorney even if the FBI agent *had* advised the suspect of his speculative right to counsel under the law of Nation X and the suspect had, as a result, requested an attorney. The *Bin Laden* rule would require the suppression of the confession to promote a hypothetical right that actually does not exist, and thus, cannot be protected through the application of the exclusionary rule.

Certainly there would be many instances in which the host country would agree to supply counsel to the suspect during an interrogation, and *Miranda*'s goal of protecting civil liberties would be furthered.[263] But the percentage of scenarios in which counsel would actually be afforded by the host nation upon request could not be determined with accuracy, and would be in an ongoing state of flux given the continual changes in governments and regimes in nations around the world. In the United States, a suspect always has the opportunity to consult with counsel during an interrogation, and as a consequence, the civil liberties side of the scale holds the maximum possible weight. Assuming for the sake of argument, however, that in 50 percent of foreign countries the right to counsel during an initial interrogation is not guaranteed, then the global application of the *Bin Laden* rule would result in the civil liberties side of the *Miranda* balancing scale carrying only half of the weight in the international context than it did when the *Miranda* Court evaluated the prophylactic warning procedure in the domestic context. Thus, the *Bin Laden* court's analysis exacts a heavy toll on our society by suppressing probative confessions to support a prophylactic mechanism that is less effective than it is in the United States for suspects who do not invoke their right to counsel and completely ineffective in many situations for those who do request to speak to an attorney.

263. The goal of protecting civil liberties, however, would only be furthered for those suspects who invoked their right to counsel. *Miranda*'s coercion-dissipating policy would still not be substantially furthered in relation to those suspects who did not invoke counsel and confessed after hearing about their noncommittal "right" to counsel depending on what the host nation decides.

The Nation X scenario also provides a helpful framework for analyzing Warning Four, which requires law enforcement to inform a suspect that he does not have to speak to American representatives at all if an attorney is ultimately not provided by the host nation.[264] Assume that the suspect provides a voluntary confession without having received Warning Four and a United States court excludes his confession pursuant to the analysis set forth in *Bin Laden*. Once again, application of the exclusionary rule would result in a detriment to society while purporting to protect a civil right that does not exist and therefore cannot be protected. After being placed on notice through this litigation that Nation X will never provide attorneys to suspects prior to the indictment stage, the FBI agent would have no choice but to inform the next suspect he interrogates in Nation X that the suspect has no right to an attorney and may refuse to speak to any representative from the United States. This procedure would allow non-American suspects to "freeze out" the United States from interrogations in that country. A suspect would simply have to invoke his right to an attorney, and because the FBI agent could not provide counsel under the law of Nation X, the FBI would be forced to back out of the interrogation under the *Bin Laden* rule.[265] As a result, Nation X would probably take over both the interrogation and the prosecution, and the suspect would not be provided with an attorney and might be subjected to civil rights abuses that far exceed a mere failure to administer *Miranda* warnings. By refusing to allow *Miranda* to be modified to reflect the realities of global law enforcement, the *Bin Laden* court created a *Miranda* balancing scale for the international context that not only carries less weight on the civil liberties side of the balance than in the United States but may also actually undermine the civil liberties it purports to protect.

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264. This warning is the foundation from which Warnings Two and Three derive. Indeed, Warnings Two and Three stem from the *Bin Laden* court's fundamental belief that the right to have an attorney present during interrogation invariably applies regardless of foreign law, as these two warnings make sense only as context and background to the final statement of the ultimate right to counsel embodied in Warning Four.

265. Of course, when a suspect invokes his right to counsel in the United States, law enforcement officers are not "frozen out" of the interrogation; they must simply provide the suspect with the opportunity to obtain counsel before continuing. But in Nation X, the interrogation could not continue under any circumstances because counsel would not be available. In addition, in the United States when a suspect obtains counsel and then declines to continue the interview, the civil liberties side of the *Miranda* balancing scale is enhanced as a trade-off because a constitutional right has been exercised and protected as a result. But a corresponding benefit could never be achieved in Nation X.

At the same time, the *Bin Laden* court's ruling places an even heavier burden on the "public detriment" side of the scale than exists in the domestic setting. Indeed, not only are voluntary and reliable confessions suppressed from evidence (which is the bulk of the weight that this side of the scale carries domestically[266]), but in addition, the United States is hampered with a competitive disadvantage vis-à-vis other nations in its ability to investigate international crime. Most notably, and somewhat ironically, if the foreign nation were to take over the interrogation because of this "freeze out" effect and the suspect were still ultimately tried in the United States, the suspect's confession would be admissible despite the lack of any *Miranda* warnings because the federal courts have universally held that foreign police do not have to Mirandize suspects—even when those suspects are later tried in the United States.[267] Thus, the FBI under *Bin Laden* would be frozen out of the interrogation each time a suspect invoked his right to counsel and would be placed at a competitive disadvantage vis-à-vis foreign law enforcement. The suspect then either will be tried abroad, where protections for civil liberties may be scant or nonexistent, or tried in the United States, where *Miranda* warning would not be required anyway under the "foreign police" exception to *Miranda*. The absurdity of this framework speaks for itself.

If this absurd framework resulted from an inflexible constitutional mandate, it certainly could not be modified; the Bill of Rights cannot be discarded when it causes inconvenience or hardship. But *Miranda* should be read after *Dickerson* as a flexible, prophylactic rule that can be modified—or even temporarily discarded—in new situations in which its application is illogical or in which the balancing test suggests that the rule would be inappropriate. Under *Bin Laden*, society endures the hardships described above and their costs to civil liberties to promote a prophylactic rule that does not effectively protect—and may actually undermine—the underlying constitutional right that it was designed to protect.[268] This result tortures the balancing test established by

266. The *Miranda* warnings may also cause some suspects to decline to voluntarily confess where they otherwise might have.

267. *See supra* notes 15, 64; *infra* note 321.

268. Although the *Dickerson* Court held that *Miranda* was constitutionally based, it cannot be considered an absolute "right" in the sense that exceptions to the doctrine can be made. *See supra* Part IV.B.

Miranda and its progeny.[269] It is important to remember that this analysis focuses on the applicability of a prophylactic rule, not the underlying constitutional right. In the international context, the privilege against self-incrimination would protect the suspect at all times, and if the underlying constitutional right were violated (because the amount of FBI coercion put on the subject resulted in a "compelled" confession), any statements obtained as a result would be inadmissible at trial in the United States.[270]

Finally, consider Warning One, which requires law enforcement officials to inform non-American suspects that they have the right to remain silent. In creating this warning, the *Bin Laden* court apparently did not envision countries such as China that do not offer suspects this right.[271] Consider the following hypothetical, based loosely on the *Bin Laden* facts. Members of a rogue terrorist group have bombed the United States embassy in China, murdering numerous Americans and Chinese. FBI agents arrive in China to investigate and learn that Chinese authorities have taken into custody a potential suspect in the bombing. Chinese authorities grant the FBI access to the suspect for an interview. The lead FBI agent introduces himself to the suspect and, without Mirandizing the suspect, says, "I think you know why we are here. Do you have anything to tell us about the bombing?" The suspect, who hopes to cut a good deal by cooperating with authorities, proceeds to admit his participation in the terrorist attack and provides the FBI with details concerning the participation of his co-conspirators. Later, the suspect is brought to trial in the United States and, while admitting that his confession was made voluntarily and without any coercion, moves to suppress the confession that he made in China on the sole ground that he was not

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269. *Id.*

270. It is not clear which of the two rules—the "compelled confession" rule of the privilege against self-incrimination or the "involuntary confession" rule of the Due Process Clause—would apply in this context, as the Supreme Court has been less than clear on the distinction between these rules even in the domestic setting. *See infra* note 292 and accompanying text.

271. Under Article 93 of the People's Republic of China's criminal procedure law, suspects not only have no right to remain silent, but are obliged to answer questions which are "relevant" to the investigation. THE AMENDED CRIMINAL PROCEDURE LAW AND THE CRIMINAL COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 77 (Wei Luo trans., 2000) ("A criminal suspect shall truthfully answer the questions raised by an investigative functionary based on facts, but he has the right to refuse to answer the questions which are not relevant to the case."); *see also* Hilary K. Josephs, *The Upright and Low-Down: An Examination of Official Corruption in the United States and the People's Republic of China*, 27 SYRACUSE J. INT'L L. & COM. 269, 272 (2000) (noting that China does not recognize a corollary to the American privilege against self-incrimination).

read his *Miranda* rights under *Bin Laden* before he was questioned. The application of *Miranda*'s exclusionary rule in such a situation, however, would again be tantamount to protecting a civil liberty that does not exist and thus cannot be protected.

Furthermore, application of the exclusionary rule in such a scenario would result in the same "freeze out" from future interrogations in that country. Now knowing that China does not afford suspects the right to remain silent or the right to counsel during an interrogation,[272] a recitation of the *Bin Laden* warnings would be misleading. Thus, no warnings could be given in good faith to suspects. Certainly it would be less coercive to say nothing at the start of such an interrogation than to inform a suspect of the truth: that he has no right to remain silent and cannot obtain a lawyer. But because an FBI agent would be forced to Mirandize a suspect under *Bin Laden*, the agent would have to back out of the investigation. The United States would be forced to allow Chinese authorities to handle all future interrogations in that country—even when serious American interests are at stake—and abuses far worse than a *Miranda* violation might occur. Indeed, Chinese authorities would be permitted under Chinese law to forcibly extract a confession from the suspect without a lawyer present.[273] And if Chinese authorities conducted the interrogation and the suspect were later tried in the United States, his confession would be admissible despite the lack of *Miranda* warnings as long as it was voluntarily made. Again, not only would such a result add further weight to the "public detriment" side of the *Miranda* balancing scale because it would hinder the ability of the United States to redress serious national injuries abroad, but it also would not further the broader goals of protecting civil liberties.[274]

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272. A right to counsel in China does not attach until *after* the first time the suspect has been questioned. There is no requirement that police inform a suspect of his right to counsel. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 39–40 (1996); *see also* Josephs, *supra* note 271, at 272 n.13 (discussing the limited right to counsel in China).

273. *See* Josephs, *supra* note 271, at 272 n.13 (describing the limited rights of criminal suspects under Chinese law).

274. It obviously would be difficult to obtain a voluntary confession in China if the suspect were aware during the interview that China does not recognize the right to remain silent. If the FBI were preparing to interview such a suspect, it would be wise for its agents to inform the suspect that he is not required to speak to the FBI. This would be done as a matter of good practice to increase the likelihood that any confession that followed later would be viewed as voluntary by an American court. What the FBI should do as a matter of strategy and good practice, however, is different than requiring the practice as a matter of law. Because

As the Supreme Court suggested in *Tucker*,[275] *Elstad*,[276] and *Harris*,[277] *Miranda*'s applicability to new situations is determined not only through a balancing test but also by analyzing the facts of a case in light of the purpose of the exclusionary rule. As the Supreme Court expressed in *Tucker*:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[278]

In the China scenario, the FBI agents cannot improve the suspect's situation by misleading him with the administration of nonexistent *Miranda* rights. They could not have provided him with counsel, and therefore they could not have taken "a greater degree of care" in protecting the suspect's rights. The FBI agents in the China scenario did nothing wrong by failing to advise the suspect of his *Miranda* rights, and the agents are prohibited by the realities of foreign law from changing their conduct in the future even after being penalized by the exclusionary rule. Clearly, the application of the exclusionary

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suppressing a voluntary confession in China due to a lack of *Miranda* warnings would not serve any purpose, such warnings should not be imposed upon the FBI by a court.

275. 417 U.S. 433 (1974).

276. 470 U.S. 298 (1985).

277. 401 U.S. 222 (1971).

278. 417 U.S. at 447. The *Tucker* Court also stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.
>
> We have recently said, in a search-and-seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." We then continued: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." In a proper case this rationale would seem applicable to the Fifth Amendment context as well.

Id. at 446–47 (citations omitted). *But see* Martin R. Gardner, *The Emerging Good Faith Exception to the* Miranda *Rule—A Critique*, 35 HASTINGS L.J. 429, 468–75 (1984) (discussing the policies behind the exclusionary rule and the "good faith" exception to the rule, and arguing that the courts should not extend the good faith exception in the Fifth Amendment context).

rule can never effectively protect a right that does not exist in the country where an interrogation takes place.

Finally, the Supreme Court has viewed the *Miranda* rule favorably in domestic cases because it is easy for police officers to apply. A law enforcement officer in the United States must merely recite the warnings from memory, taking just a few seconds to satisfy his constitutional mandate. The *Quarles* Court noted that *Miranda* remains a "workable rule" primarily based upon the assumption that it is easy for police officers to implement.[279] Of paramount importance in the evolution of *Miranda* is to maintain a framework "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[280] In creating the public safety exception, the Court declined

> to place [police] officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.[281]

But the rule created by the *Bin Laden* court drastically deviates from this simplicity, thus undermining the effectiveness of the *Miranda* rule in the international context. Although the court stated that FBI agents must "ask" local officials if they will provide counsel for the suspect, this task would hardly be so simple. One can easily imagine scenarios in which this request would proceed up the hierarchical chain of law enforcement within the host country and would quickly unfold into a complicated negotiation between the host nation and the United States. Rather than calling the *Bin Laden* rule one that requires the administration of "warnings" to a suspect, it could more accurately be characterized as a rule that requires FBI agents to make an offer to a suspect to begin complicated negotiations on his behalf with the host nation as to what rights he will receive.

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279. New York v. Quarles, 467 U.S. 649, 658 (1984).

280. *Id.* (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).

281. *Id.* at 657–58.

The court also rather naively assumed that the FBI and the law enforcement agency from the host nation would be on good terms with one another, and thus, cooperation between the two would be the norm. Anyone who has worked in federal law enforcement can verify, however, that when two sovereigns are thrown into a case together (including, for example, federal and state entities in the domestic context), a lack of mutual cooperation is not uncommon. It is easy to imagine situations in which law enforcement representatives from the host nation would be hostile to the presence of the FBI in their country (from their point of view, the FBI might be trying to take over their investigation and prosecution), and thus would look askance at any such request from the United States. In many cases abroad, FBI agents would be guests of the host country and often would have been forced to negotiate in the first instance simply to secure the opportunity to speak to the suspect. To expect the FBI to make sensitive requests of the host nation as soon as its agents arrive on the scene does not recognize the delicate realities of law enforcement in the international arena.

After advising a suspect of his speculative rights under foreign law, the *Bin Laden* rule requires officers to make a "detailed inquiry" into the law of that nation and engage in negotiation with local officials in an effort to mimic the rights that would have been provided were the interrogation conducted in the United States.[282] To recreate an American interrogation, the *Bin Laden* holding places American law enforcement officers in an untenable position; FBI agents must maneuver through the complexities of foreign law and become temporary diplomats with the sensitive responsibility of negotiating international human rights with the host country. Such a situation has never been required by *Miranda* and its progeny, and the Supreme Court made clear in *Berkemer v. McCarty*[283] that the evolving *Miranda* rule must be crafted in a way to avoid placing law

282. United States v. Bin Laden, 132 F. Supp. 2d 168, 188 (2001).

283. 468 U.S. 420 (1984).

enforcement officers in such complicated scenarios.[284]

In the United States, application of *Miranda* is a simple endeavor. An officer must merely recite from memory the standard warnings that never change as the officer's geographic location varies. But requiring law enforcement officers abroad to successfully navigate the laws of every foreign country in which they may find themselves, and then negotiate with foreign officials to determine what additional rights can be afforded, would likewise create an "elaborate set of rules, interlaced with exceptions and subtle

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284. In *Berkemer*, the Supreme Court rejected the government's urgings to carve out an exception to *Miranda* for misdemeanor arrests, stating:

> One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.
>
> "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis."
>
> The exception to *Miranda* proposed by [the government] would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, while reckless vehicular homicide is a felony. When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.
>
> Equally importantly, the doctrinal complexities that would confront the courts if we accepted [the government's] proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters; at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by *Miranda*? The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development.
>
> Absent a compelling justification we surely would be unwilling so seriously to impair the simplicity and clarity of the holding of *Miranda*.

Id. at 430–32 (citations and footnotes omitted).

distinctions,"[285] that varied from country to country, and would result in the same type of unwieldy and confusing framework that the Supreme Court so strongly discouraged in *Berkemer* and *Quarles*.[286]

The *Bin Laden* court's failure was that it imposed its requirements based upon the premise that "the great wisdom of *Miranda*" is that law enforcement must "do what it can at the start of interrogation to dissipate the taint of compulsion."[287] This is not entirely correct. *Miranda* was not designed to be a one-sided doctrine that requires the police to do everything they possibly can to counteract any compulsion that a suspect might feel. As many scholars have pointed out, *Miranda* was a compromise opinion that rejected this one-sided approach.[288] The Court easily could have taken a stronger civil liberties stance and required, as urged by the American Civil Liberties Union,[289] that an interrogation cannot take place unless defense counsel is present in the interrogation room. Instead, *Miranda* attempted to craft a delicate balance between the needs of law enforcement and the constitutional rights of suspects.[290] The *Bin Laden* court, however, utterly failed to analyze its holding in light of the *Miranda* balancing test and the purposes behind the exclusionary rule—both of which are intimately intertwined with *Miranda*'s applicability to new situations.

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285. *Id.* at 432.

286. *See supra* notes 279–280, 283–284, and accompanying text. For a discussion of the need for bright-line rules in criminal procedure, and particularly *Miranda*, see Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 162–67 (1998) (discussing the continuing need for bright-line rules in criminal procedure and the clear guidance that *Miranda* provides to law enforcement officials and judges).

287. *Bin Laden*, 132 F. Supp. 2d at 187.

288. *See* Dripps, *supra* note 139, at 19–22 (noting that the waiver doctrine's inconsistency with the rest of the *Miranda* opinion can only be explained as the Court's "concern for effective law enforcement"); Kamisar, *supra* note 158, at 407–08 (discussing the balance drawn by Justice O'Connor between the needs of law enforcement and the protections afforded to the suspect from "impermissible coercion").

289. *See* Dripps, *supra* note 139, at 20 (noting that the *Miranda* opinion partially tracked the ACLU's brief, but rejected the argument that the presence of counsel is required to protect the Fifth Amendment privilege against self-incrimination); Kamisar, *supra* note 158, at 395 ("*Miranda* rejected 'the more extreme position' advocated by the ACLU that nothing less than 'the actual presence of a lawyer' . . . was needed to dispel the compelling pressure inherent in custodial interrogation.") (quoting Justice O'Connor in Moran v. Burbine, 475 U.S. 412, 426 (1986)).

290. *See supra* notes 54–63 and accompanying text.

VI. *MIRANDA*'S FINAL FRONTIER: A NEW FRAMEWORK FOR THE INTERNATIONAL ARENA

The foregoing analysis is not intended to imply that FBI agents abroad should be free to trample upon the civil liberties of non-Americans abroad. Because the *Miranda* prophylactic rule exists to protect the privilege against self-incrimination, it can be modified in new situations in which it fails to perform the functions for which it was intended. But the privilege against self-incrimination, which is inflexible and applies to anyone tried in the United States regardless of nationality, must always be satisfied.[291] Thus, the privilege invariably protects non-Americans during American interrogations abroad, and, as a result, any confession that an FBI agent obtains from such a suspect that is "compelled" and/or "involuntary" would be inadmissible.[292] Although this Article has identified problems with the *Bin Laden* court's expansive extraterritorial application of *Miranda*, some of the court's analysis would be useful in determining the voluntariness of a confession. For example, if a suspect abroad independently were to request counsel during an interrogation, even though he was located in a country that does not recognize that right and therefore was not advised of such a right at the outset of the

291. *See supra* notes 43–63 and accompanying text.

292. And/or is used in this sentence because it is not clear which of these two doctrines would apply in an international scenario in which *Miranda* is inapplicable. *See Bin Laden*, 132 F. Supp. 2d at 194 n.26 (demonstrating the court's uncertainty as to which standard—the privilege against self-incrimination or the due process "voluntariness" test—is appropriate). Even after holding in 1964 that the privilege against self-incrimination applies to the states, the Supreme Court has continued to use the Due Process Clause rather than the privilege to exclude involuntary confessions. *See supra* note 61. Whether or not the "voluntariness" test of the Due Process Clause applies to an interrogation of a non-American beyond the borders of the United States, however, is beyond the scope of this Article. This Article has concluded, however, that the privilege does apply to such an interrogation. But as a result of its reliance on notions of due process, the Court has not fully developed the legal standard by which the privilege would exclude a problematic confession in a situation where *Miranda* is inapplicable. Professor Joseph Grano argues that the test pursuant to the privilege should be "voluntariness," and should therefore be identical to the due process test. *See* Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confession Law*, 84 MICH. L. REV. 662, 687–88 (1986) (comparing Fifth Amendment compulsion to pre- and post-*Miranda* decisions). Professor Lawrence Herman argues, on the other hand, that the test under the privilege should be whether the confession was "compelled." *See* Herman, *supra* note 61, at 524–28, 552 (arguing that the "compelled" test under the Fifth Amendment leaves less ambiguity than the "involuntary" due process test). This test, according to Professor Herman, is more protective of a suspect's rights than is the due process "voluntariness" test, as it focuses solely on the pressure applied by the police rather than the "totality of the circumstances." *See id.* at 501–04 (focusing on "an abstract assessment of the power or force of the sanction imposed on silence").

interrogation, an FBI agent would have to tread lightly or risk rendering any subsequent confession "compelled" or "involuntary."[293] The question addressed by the *Bin Laden* court and this Article, however, is not the myriad situations that could arise when *Miranda* warnings are not administered and a suspect independently attempts to invoke certain rights, but rather what warnings must be given to an alien suspect at the outset of a foreign interrogation.

A. The Required Warnings

The balancing test and exclusionary rule policy that revealed that the analysis of the *Bin Laden* court was skewed also suggest that FBI agents abroad should not be entirely free of dictates of *Miranda*. In situations in which an FBI agent is aware, or can discover through reasonable efforts under the exigencies of the circumstances, that the host country offers certain rights embodied in *Miranda*, there is no logical reason under *Miranda* why the suspect in question should not be advised of those rights. For example, if an FBI agent were to conduct an interrogation in Germany and had knowledge that suspects in Germany have the right to remain silent during interrogations,[294] any confession he obtained from the suspect should be suppressed if the agent did not advise the suspect of that right. In nations in which the right to remain silent and/or the right to counsel during interrogation are recognized, applying the exclusionary rule when United States law enforcement agents willfully or negligently

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293. The law is, at best, unclear whether a confession would be deemed inadmissible if a suspect's request for counsel were denied in situations in which *Miranda* does not apply. The Supreme Court has stated that the Sixth Amendment right to counsel attaches after the time that judicial proceedings have been initiated against a suspect, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Brewer v. Williams, 430 U.S. 387, 398 (1977) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). Thus, under *Brewer*, a suspect would not have a Sixth Amendment right to counsel during a stationhouse interrogation if he has not yet been formally charged with a crime. And because the *Miranda* decision ruled that the right to counsel during police interrogations was based upon the privilege against self-incrimination rather than the Sixth Amendment right to counsel, Miranda v. Arizona, 384 U.S. 436, 469–70 (1966), this modified right to counsel arguably would not be triggered in interrogations in which *Miranda* was deemed inapplicable. Thus, the most likely result would be that the denial of a request for counsel in situations in which the *Miranda* warnings are not required would be seen as one factor in determining whether the subsequent confession may have been involuntary or compelled. *See supra* notes 43–63 and accompanying text; *see also* Kamisar, *supra* note 158, at 389–90 (discussing whether the denial of a request for an attorney would render a confession inadmissible and stating that the answer is "not perfectly clear").

294. *See* Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 808 n.25 (1998) (discussing the right to remain silent in Germany).

ignore those rights would protect the suspect's rights in the same manner as it does in the United States. Indeed, advising a suspect abroad of a right that is *certain* and that he may invoke at will would lessen the coercive atmosphere of the interrogation, thus furthering the policies behind *Miranda*. And because the law enforcement officers of the host nation would be held to the same requirements, the United States would not be placed at competitive disadvantage in redressing its national injuries by the "freeze out" effect. In such situations, therefore, the operation of the balancing test would closely track its operation in the United States.

Questions might arise as to the proper procedure in countries that recognize a certain right, such as the right to counsel during an interrogation, but that do not require the local police to advise suspects of that right. Because such a scenario would create the identical situation that the *Miranda* court faced in the domestic context in 1966, the warnings should be required in such a situation. One could imagine, however, a situation in which a high-profile suspect would decline to confess after hearing of his *Miranda* warnings from the FBI, prompting the foreign police to become hostile to the FBI because the foreign police would believe that the suspect would have confessed had the FBI not interceded and advised the suspect of his rights. Or one could imagine a situation in which the host country would agree to allow the FBI to interrogate a suspect in their country only on the condition that, consistent with local law, FBI agents do not advise the suspect of his rights. If a foreign nation attempted to undermine the ability of American law enforcement officials to interrogate suspects because that nation did not want suspects to be advised of their rights, American courts should allow the FBI to proceed without administering *Miranda* warnings. Indeed, because the suspect's confession could be admitted at a trial in the United States when the foreign police interrogate him without *Miranda* warnings, requiring a rule that places the United States at a disadvantage to the host country imposes certain disadvantages without offering any countervailing protections.[295]

In China, for example, where no *Miranda*-type rights exist during an initial interrogation,[296] no warnings would be required and the only test for admissibility would be whether the confession was "compelled" in violation of the privilege against self-incrimination,

295. *See supra* notes 15, 64 and accompanying text; *infra* note 321 and accompanying text.

296. *See supra* notes 272–273 and accompanying text.

and/or involuntary in violation of the due process "voluntariness" test.[297] In the vast majority of countries that recognize the right to remain silent,[298] however, FBI agents should be required, at a minimum, to advise suspects of that right. Where the right to counsel during interrogation is respected, FBI agents should be required to advise a suspect of that right as well.

B. The Effort That Should Be Required of American Investigators Abroad to Determine the Rights Available to a Suspect: The Good Faith Exception

The question remains as to what effort should be required of an FBI agent to discover what rights are recognized in a foreign country before he decides which, if any, *Miranda*-type warnings should be administered to a non-American abroad. Based on the fact that the exclusionary rule was designed primarily to deter law enforcement officers from acting in bad faith or negligently in denying a right to a suspect, the prosecution in *Bin Laden* argued that the FBI agents had done the best they could considering that they were acting with scant judicial guidance and that they certainly had not willfully or negligently denied rights to Al-'Owhali.[299] From their conversations with local authorities, FBI agents believed that the right to counsel in Kenya was not a "right" in the sense that it was left to the discretion of the Kenyan police.[300] The court responded that "[w]hatever the merits of this [good faith] theory" when foreign *Miranda* warnings are administered "after a detailed inquiry into a specific nation's law," such a theory could not provide relief to the prosecution in *Bin Laden* because the FBI agents failed to undertake such an inquiry.[301] Thus, the *Bin Laden* court essentially held that even though the FBI had responded immediately to a foreign scene where an act of terrorism had taken place and had a heightened need to speak to Al-'Owhali immediately to determine if additional acts of terrorism were forthcoming from his cohorts, the fact that the FBI did not engage in

297. *See supra* notes 270, 274, and 292.

298. *See* Van Kessel, *supra* note 294 at 804 (observing that the right to remain silent is a common international approach).

299. *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 192 n.23 (S.D.N.Y. 2001) ("The Government additionally argues for some sort of good faith exception to an erroneous [advice of rights].").

300. *Id.* at 190–91.

301. *Id.* at 192 n.23.

a detailed legal analysis of the rights available to him in Kenya meant that the FBI had acted in bad faith or at least negligently.

Interestingly, the *Bin Laden* court set out in a separate part of its opinion to interpret the laws of Kenya to determine if Al-'Owhali did in fact have a right to counsel under the laws of that country during the interrogation. The court stated:

> *The Court's understanding of the law as to Kenya . . . is murky at best.* Kenya's Constitution imparts: "Every person who is charged with a criminal offense shall be permitted to defend himself before the court in person or by a legal representative of his own choice." Moreover, "nothing contained in [the aforementioned provision] shall be construed as entitling a person to legal representation at public expense." Yet the Kenyan Criminal Procedure Code guarantees that "[a] person accused on an offense before a court, may of right be defended by an advocate." And the Kenyan Police Force Standing Orders also ensure: "Every person detained by police should be given facilities for communicating with a friend or legal adviser, and such person should be permitted to visit the prisoner." *We deem it highly inadvisable for the Court to interpret, in the first instance, how these various provisions play out in practice within Kenya.*[302]

Thus, the *Bin Laden* court—which is practiced in interpreting legal verbiage and has the luxury of law clerks and a law library to assist in its research—threw up its judicial hands in attempting to interpret Kenyan law, yet simultaneously held that the FBI agents in question, presumably without commiserate legal training and under exigent circumstances, did not sufficiently act in good faith because they did not parse through the same confusing foreign texts and then negotiate with the host nation to determine what additional rights could be afforded to the suspect. Indeed, the analysis of the *Bin Laden* court extended the boundaries of the exclusionary rule beyond the current parameters set by the Supreme Court. Because a suspect's constitutional rights in the United States are easy to understand and never vary, it is easy to see how an officer can be considered to act in bad faith if he fails to advise a suspect of rights which that officer *already knows of or should know of* from his prior experience in his own country. But because it was designed to deter bad faith and negligence, the exclusionary rule has never been interpreted to require an officer to research the laws of foreign jurisdictions or

302. *Id.* at 190–91 (emphasis added) (citations omitted).

otherwise take such affirmative steps to *increase* the rights available to a suspect.[303]

The inability of the *Bin Laden* court to grapple with the tedious issues of Kenyan law underscores the fact that the *Miranda* doctrine cannot be interpreted to place an unrealistic burden on American law enforcement abroad. Recall that in *Quarles* and *Berkemer*, the Supreme Court reminded the lower courts that the efficacy of *Miranda* depends on its simplicity. The *Quarles* Court created the "public safety" exception to *Miranda* in part because it did not want to burden law enforcement officers, "who have only limited time and expertise," with the task of balancing competing social issues before deciding whether to Mirandize a suspect.[304] Based on the same rationale, the *Berkemer* Court refused to adopt a rule that may have required police officers to perform research and perhaps criminal background checks on suspects before knowing whether to Mirandize a suspect.[305] The holding of *Bin Laden* flies in the face of the Supreme Court's repeated admonitions that *Miranda* must remain "simple" and "practical" for it to remain effective.

This Article proposes, in contrast, that the policies behind *Miranda* and its exclusionary rule should require American law enforcement officers abroad to act in good faith and make a reasonable effort, under the circumstances, to determine what rights are available to a suspect. Most FBI agents are not lawyers with expertise in researching the laws of foreign countries, and under the exigencies of many international investigations, they cannot be expected to visit foreign law libraries to perform detailed research regarding the rights that are available to a suspect in a given country before they begin a custodial interrogation.

At the same time, however, the policies behind the exclusionary rule dictate that when an officer willfully or negligently violates a suspect's rights, the evidence obtained as a result should be

303. *See supra* notes 282-286 and accompanying text. In requiring American law enforcement abroad to negotiate with their foreign hosts in an effort to replicate the rights that would be available in America, the *Bin Laden* court created a requirement that American law enforcement must seek to increase the rights that are available to the suspect under the laws of the country where he is interrogated. Under *Bin Laden*, American law enforcement abroad must make every effort to turn nonrights, in the sense that they are mere hypothetical possibilities, into actual rights.

304. *See supra* notes 279–281 and accompanying text.

305. *See* Berkemer v. McCarty, 468 U.S. 420, 432–33 (1984) (noting the clarity of the *Miranda* doctrine).

suppressed. In a rapidly unfolding scenario in which the FBI has responded without notice to the foreign scene of an act of terrorism and has a pressing need to debrief a suspect immediately to determine if additional acts of terrorism are imminent, simply asking foreign law enforcement officials on the scene as to their practices should be deemed reasonable.

If, on the other hand, no exigencies are present (when a foreign interrogation is planned by appointment prior to the FBI agent departing from the United States, for example), more care should be required. In such cases, it might be negligent for an FBI agent, if time would have permitted, to fail to consult with the FBI's legal advisors or attorneys in the Department of Justice or the Department of State to try to make an accurate determination of foreign rights. In addition, if further investigation at the time of trial in the United States determines that an FBI agent misinterpreted foreign law and did not advise a suspect of a right to which he was entitled in the foreign country, a "good faith" exception would bar the use of the exclusionary rule as long as the officer did not willfully or negligently make the mistake. The difficulty that the *Bin Laden* court had in interpreting Kenyan law demonstrates that good faith mistakes would not be rare in the global application of *Miranda*.

The framework proposed in this Article does not offer a bright-line rule, because such a rule cannot be formulated for the complex international arena, but this framework is certainly easier for law enforcement to implement than the *Bin Laden* rule. In addition, the touchstone issues at a suppression hearing would be the "reasonableness" and "good faith" of the law enforcement officers. Reasonableness and good faith are fundamental legal standards, and courts have a wealth of experience in evaluating these standards in areas ranging from torts to criminal law to contract law.[306]

The analysis presented in this Article was implicitly applied in two federal cases largely ignored by the *Bin Laden* court. In *United*

306. *See generally* Thomas K. Clancy, *Extending the Good Faith Exception to the Fourth Amendment's Exclusionary Rule to Warrantless Seizures that Serve as a Basis for the Search Warrant*, 32 HOUS. L. REV. 697 (1995) (describing the good faith standard in criminal procedure); Agasha Mugasha, *Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts*, 45 WAYNE L. REV. 1789 (2000) (discussing these standards in contract law); George W. Soule & Jacqueline M. Moen, *Failure to Warn in Minnesota, the New Restatement on Products Liability, and the Application of the Reasonable Care Standard*, 21 WM. MITCHELL L. REV. 389, 397–407 (1995) (describing the reasonableness standard in torts).

States v. Dopf,[307] a case before the Court of Appeals for the Fifth Circuit, the defendants were arrested by Mexican authorities, at the request of an FBI agent, for transporting a stolen car from Texas to Mexico.[308] In Mexico, the FBI agent interviewed each of the defendants separately.[309] Prior to advancing his questions, the agent advised each defendant that they had a right to remain silent but that he could not offer them an attorney in Mexico.[310] Because the defendants were American citizens, the agent also offered to contact the American consulate on their behalf.[311] The defendants each confessed in response to the FBI agent's questions.[312] At trial in the United States, the defendants moved to suppress their convictions because they had not been advised of their right to counsel pursuant to *Miranda*, but the district court denied their motions.[313] Without significant analysis or discussion, the court of appeals upheld the district court based upon the rationale provided by the FBI agent at the suppression hearing:

> The waiver of rights form that we use [in the United States] specifies that they will be furnished with an attorney, that we will provide them with an attorney, [but] that it makes no provision for the circumstances we found ourselves in Mexico of having no authority and not being able to assist them in any other way than to advise the Consulate.[314]

The *Dopf* court approved the deviation from *Miranda* apparently on the ground that suspects do not have to be advised of rights that they do not have in the country in which they are interrogated.

Similarly, in *Cranford v. Rodriguez*,[315] the Court of Appeals for the Tenth Circuit faced almost identical facts to those in *Dopf*. The court recognized that obtaining a publicly appointed attorney for the defendant in Mexico was "not possible" and approved a recitation of rights that did not include the fact that an attorney would be

307. 434 F.2d 205 (5th Cir. 1970).
308. *Id.* at 206.
309. *Id*.
310. *Id.* at 206–07.
311. *Id.* at 207.
312. *Id*.
313. *Id*.
314. *Id.* (internal quotations omitted).
315. 512 F.2d 860 (10th Cir. 1975).

appointed for the suspect if he could not afford one.[316] The *Cranford* court stated, "We consider the departure from the *Miranda* doctrine that occurred here as a variation which under the facts of this case was unavoidable and not prejudicial."[317] Admittedly, although these cases are important in the sense that they both allow deviations from *Miranda* abroad, they must be taken lightly because neither offers the level of analysis expected of such a difficult issue.

The *Bin Laden* court addressed *Dopf* and *Cranford* in a footnote by noting simply that they are distinguishable because "the courts seem[ed] to accept as true the blanket assertion that access to counsel was never possible under the circumstances."[318] This comment suggests that the *Bin Laden* court believed that if a right truly is not available to a suspect abroad, the suspect need not be advised of that right. This is a plainly unpersuasive attempt to distinguish these cases, however, as this comment by the *Bin Laden* court runs directly contrary to its own detailed analysis in the rest of its opinion. Indeed, the *Bin Laden* court's framework requires law enforcement officers to research whether or not counsel is available under foreign law, and if foreign law does not provide for counsel, then they must ask local authorities to provide for one in any event.[319] The *Bin Laden* court also held that if counsel is deemed to be absolutely unavailable after these steps are completed, the suspect must be apprised nonetheless of this development and told that he is not required to speak to American law enforcement because of the unavailability of counsel.[320] Its holding, therefore, is directly contrary to the holdings in *Dopf* and *Cranford*, which imposed no such requirements in ruling that deviations from *Miranda* were permissible abroad.[321]

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316. *Id.* at 863.

317. *Id*.

318. United States v. Bin Laden, 132 F. Supp. 2d 168, 191 n.22 (S.D.N.Y. 2001).

319. *See id.* at 190–91 (criticizing the government's advice of rights form for neither correctly informing the suspect of his right to counsel under foreign law nor seeking to preserve the spirit of *Miranda* and the paramount right to counsel).

320. *Id*. at 189.

321. The *Bin Laden* court supported its holding by citing a line of cases known as the "joint venture" cases, which all held that *Miranda* warnings are not required abroad when the interrogation is conducted by foreign, as opposed to American, law enforcement. *Id.* at 187 (citing United States v. Bagaric, 706 F.2d 42, 69 (2d Cir. 1983); United States v. Heller, 625 F.2d 594, 599 (5th Cir. 1980); Pfeifer v. United States Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980); United States v. Emery, 591 F.2d 1266, 1268 (9th Cir. 1978); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); United States v. Molina-Chacon, 627 F. Supp. 1253, 1262 (E.D.N.Y. 1986); United States v. Hensel, 509 F. Supp. 1364, 1375 (D. Me. 1981)). These cases all hold that *Miranda* warnings are not required abroad when the interrogation is conducted by foreign—as

C. *Applying the New Framework to the Facts of* Bin Laden

If the framework proposed in this Article were applied to the facts of *Bin Laden*, one would have to conclude that the court in that case erred in suppressing Al-'Owhali's statements to the FBI pursuant to the modified *Miranda* warnings that he received. Al-'Owhali's statements were made voluntarily pursuant to the privilege against self-incrimination,[322] thus the only ground for exclusion in that case was the *Miranda* doctrine. The FBI agents in *Bin Laden* advised Al-'Owhali that he had the right to remain silent.[323] Regarding the right to counsel, however, it is at best unclear whether Al-'Owhali had such a right during the interrogation—reported Kenyan law is murky on that issue, as the *Bin Laden* court discovered.[324] The FBI agents in Kenya believed in good faith, after speaking with Kenyan authorities, that counsel was available "at the sole discretion" of the

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opposed to American—law enforcement. The *Bin Laden* court stated that these cases further provide that "the lack of *Miranda* warnings will still lead to suppression if U.S. law enforcement themselves actively participated in the questioning . . . or if U.S. personnel, despite asking no questions directly, used the foreign officials as their interrogational agents in order to circumvent the requirements of *Miranda*." *Bin Laden*, 132 F. Supp. 2d at 187. This is not an entirely accurate statement. First, in all of the cases but *Emery*, the American law enforcement officers did not participate in the questioning. Thus, these cases simply held that because the foreign police conducted the interrogation in question, *Miranda* was not implicated. Each of these cases then mentioned in passing—without any analysis—that if the American representatives *had* participated, then the outcome might have been different. These statements constitute mere dicta, as none of the cases squarely addressed the issue or in fact ruled on whether *Miranda* warnings are required when American law enforcement participates in the questioning. The *Emery* case, however, did hold that because American law enforcement officers actively participated in the questioning along with foreign law enforcement in that case, a *Miranda* violation occurred. 591 F.2d at 1267–68. It is unclear, however, whether the defendant in that case, John Emery, was a citizen of the United States or of Mexico (the site of the interrogation). Thus, it is questionable whether *Emery* supports *Bin Laden* in holding that *Miranda* warnings must be administered to non-Americans abroad. In addition, the *Emery* decision made its ruling on this point without any significant analysis. *Emery*, 591 F.2d at 1268. Thus, it can fairly be said that two cases, *Dopf* and *Cranford*, support some aspects of the analysis proffered by this Article, while one case, *Emery*, perhaps supports some aspects of the holding of *Bin Laden*. Neither *Dopf* nor *Cranford* nor *Emery*, however, should carry much weight as their analyses were too superficial to support either perspective.

322. *See Bin Laden*, 132 F. Supp. 2d at 194 n.26 (stating that "[even if the relevant standard were due process, Al-'Owhali's confession would still be considered voluntary").

323. *Id.* at 173 ("You do not have to speak to us or answer any questions. Even if you have already spoken to the Kenyan authorities, you do not have to speak to us now."). Whether he actually enjoyed that right is unknown, as the *Bin Laden* court simply assumed that this warning must always be administered.

324. *Id.* at 190–91. For more on the court's treatment of Kenyan law, see *supra* notes 302–303 and accompanying text.

Kenyan investigators.[325] They nevertheless advised him that because the interrogation was taking place in Kenya and his right to counsel during the interrogation could not be guaranteed, he still had a choice whether he wished to speak to the American representatives without a lawyer present.[326]

If Kenyan law did not provide Al-'Owhali with the right to counsel during the interrogation, the FBI should have been able to remain silent on the issue without risking suppression of the statements by Al-'Owhali. The warnings they did provide Al-'Owhali on that subject would have been superfluous. Because there was nothing in the record of the *Bin Laden* court demonstrating that the right to counsel during an interrogation in Kenya was an actual right, no warnings pertaining to counsel should have been required in that case. On the other hand, if Kenyan law did provide Al-'Owhali with the right to counsel, Al-'Owhali's statements should not have been suppressed under the "good faith" exception to the exclusionary rule. The FBI agents were acting under considerable time pressure and certainly could not have been expected to stop their investigation to research the intricacies of Kenyan law. If they had done so, a clear answer would not have been available in any event. They did, however, inquire of the Kenyan authorities concerning the right to counsel, and they had no reason not to doubt the accuracy of the answer they received. As such, the FBI agents did not act negligently or in bad faith, and the application of the exclusionary rule was inappropriate.

CONCLUSION

Because of the unique nature of the privilege against self-incrimination, the *Miranda* doctrine is one of the few—if not the only—constitutional doctrines that can apply in some circumstances to non-Americans outside the borders of the United States. Given the drastic increase in American law enforcement abroad in recent years, the international setting is likely to be the next frontier for the courts to explore the boundaries of *Miranda*.

The recent *Dickerson* decision notwithstanding, a modification to the *Miranda* doctrine is inevitable in the international context. Courts

325. *Id.* at 191 (internal quotations omitted).

326. *Id.* at 173–74 ("If you decide to speak with us now, without a lawyer present, you will still have the right to stop answering questions at any time.").

will be called on to create a new framework that recognizes the delicate balance between law enforcement and civil liberties, that supports the core policies embodied in *Miranda* and its exceptions, and that has the flexibility to work in the myriad situations that arise in countries offering various protections to civil rights. The *Bin Laden* court was the first court to undertake this challenging task, but the framework it created accomplishes none of these objectives.

The four international *Miranda* warnings created by the *Bin Laden* court, and the heavy additional burdens that the court placed on American law enforcement abroad, do not protect—and in many situations will actually undermine—the civil liberties that the court was trying to protect. Indeed, one of the unintended results of the *Bin Laden* court's analysis is that FBI agents abroad will be forced, because of the "freeze out" effect created by the court's onerously strict adherence to domestic *Miranda* requirements, to back out of foreign interrogations and turn suspects over to the host country for interrogation and prosecution. Because many countries around the world do not protect civil liberties as vigilantly as the United States does, this will often result in greater civil rights abuses than would have occurred had the FBI agent retained control of the interrogation and proceeded without administering *Miranda* warnings. And if this same suspect who was interrogated by the foreign police were later tried in the United States, *Miranda* warnings would not be required under the "foreign police" exception to *Miranda*. Thus, a universal application of the *Bin Laden* rule would unduly burden law enforcement and may undermine civil liberties without offering countervailing protections to civil liberties.

This Article contends that when the underlying rationales of *Miranda* and its exclusionary rule are properly applied in the international arena, American law enforcement officials should be required to advise a suspect only of the rights that he actually enjoys in the country in which the interrogation occurs. Given the complexities of foreign law, the lessons of *Quarles* and *Berkemer*, and the policies behind the exclusionary rule, if an FBI agent incorrectly interprets the rights available under foreign law in crafting his warnings, any confession that follows should not be suppressed if the agent made a good faith effort under the circumstances to determine what rights were available to the defendant.