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Constitutionally Excluded Confessions: Applying America's Lessons to a Democratic Iraq

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CONSTITUTIONALLY EXCLUDED CONFESSIONS: APPLYING AMERICA'S LESSONS TO A DEMOCRATIC IRAQ

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Torture and interrogation were synonymous under Saddam Hussein's regime in Iraq.[1] Unfortunately, given the notorious prisoner abuse scandal at Abu Ghraib,[2] and continuing police practices reminiscent of the former regime,[3] those words likely will remain associated for some time in public perception if not also in practice in Iraq.[4] If the emerging democracy is to advance the liberal principle of individual rights, as advocated by some of Iraq's emerging political and religious leaders,[5] then it will need to reform interrogation techniques and rehabilitate public perception about them. This will no doubt be a difficult task, and one that is complicated by the country's pressing need for security against the insurgent violence that plagues it daily.[6]

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1. *See, e.g.*, S. H. AMIN, THE LEGAL SYSTEM OF IRAQ 21-24 (1989); INTERNATIONAL COMMISSION OF JURISTS, IRAQ AND THE RULE OF LAW 122 (1994); Jack Kelley, *Iraqis Pour Out Tales of Saddam's Torture Chambers*, USA TODAY, Apr. 13, 2003, *available at* http://www.usatoday.com/news/world/iraq/2003-04-13-saddam-secrets-usat_x.htm; Bill Neely, *Inside Saddam's Torture Chamber*, BBC NEWS, Apr. 9, 2003, *at* http://news.bbc.co.uk/2/hi/middle_east/2930739.stm.

2. *See, e.g.*, Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42, *available at* http://www.newyorker.com/fact/content/?040510fa_fact; Richard B. Schmitt, *Senators Quiz Gonzales on Torture Policy*, L.A. TIMES, Jan. 7, 2005, at A1.

3. *See, e.g.*, Hannah Allam, *Iraqi Police Off to a Brutal Start*, ST. PAUL PIONEER PRESS, July 20, 2004, at 1A; Brian Knowlton, *U.S.-Installed Government in Iraq Is Cited by U.S. for Rights Abuses*, N.Y. TIMES, Mar. 1, 2005, at A1; Gideon Long, *Torture Still Routine in Iraqi Jails*, Jan. 24, 2005, *at* http://story.news.yahoo.com/news?tmpl=story&u=/nm/20050125/ts_nm/iraq_rights_dc.

4. Indeed, the prison abuse scandal has spawned a new negative association between the brutality of interrogations under Saddam Hussein and that under the U.S. military at Abu Ghraib. *See, e.g.*, Mark Mazzetti et al., *Pressing Inmates for Intel*, U.S. NEWS & WORLD REP., May 17, 2004, at 33.

5. *See* Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 OKLA. L. REV. 1, 2 (2005).

6. *See* Ellen Knickmeyer, *Insurgent Violence Escalates in Iraq*, WASH. POST, Apr. 24, 2005, at A1; Jonathan S. Landay, *Iraq Tops World in Terror Attacks*, MIAMI HERALD, Apr. 27, 2005, at A20; Dana Priest, *Iraq New Terror Breeding Ground; War Created Haven, CIA Advisers Report*, WASH. POST, Jan. 14, 2005, at A01.

The task of reforming interrogation practices and rehabilitating their public perception will require action on many fronts — military, political, cultural, religious, and legal. Agreeing with Professor Noah Feldman's observation that legal reasoning may "facilitate democratic thinking and outcomes" in a new Iraq,[7] this Article will set out general considerations on the legal front for when to exclude confessions from criminal prosecutions. While other legal measures surely will be necessary,[8] the drafting of a new constitution[9] will present an opportunity for enshrining in Iraqi law exclusionary rules that will help protect Iraqis in the interrogation chamber, improve the reliability of confessions, increase confidence in the process for obtaining them, and advance the norms of liberal democracy.

In taking advantage of this opportunity, much can be gained by considering the United States' own constitutional approaches to regulating interrogations through the exclusionary rule and adapting the lessons learned to Iraq's current concerns and future aspirations. This Article therefore will examine the constitutional bases relied on by the U.S. Supreme Court to exclude confessions obtained under interrogation and consider their suitability to a democratic Iraq. In Part I, as a preliminary matter, this Article will review past and present Iraqi law regulating interrogations. Then, in Parts II through IV, this Article will review the constitutional principles governing the admissibility of confessions developed by the Supreme Court under the Due Process Clause (Part II), the Sixth Amendment (Part III), and the Fifth Amendment (Part IV), and consider how well these principles and related Iraqi law may be adapted to advance the nation's competing needs for security and liberty.

I. Iraqi Law

One need look no further than Iraqi law under Saddam's regime to find broad and stringent bans on abuses in interrogation. Specifically, Article 22 of the 1990 Interim Constitution of Iraq provides that "[t]he dignity of man is safeguarded," and categorically proscribes the infliction of "any physical or psychological harm."[10] Furthermore, the code of criminal procedure in effect during Saddam's reign states that "[t]he use of any illegal method to influence the accused and extract a confession is not permitted," and lists as illegal

7. Feldman, *supra* note 5, at 9.

8. For example, criminal or civil liability for abusive interrogation practices would be advisable. *See infra* notes 13-14, 61, 145 and accompanying text.

9. *See infra* notes 22-23 and accompanying text.

10. IRAQ INTERIM CONST. art. 22(a) (1990).

methods "[m]istreatment[s], threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants."[11]

Notably, none of the above provisions require excluding from criminal prosecutions confessions obtained as a result of their violation. Indeed, the code of criminal procedure provides without limitation that "statements of the defendant are [to be] heard" at trial.[12] However, the Iraqi Penal Code of 1969 does prescribe imprisonment for "[a]ny public official or agent who tortures or orders the torture of an accused, witness, or informant to compel him to confess."[13] What is more, the penal code also punishes by imprisonment "[a]ny public official or agent who cruelly treats a person in the course of his duties thereby causing him to suffer a loss of esteem or dignity or physical pain."[14] While sweeping and severe on paper, these laws lacked enforcement under the Saddam regime, which made torture an essential tool of interrogation.[15]

After the fall of the regime in 2003, the governing Coalition Provisional Authority (CPA) led by the United States and the United Kingdom adopted most of the provisions of the penal and criminal procedure codes, including those previously discussed.[16] The CPA subsequently turned over sovereignty to a new Iraqi government under the Transitional Administrative Law (TAL) in 2004.[17] That law supplemented the above provisions[18] to give accused individuals a number of protections, among them the right "to engage independent and competent counsel," "to remain silent in response to questions addressed to him with no compulsion to testify for any reason," and

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11. LAW ON CRIMINAL PROCEEDINGS WITH AMENDMENTS, Book Two, ch. 5, § 5, ¶ 127 (1971) [hereinafter LAW ON CRIM. PRO.].

12. *Id.*, Book Three, § 4, ¶ 167.

13. IRAQI PENAL CODE ¶ 333 (1969). This paragraph does not set out any particular range of imprisonment.

14. *Id.* ¶ 332. The maximum term of imprisonment set out in this paragraph is one year.

15. *See supra* note 1 and accompanying text.

16. *See* Coalition Provisional Authority [hereinafter CPA], Memorandum No. 3 (Rev.), § 2 (June 27, 2004), *at* http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (adopting in substantial part the LAW ON CRIM. PRO., *supra* note 11); CPA, Order No. 7, § 2 (June 9, 2003), *at* http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (adopting in substantial part the IRAQI PENAL CODE, *supra* note 13).

17. *See generally* CPA, Order No. 100 (June 28, 2004), *at* http://www.iraqcoalition.org/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdf; LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD [hereinafter TAL].

18. *See* TAL, *supra* note 17, art. 26 ("Except as otherwise provided in this Law, the laws in force in Iraq on 30 June 2004 [the turnover date] shall remain in effect unless and until rescinded or amended by the Iraqi Transitional Government in accordance with this Law.").

to "be notified of these rights."[19] Furthermore, like prior laws, the TAL prohibited "[t]orture in all its forms, physical or mental," as well as "cruel, inhuman, or degrading treatment."[20] Significantly, the TAL provided for the first time that confessions "made under compulsion, torture, or threat thereof" shall be excluded from "any proceeding, criminal or otherwise."[21]

Pursuant to the TAL, Iraqis early in 2005 elected a National Assembly,[22] which the TAL charges with responsibility for drafting "a permanent and legitimate constitution achieving full democracy."[23] The TAL and the prior laws it extends will stay in effect until the formation of a new government under the permanent constitution.[24] As a result, a hodgepodge of provisions currently governs interrogation practices and the use of confessions in Iraq, from the Saddam-era prohibitions against interrogation abuses to the additional rights and exclusionary remedy under the TAL.[25]

Because these Iraqi laws have little enforcement history, this Article will consider their suitability to regulating interrogations in the context of discussing more practiced constitutional doctrines in the United States. It is to the first of these doctrines, historically speaking, that this Article now turns.

II. Due Process

As construed by the Supreme Court, the Due Process Clause of the Fifth and Fourteenth Amendments[26] prohibits the admission of involuntary confessions.[27] Further refined, the clause requires the exclusion of confessions where "a defendant's will was overborne" under the totality of circumstances, considering "both the characteristics of the accused and the details of the interrogation."[28] Among the concerns underlying this prohibition are an

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19. *Id*. art. 15(E).

20. *Id*. art. 15(J).

21. *Id*.

22. *See id*. art. 30; *see also* Dexter Filkins, *The Iraqi Election*, N.Y. TIMES, Jan. 31, 2005, at A1.

23. TAL, *supra* note 17, pmbl. *See generally id*. art. 60-61.

24. *Id*. art. 62.

25. In addition, the rules of procedure being developed for the Iraqi Special Tribunal for the prosecution of crimes of genocide, crimes against humanity, and war crimes apparently will require exclusion of "any evidence" resulting from torture. *See Morning Edition* (NPR radio broadcast, Dec. 12, 2004) (interview statement of Michael Scharf).

26. Both the Fifth Amendment, applicable to the federal government, and the Fourteenth Amendment, applicable to the states, provide that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV.

27. *See* Brown v. Mississippi, 297 U.S. 278, 286 (1936).

28. Dickerson v. United States, 530 U.S. 428, 434 (2000) (internal quotations omitted). Put another way, this fact-specific test requires determining whether, considering the circumstances,

evidentiary one with the "inherent untrustworthiness" of coerced confessions[29] and a normative one with methods of interrogation "revolting to the sense of justice."[30]

As applied by the Supreme Court, the due process test has been fairly effective at identifying and excluding confessions obtained by physical coercion from actual or threatened brutality[31] or from basic physical deprivations.[32] The test has been less successful, however, at delineating the difference between permissible and overbearing pressures in more subtle physical or psychological forms. For example, while circumstances such as the length and time of interrogation,[33] the use of false sympathy or fabricated evidence,[34] implied promises of leniency or harshness,[35] and the age,

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the government deprived a confessing suspect of his "power of resistance." Fikes v. Alabama, 352 U.S. 191, 197 (1957).

29. Spano v. New York, 360 U.S. 315, 320 (1959).

30. *Brown*, 297 U.S. at 286. The normative concern encompasses "a complex of values" beyond "the likelihood that the confession is untrue [or] the preservation of the individual's freedom of will." Blackburn v. Alabama, 361 U.S. 199, 207 (1960). "It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Spano*, 360 U.S. at 320-21. The Court has even gone so far as to say that involuntary confessions must be excluded

> [n]ot because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system — a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).

31. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 283 (1991) (excluding confession from defendant subjected to credible threat of physical harm at hands of other inmates); *Brown*, 297 U.S. at 281-82 (excluding confession from defendant subjected to actual hanging and whipping).

32. *See, e.g.*, Brooks v. Florida, 389 U.S. 413, 413-14 (1967) (excluding confession from defendant subjected to denial of clothing and food).

33. *See, e.g.*, Davis v. North Carolina, 384 U.S. 737, 752 (1966) (excluding confessions from defendant subjected to repeated interrogation in "coercive atmosphere" over sixteen days); Ashcraft v. Tennessee, 322 U.S. 143, 153-54 (1944) (excluding confession from defendant subjected to interrogation for thirty-six hours "without respite").

34. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 737-39 (1969) (holding that use of fabricated confession of another "is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible"); *Spano*, 360 U.S. at 323 (concluding that defendant's "will was overborne by official pressure, fatigue and sympathy falsely aroused" from emotionally manipulative interrogation by childhood friend).

35. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534-35 (1963) (excluding confession obtained from defendant inexperienced in criminal law "after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did

education, intelligence, and other characteristics of the suspect,[36] have all factored into the voluntariness inquiry, none have proved dispositive.[37] Indeed none can be, given the due process test's requirement that "the totality of all the surrounding circumstances" be considered.[38] Moreover, the metaphysical inquiry into the state of a person's "will," while confounding enough as a philosophical matter,[39] may be impossible to discover as a matter of historical fact. These difficulties have left interrogators in the field without much practical guidance.[40] Furthermore, courts reviewing interrogations ultimately must resort to an implicit, if not express, balancing between society's need for security and competing norms of justice, fairness, and liberty.[41]

In light of these considerations, application of the due process involuntariness standard in Iraq would have certain pluses and minuses. On the plus side, the standard should suffice to exclude confessions obtained by the kind of physical and extreme psychological abuse that was the hallmark of interrogations under the old regime and that continues under the new governing authorities.[42] Less obviously, but perhaps as importantly, incorporating the standard into the new Iraqi constitution would help to promote respect for the individual in the emerging democracy. At the same time, the standard has enough flexibility to provide some accommodation to Iraq's pressing need for security, and to grow more protective as the security situation improves.[43]

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not 'cooperate,'" but that officers would recommend "leniency" if she did).

36. *See, e.g.*, Crooker v. California, 357 U.S. 433, 438 (1958) (considering "petitioner's age, intelligence, and education," including his law school training in criminal law, in determining whether confession was coerced).

37. For more cases considering these and other factors, see *Annual Review of Criminal Procedure*, GEO. L.J. 172-76 (2004).

38. Dickerson v. United States, 530 U.S. 428, 434 (2000) (internal quotations omitted).

39. *See, e.g.*, IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON (Werner S. Plunar trans., 2002) (1788).

40. *See* Haynes v. Washington, 373 U.S. 503, 515 (1963) ("The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw.").

41. However, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court asserted that its due process cases "reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty." *Id.* at 225. The concept of "voluntariness," according to the Court, accommodates both "the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws," and "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." *Id*. at 224-25.

42. *See supra* notes 1-3 and accompanying text.

43. *Cf.* Duncan v. Louisiana, 391 U.S. 145, 175 (1968) (Harlan, J., dissenting) (arguing that the "evolving conscience of the American people would add new 'intermediate premises'" to due process protections).

On the minus side, the fact-specific and metaphysical nature of the involuntariness standard may lend itself even less to sorting out distinctions in Iraq between those more subtle interrogation tactics that are coercive and those that are permissible. Indeed, the somewhat "amphibian"[44] standard may encourage rather than discourage interrogators from engaging in more questionable methods of inquiry. Outside the scope of the clearly impermissible, the de facto discretion provided to interrogators by the involuntariness standard may be problematic enough in the United States.[45] Those problems would be exacerbated in a country wracked daily by terrorist attacks.

Given these potential problems, Iraq's adoption of a more specific standard may be desirable. Such standards may be found in both U.S. and Iraqi law. For example, to borrow from another constitutional provision, the Fifth Amendment privilege against self incrimination, as once construed by the Supreme Court,[46] prohibits the use of confessions "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence."[47] Additionally, as noted, the 1990 Interim Constitution of Iraq bans the infliction of "any physical or psychological harm";[48] the code of criminal procedure prohibits the extraction of confessions by "[m]istreatment[s], threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants";[49] the Iraqi Penal Code of 1969 criminalizes torture and cruel treatment by public officials;[50] and the TAL not only bans "[t]orture in all its forms, physical or mental," but also prohibits the admission of any confession "made under compulsion, torture, or threat thereof" in any proceeding.[51]

These standards reflect some of the same liberal norms as the due process standard.[52] They seek to safeguard "the dignity of man"[53] from "cruel, inhuman, or degrading treatment."[54] They also generally provide greater protection. For instance, the proscription of "*any* physical *or* psychological

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44. Culombe v. Connecticut, 367 U.S. 568, 605 (1961).

45. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2608 (2004) (plurality op.) ("[T]he traditional totality-of-the-circumstances test posed an unacceptably great risk that involuntary custodial confessions would escape detection.") (internal quotations omitted).

46. *See infra* note 88 and accompanying text.

47. *See* Bram v. United States, 168 U.S. 532, 542-43 (1897) (internal quotations omitted).

48. IRAQ INTERIM CONST. art. 22(a) (1990).

49. LAW ON CRIM. PRO., *supra* note 11, Book Two, ch. 5, § 5, ¶ 127.

50. IRAQI PENAL CODE ¶¶ 332, 333 (1969).

51. TAL, *supra* note 17, art. 15(J).

52. *See supra* note 30 and accompanying text.

53. IRAQI INTERIM CONST. art. 22(a).

54. TAL, *supra* note 17, art. 15(J).

harm,"[55] taken literally, prohibits all bodily or mental injury; the prohibition of the use of "*any* . . . psychological influence,"[56] taken literally, is even broader; and the ban on "any improper influence,"[57] depending on the construction of "improper," may be the broadest possible proscription. By contrast, the due process inquiry treats nonphysical influences and injuries as nondispositive considerations under the totality of circumstances.[58]

The relative specificity of these alternative standards recommends them over the due process involuntariness test. Under a new government, in particular, state interrogators and individuals subject to interrogation would benefit from clearer rules at the outset regarding the permissible bounds of official questioning. However, the reach of the broader of these standards may make all but the most innocuous methods of interrogation illegal, and deprive the state of the ability to employ subtle but effective psychological ploys to obtain confessions.

In the end, a standard or set of standards that strikes a balance between clarity and flexibility may work best. In this regard, the TAL's provisions merit serious consideration. The TAL's prohibition of actual or threatened torture in all forms, physical and mental, is more specific than the due process standard but less sweeping than bans on all psychological harms or influences. Additionally, the TAL's prohibition of compelled confessions may provide fallback protection similar to that of the involuntariness test against coercive police conduct not rising to the level of torture. Combined, these two provisions would give the Iraqi government some room in which to operate and some guidance with respect to clearly prohibited conduct. At the same time, they would protect individuals against more or less obvious interrogation abuses.

Of course, however bright or broad, proscriptions of interrogation abuses mean nothing without effective enforcement mechanisms or a government willing to enforce them. Indeed, the Iraqi experience to date amply illustrates the potential gulf between laws on paper and actual practice.[59] Nevertheless, the drafters of the new Iraqi constitution must proceed on the assumption that a new regime eventually will abide by the dictates of that document.

If the drafters choose to incorporate any of the above interrogation standards into the constitution, they should consider including a command of exclusion[60]

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55. IRAQ INTERIM CONST. art. 22(a) (emphasis added).

56. LAW ON CRIM PRO., *supra* note 11, Book Two, ch. 5, § 5, ¶ 127 (emphasis added).

57. Bram v. United States, 168 U.S. 532, 543 (1897) (internal quotations omitted).

58. *See supra* notes 33-38 and accompanying text.

59. *See supra* notes 1-3.

60. As noted, such a command is noticeably absent from the comprehensive Saddam-era prohibitions, *see supra* note 12 and accompanying text, but present in the TAL, *see supra* note

with it as a means of deterring violations.[61] For the same reason, they should also consider whether to require the exclusion of evidence derived from involuntary confessions — including subsequent confessions, witness testimony, and physical evidence — to prevent the state from exploiting its illegality and to deter further violations.[62]

III. Sixth Amendment

The second constitutional provision under which the U.S. Supreme Court has excluded confessions is the Sixth Amendment guarantee of the right to "the Assistance of Counsel" in "all criminal prosecutions."[63] According to the

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21 and accompanying text, as well as the Fifth Amendment, *see* United States v. Patane, 124 S. Ct. 2620, 2628 (2004) (plurality op.) ("[T]he Self-Incrimination Clause contains its own exclusionary rule. It provides that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself.'") (quoting U.S. CONST. amend. V). Furthermore, the due process standard implicitly requires exclusion, as it is violated not only when a confession is obtained by coercive methods, but also when the government uses a confession so obtained to "prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U.S. 534, 541 (1961); *see* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989). Nevertheless, if the drafters choose to adopt a due process standard, they would do well to expressly exclude such confessions rather than leave their admissibility open to the vagaries of how the standard will be construed.

61. Among the purposes served by "excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution." Colorado v. Connelly, 479 U.S. 157, 166 (1986). Of course, there may be other means of deterring violations, such as criminal, civil, or administrative sanctions. *See supra* notes 13-14 and accompanying text; *cf.* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that strict governmental liability and punitive damages rather than exclusion best deters future violations). Considerations underlying such sanctions and their desirability for Iraq are beyond the intended scope of this article.

62. *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (holding that exclusion of evidence as the "fruit of the poisonous tree" of illegal police action turns on whether such evidence "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint") (internal quotations omitted); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."). The Supreme Court has yet to hold expressly that the "fruit of the poisonous tree" principle applies to due process violations. *Cf.* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (refusing to hold voluntary confession in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), "so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period").

63. In relevant part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

Supreme Court, this right arises after the initiation of judicial proceedings,[64] and requires exclusion of statements "deliberately elicited" by the government from the accused absent counsel or a valid waiver of counsel.[65] Such deliberate elicitation may occur directly through interrogation,[66] or indirectly through the creation of situations calculated to produce incriminating information.[67] While the underpinnings of this doctrine have been criticized as less than clear,[68] the doctrine appears to be motivated by a systemic concern with maintaining an adversarial process and a normative concern with ensuring the fairness of that process through interposing counsel between the suspect and the state.[69]

In the United States, the Sixth Amendment has not played a major role in regulating interrogations. Doctrinally speaking, because the right to counsel does not attach until the initiation of judicial proceedings,[70] it does not necessarily extend its protections to the interrogation room. And practically speaking, most interrogations occur shortly after arrest but before the attachment of the right. Thus, unlike due process, the Sixth Amendment's ability to regulate confessions is limited by its applicability. Moreover, historically speaking, the Supreme Court's use of the Sixth Amendment as a check on state interrogation methods began in 1964 with *Massiah v. United States*,[71] but was shortly supplanted and largely overshadowed by the Court's landmark decision two years later in *Miranda v. Arizona*.[72] As discussed

64. *See* Brewer v. Williams, 430 U.S. 387, 398 (1977). Judicial proceedings may be initiated for Sixth Amendment purposes "'by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id*. (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

65. Massiah v. United States, 377 U.S. 201, 206, 207 (1964). To prove waiver, the state must show "an intentional relinquishment or abandonment of a known right or privilege." *Brewer*, 430 U.S. at 404 (internal quotations omitted).

66. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964).

67. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); *Massiah*, 377 U.S. 201.

68. *See, e.g., Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting).

69. *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) ("Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State."); *Massiah*, 377 U.S. at 204 (deliberately eliciting statements from a defendant without the protection of counsel "might deny [him] effective representation by counsel at the only stage when legal aid and advice would help him") (internal quotations omitted).

70. The Court extended the right to counsel early on in its doctrinal life to a case where a suspect under interrogation was the "focus" of police investigation. *See Escobedo*, 378 U.S. at 490. However, the Court never again has recognized the right before the beginning of formal adversarial proceedings, but rather has limited *Escobedo* to its facts. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972).

71. 377 U.S. 201 (1964).

72. 384 U.S. 436 (1966).

below,[73] the latter decision shifted the constitutional focus to the Fifth Amendment.

The Sixth Amendment right to counsel under *Massiah* has no analogue in Iraqi law,[74] and several considerations weigh against the adoption of such a right to reform interrogation practices in Iraq. Foremost, while no doubt clearer than the due process involuntariness standard, the right's accidental reach into the interrogation room would make it underinclusive as a regulatory tool. Of course, the drafters of the new Iraqi constitution could choose to extend the right to counsel to all interrogations regardless of whether a criminal prosecution has commenced. However, decisions regarding whether, when, and to what extent to guarantee a right to counsel implicate considerations other than interrogation reform. For example, what role, if any, should counsel play in the criminal process, and what resources, if any, should the country devote to the provision of counsel? As these basic questions suggest, Iraqi choices regarding the nature of the criminal process and the role of counsel in that process will determine in large part the existence and shape of any right to counsel in Iraq.[75]

In short, the right to counsel derives from systemic considerations that are broader than concerns about interrogation. While the right may be adapted to address those concerns, as the Supreme Court has done, they are not the right's *raison d'être*, and the fit is hardly perfect. To address interrogation abuses head on, a more direct approach may work better.

IV. Fifth Amendment

In *Miranda v. Arizona*, the Supreme Court took one such direct approach. Responding to the underinclusiveness of the Sixth Amendment as an interrogation-policing doctrine;[76] the "unacceptably great" risk that the due

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73. *See infra* Part IV.

74. Although the TAL secures "the right to engage independent and competent counsel," TAL, *supra* note 17, art. 15(E), the TAL gives no indication that this right to procure counsel extends to the interrogation setting, much less that it protects against the deliberate elicitation of confessions without counsel after judicial proceedings have begun. *See infra* notes 133-34 and accompanying text.

75. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (describing counsel's role as essential in a "due process" model of the criminal process but negligible in a "crime control" model).

76. Evincing this concern, the Supreme Court in *Miranda* recast its prior foray into regulating interrogations under the Sixth Amendment in Fifth Amendment terms: "The denial of the defendant's request for his attorney [in *Escobedo*] thus undermined his ability to exercise the privilege — to remain silent if he chose or to speak without any intimidation, blatant or

process involuntariness standard may not catch less blatant forms of coercive interrogation;[77] the historical shift from physical to psychological techniques to extract confessions;[78] an assumption that these modern methods "trade[] on the weakness of individuals" and make the setting for interrogation "inherently compelling";[79] and a desire to preserve the "adversary" and "accusatory" system of criminal justice as well as "the dignity and integrity" of the person,[80] the Court required the now-famous "procedural safeguards" to "secure the privilege against self-incrimination" of the Fifth Amendment.[81] Before custodial interrogation, the suspect must be informed that he has a right to remain silent, that anything he says may be used against him, that he has a right to have an attorney before and during questioning, and that if he cannot afford an attorney one will be provided.[82] Absent proper warnings or a valid waiver of the rights therein, any statement from the suspect is deemed coerced by the "inherently compelling pressures" of the interrogation environment[83] and therefore inadmissible at trial.[84] However, after such warnings "to combat these pressures"[85] and a valid waiver,[86] a confession will be constitutionally admissible unless it is "involuntary."[87] If involuntary, the confession would violate due process as well as the actual privilege against self-incrimination, which the Court has construed to provide "parallel" protection.[88]

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subtle." *Miranda*, 384 U.S. at 466.

77. *Id*. at 442.

78. *See id*. at 445-55.

79. *Id*. at 455, 467.

80. *Id*. at 460.

81. *Id*. at 444. The Fifth Amendment provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

82. *Miranda*, 384 U.S. at 444-45, 473.

83. *Id*. at 467.

84. *Id*. at 476.

85. *Id*. at 467.

86. In *Miranda*, the Court stated that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," and warned that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id*. at 475. However, in *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court observed that "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may . . . support a conclusion that a defendant has waived his rights." *Id*. at 373.

87. *See* Dickerson v. United States, 530 U.S. 428, 434, 444 (2000).

88. Missouri v. Seibert, 124 S. Ct. 2601, 2607 (2004) (plurality op.); *see also Dickerson*, 530 U.S. at 433 ("Over time, our cases recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."). This was not always the case, as the Fifth Amendment standard was once clearer and more protective:

As the Supreme Court recently has observed, "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[89] Notwithstanding its iconic status, *Miranda* has attracted a fair amount of criticism from its inception to the present. Among these criticisms are attacks on the validity of *Miranda's* requirements and rights on the grounds that they are not "compelled [or] even strongly suggested by the language of the Fifth Amendment," are "at odds with American and English legal history" regarding the privilege,[90] and do not reflect actual, less coercive, police practices.[91] Additionally, some have accused *Miranda* of hindering good police investigation and, as a result, costing society too many confessions and convictions.[92] On the other hand, the Supreme Court's subsequent cases construing *Miranda* narrowly[93] and limiting its exclusionary rule[94] can be criticized as an extended campaign to undermine

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> [A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise . . . .

Bram v. United States, 168 U.S. 532, 542-43 (1897) (internal quotations omitted).

89. *Dickerson*, 530 U.S. at 443.

90. *Miranda*, 384 U.S. at 531 (White, J., dissenting); *see also Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting) ("[A]ny conclusion that a violation of the *Miranda* rules *necessarily* amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense."); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996).

91. *See* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

92. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). *But see* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); George C. Thomas, III, *Plain Talk About the* Miranda *Empirical Debate: A 'Steady-State' Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

93. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292 (1990) (holding that interrogation by undercover officer is not interrogation requiring *Miranda* warnings); New York v. Quarles, 467 U.S. 649, 656 (1984) (holding that *Miranda* requirements are inapplicable where "police officers ask questions reasonably prompted by a concern for the public safety"); California v. Prysock, 453 U.S. 355, 359, 360 (1981) (opining that *Miranda* only requires an "equivalent" rather than "talismanic incantation" of its warnings) (internal quotations omitted); North Carolina v. Butler, 441 U.S. 369, 373 (1979) (noting that *Miranda* waivers may be implied from "course of conduct").

94. *See, e.g.*, United States v. Patane, 124 S. Ct. 2620 (2004) (plurality op.) (holding that physical "fruit" of *Miranda* violation is admissible); Oregon v. Elstad, 470 U.S. 298 (1985) (holding that warned confession that is "fruit" of prior unwarned but uncoerced confession is admissible); Michigan v. Tucker, 417 U.S. 433 (1974) (holding that witness testimony that is

the underpinnings and effectiveness of the decision.[95] The Court's post-*Miranda* cases have also drawn fire for characterizing *Miranda's* requirements as either "prophylactic"[96] or "constitutional"[97] in nature — or remarkably, even both at the same time[98] — when such characterizations have suited the result.[99] Finally, for a decision that purported to give "concrete constitutional guidelines for law enforcement agencies and courts,"[100] *Miranda* can be faulted for generating an entire body of (not entirely consistent) case law defining basic terms and deciding basic questions, often decades later.[101]

Despite these criticisms, or perhaps in light of them, considered application of *Miranda's* core rules in Iraq now may realize greater advantages than in the United States, and at the same time may avoid some of the criticisms leveled against *Miranda*. Foremost, adoption of *Miranda's* rights to silence and counsel and its requirements to warn would rehabilitate interrogation practices and perceptions in several significant respects. First, from a practical standpoint, Iraqis may be unfamiliar with their rights under the new regime,

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"fruit" of *Miranda* violation is admissible); Harris v. New York, 401 U.S. 222 (1971) (allowing statements obtained in violation of *Miranda* to be used for impeachment).

95. Indeed, casting these decisions in a positive light, Chief Justice Rehnquist wrote for the Court in *Dickerson* that "our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson*, 530 U.S. at 443-44.

96. *See, e.g.*, *Quarles*, 467 U.S. at 654 (Rehnquist, J.) ("The prophylactic *Miranda* warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting *Tucker*, 417 U.S. at 444).

97. *See, e.g.*, *Dickerson*, 530 U.S. at 432 ("We hold that *Miranda* [is] a constitutional decision of this Court."). The author of this statement, Chief Justice Rehnquist, also authored the contrary statement in *Quarles*. *See supra* note 96.

98. *See, e.g.*, *Patane*, 124 S. Ct. at 2629-30 (characterizing *Miranda* as "a constitutional rule" and a "prophylactic rule," in the same paragraph no less).

99. *See, e.g.*, Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 89 n.212 (2000); Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898, 901-04 (2001).

100. Miranda v. Arizona, 384 U.S. 436, 442 (1966).

101. *See, e.g.*, *Patane*, 124 S. Ct. 2620 (deciding the admissibility of physical fruits of *Miranda* violations thirty-eight years after *Miranda*); Rhode Island v. Innis, 446 U.S. 291 (1980) (defining "interrogation" fourteen years after *Miranda*); *see also Miranda*, 384 U.S. at 545 ("Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution.") (White, J., prophetically dissenting).

and what better time to inform or remind them of their rights under interrogation than before questioning. Second, placing the power to forego questioning squarely in the hands of the suspect rather than the questioner would reverse the paradigm of absolute state power and individual powerlessness that has dominated Iraq. That paradigm shift would help "overcom[e] the inherent pressures of the interrogation atmosphere."[102] However arguable those pressures may be in the United States, surely they cannot be gainsaid in Iraq, where past and present practices of torture cannot be far from the minds of those subject to interrogation. Although such pressures still may make invoking the right to silence or counsel difficult,[103] the warnings at least would underscore to suspects an option not previously available. Furthermore, compliance with *Miranda's* core protections by law enforcement would eventually engender confidence in their reality. Third, such compliance in Iraq would increase the reliability of confessions,[104] improve public perception of interrogation, and propagate *Miranda's* underlying norms of individual dignity and integrity, especially if these protections end up so "embedded in routine police practice" as to become part of the "national culture."[105]

To be sure, the potential advantages that stem from adopting *Miranda's* core rules should be weighed against the social costs of reliable confessions, resulting convictions, and investigatory leads that may be lost as a result of the very success of the adoption.[106] After all, unlike in the United States, where the Supreme Court has construed the *Miranda* rules to be constitutionally required to secure the Fifth Amendment privilege,[107] the drafters of the Iraqi constitution must consider in the first instance whether to afford any protections against self-incrimination in the interrogation setting. However,

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102. *Miranda*, 384 U.S. at 468.

103. *See* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2187 (2002) ("Invocation is both an act of power by which the suspect takes control of his conversation with the police, and an act of rational self-interest by which he avoids talking his way into a prison cell. Frightened suspects in police interrogation rooms are not likely to feel powerful.").

104. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000) (noting that "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").

105. *Id*. at 443.

106. Costs from lost investigatory leads may be high even from the loss of a single confession if, for example, it would have revealed the location of a car bomb. Of course, compliance with *Miranda* does not necessarily result in the loss of a confession, as a suspect may waive his right to confess, as often occurs in the United States. *See infra* notes 115-17 and accompanying text.

107. *See Dickerson*, 530 U.S. at 432.

Miranda's potential costs should not counsel against its adoption, as those costs may be mitigated in a number of ways.

Miranda's right to counsel may provide one source of mitigation. At the outset, it should be noted that, unlike the Sixth Amendment, this right to counsel does not require the state to provide a suspect with an attorney. Rather, it simply prohibits the police from questioning if counsel is requested but not provided.[108] Thus, the *Miranda* right to counsel is tailored to the interrogation process and does not depend on broader systemic considerations that make the Sixth Amendment guarantee less suitable.[109] In addition, the presence of counsel, if requested and provided, may not hinder the investigation. Counsel may find it in the client's best interest to cooperate, and, in fact, one prominent study in the United States found that lawyers usually advised suspects to do so.[110] If the same holds true in Iraq, then an additional advantage of *Miranda's* right to counsel would be the legitimacy that counsel would add to the interrogation process and any confession that results.[111] Therefore, the right to counsel may cost society less than perhaps originally thought.

The warnings themselves may not prove as costly either if, along with the core *Miranda* rules, Iraq also adopts a public safety exception similar to that articulated by the Supreme Court in *New York v. Quarles*.[112] In that case, the Court held that police do not have to give *Miranda* warnings if there is an "objectively reasonable need to protect the police or the public from any immediate danger"[113] and questioning is "reasonably prompted by a concern for the public safety."[114] An exception like this may strike an acceptable balance between security and liberty in Iraq. It would allow authorities to question a suspect who may know the whereabouts of a car bomb or an attacker in the vicinity without the potential hindrance of warnings, while preserving a suspect's rights in less pressing interrogation scenarios. To be sure, there is a risk that such an exception may swallow the rule requiring

108. Miranda v. Arizona, 384 U.S. 436, 474 (1966).

109. *See supra* note 75 and accompanying text.

110. *See generally* Wald, *supra* note 91.

111. *Miranda*, 384 U.S. at 470 ("With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.").

112. 467 U.S. 649 (1984).

113. *Id*. at 659 n.8.

114. *Id*. at 656. Under those circumstances, according to the Court, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege." *Id*. at 657.

warnings in a volatile nation like Iraq. However, if limited to truly exigent circumstances of immediate danger to the public, the applicability of the exception should diminish as Iraq's security situation improves. In that way, the exception would give the *Miranda* rules some practical flexibility to protect suspects without unduly compromising the safety of the public, and to expand its protections as the country stabilizes.

In any event, regardless of whether Iraq recognizes a public safety exception of some sort, the administration of warnings may not deter a great number of confessions. In the United States, an empirical debate over the effect *Miranda* warnings have had on the production of confessions has remained unresolved.[115] But what is fairly clear from major studies is that suspects very frequently waive their rights and confess.[116] Consequently, the administration of warnings in Iraq may not have a substantial chilling effect on confessions.[117] On the other hand, as argued above, warnings could improve the reliability of confessions and perhaps more importantly the practice of interrogation.[118]

Another way to mitigate the social costs of implementing *Miranda's* core rules in Iraq would be to limit their exclusionary reach. In the United States, over the course of four decades, the Supreme Court has done just that. While confessions obtained in violation of *Miranda* itself are still inadmissible,[119] the Court has held admissible physical evidence[120] and witness testimony[121] discovered as a result of such a violation. Additionally, in most circumstances, warned statements that may be the "fruit" of an unwarned confession are also admissible.[122] In deciding whether to adopt any or all of these limitations, the

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115. *See supra* note 92.

116. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859-60 (1996); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653-54 (1996); *see also* Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1466 (1985).

117. It bears mention, however, that the high waiver rate (as much as nearly 80%, *see* Leo, *supra* note 116, at 653), has been criticized for being "distributively unattractive — well-educated suspects and recidivists tend to gain at the expense of suspects with less education and less criminal experience." Stuntz, *supra* note 103, at 2188.

118. *See supra* notes 104-05, 110-11 and accompanying text.

119. Such confessions may, however, now be used for impeachment purposes. *See* Harris v. New York, 401 U.S. 222, 225-26 (1971).

120. United States v. Patane, 124 S. Ct. 2620, 2626 (2004) (plurality op.).

121. Michigan v. Tucker, 417 U.S. 433, 450-52 (1974).

122. Oregon v. Elstad, 470 U.S. 298, 309 (1985) ("[A] simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will [does not] so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period."); *cf.* Missouri v. Seibert, 124 S. Ct. 2601, 2616 (2004) (plurality op.) (Kennedy, J.,

drafters of the Iraqi constitution would need to weigh the deterrence value of downstream exclusion against the loss of often reliable evidence.[123]

Finally, cost considerations aside, constitutional adoption of *Miranda*-like rules in Iraq would avoid the legitimacy and clarity problems that have plagued the decision since its inception.[124] Obviously, writing the rules into the Iraqi constitution would avoid *Miranda's* difficulties with substantiating its requirements as constitutionally mandated[125] — difficulties that over decades have made *Miranda* vulnerable to judicial limitations and exceptions that have left it pockmarked.[126] Furthermore, including in the constitution any limitations, exceptions, and clarifications[127] developed by the Supreme Court or contemplated by the drafters would insulate the adopted rules, in proportion to their clarity and comprehensiveness, from subsequent judicial or legislative attack.[128]

Of course, "it is a *constitution*" that the Iraqis will be drafting.[129] While more specificity may help protect constitutional provisions from politically or ideologically convenient constructions, it would also limit their flexibility and consequently their adaptability in the long run.[130] As a compromise, the drafters could constitutionalize the core *Miranda* protections and codify any specific exceptions, exclusionary limitations, or other clarifications to make them easier to amend, for better or worse.

An example of a quasi-constitutional adoption of *Miranda*-like rules for the drafters to consider may be found in the currently governing law in Iraq, the TAL. As previously noted, the TAL provides that an accused "has the right to engage independent and competent counsel [and] to remain silent in

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concurring in judgment) (noting that if initial *Miranda* violation is part of "deliberate two-step strategy" to question first and warn later, "postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made").

123. *See Seibert*, 124 S. Ct. at 2617 (Kennedy, J., concurring in judgment) (observing that "fruits analysis would examine . . . the balance of deterrence value versus the drastic and socially costly course of excluding reliable evidence") (internal quotations omitted); *Elstad*, 470 U.S. at 308 (reasoning that testimonial fruits of *Miranda* violations should be admitted where "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served").

124. *See supra* notes 90, 101 and accompanying text.

125. *See supra* notes 96-99 and accompanying text.

126. *See supra* notes 93, 94, 112-14, 119-22 and accompanying text.

127. *See supra* note 101 and accompanying text.

128. *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 432 (2000) (declaring unconstitutional Congress's statutory attempt to make involuntariness rather than *Miranda* the test for admitting confessions in federal court).

129. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

130. *See, e.g.*, OKLA. CONST.

response to questions addressed to him with no compulsion to testify for any reason."[131] The TAL also requires that a suspect "be notified of these rights" at the time of arrest.[132]

As the current charter of government in Iraq, the TAL provides useful precedent for the constitutional adoption of *Miranda*-like rules, but the value of its provisions lies more in their illustration of ambiguities that the drafters of the constitution should avoid. What appears clear from the TAL is that counsel is guaranteed only for those who can afford to "engage" an attorney. However, it is entirely unclear whether the right to such counsel as one may procure extends to the interrogation setting. Equally unclear is whether the right to silence is limited to not being compelled "to testify" in the formal sense at trial, or whether it also extends to pretrial interrogations, where confessions typically are obtained. And while the exclusionary provision of the TAL, prohibiting without limitation the admission of confessions made "under compulsion,"[133] suggests that the right to silence extends to interrogations, that provision leaves unanswered whether confessions obtained under interrogation without (engaged or requested) counsel would be excluded as well.[134] Given these textual shortcomings, the TAL's provisions would not serve as a particularly good model for constitution or code drafting in Iraq.

Regardless of whether the drafters of the Iraqi constitution choose to adopt the *Miranda* rules in their entirety as developed in the United States, in light of the above considerations, they at least should make their choices clear. Doing so would provide what was long missing in the United States: actual "concrete constitutional guidelines" for law enforcement to conduct interrogations and for courts to police them.[135]

V. Conclusion

Torture as a past and present tool of interrogation in Iraq threatens to undermine the country's emergence as a liberal democracy. In confronting the substantial task of reforming interrogation practices and their public perception, Iraqis may draw valuable lessons from the United States' experience with the constitutional regulation of the admissibility of confessions in criminal cases. As this Article argues,[136] writing *Miranda*-like rules into the Iraqi constitution would go far in alleviating the especially

131. TAL, *supra* note 17, art. 15(E).
132. *Id*.
133. *Id*. art. 15(J).
134. *See id*.
135. Miranda v. Arizona, 384 U.S. 436, 442 (1966).
136. *See generally supra* Part IV.

coercive environment of custodial interrogation in Iraq and restoring public confidence in the interrogation process. Adopting the core *Miranda* rights to silence and counsel as well as its requirements to warn would help Iraqis become aware of their rights under the new regime and shift control of the interrogation process from the state to the individual. Adapting *Miranda's* public safety exception and exclusionary reach to accommodate the security situation in Iraq would help to strike a viable balance between freedom from private violence and freedom from the state.[137]

To be sure, the most well-considered rules in the world would mean nothing if not enforced, as Iraq's own past and present experiences exemplify.[138] However, if the United States' experience with *Miranda* repeats itself in Iraq, then a low rate of lost confessions and the legitimizing impact of compliance may encourage eventual acceptance of *Miranda*-like rules by Iraqi law enforcement.[139] Even if widespread compliance comes later rather than sooner, writing *Miranda*-like rules into the Iraqi constitution at least would supply, for more receptive times, the legal framework for protecting the integrity and dignity of individuals under interrogation.

This is not to say that adoption and adaption of *Miranda* to Iraq would provide a panacea for its interrogation woes. Far from it. For one, police still may coerce suspects into confessing after a waiver of rights.[140] *Miranda* only regulates interrogation procedures, not techniques. For the latter, Iraq would need to adopt and enforce a substantive standard, such as involuntariness under the Due Process Clause or past Iraqi prohibitions of torture or other methods of compulsion.[141] Additionally, excluding confessions in criminal cases only indirectly regulates the methods of their extraction, and is effective only to the extent that exclusion deters.[142] Obviously, it would not affect those who engage in torture solely for the sake of pleasure or intelligence.[143] As noted

137. *Cf. Miranda*, 384 U.S. at 539 (White, J., dissenting) ("Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.").

138. *See supra* note 59 and accompanying text. *Cf.* T.S. Eliot, THE HOLLOW MEN, pt. V, ln. 5-6, 9 ("Between the idea/And the reality . . . Falls the shadow").

139. *See* Stuntz, *supra* note 103, at 2188 (describing "the general police satisfaction with *Miranda*"); *see also* Dickerson v. United States, 530 U.S. 428, 443 (2000) (observing that "*Miranda* has become embedded in routine police practice").

140. *But see Dickerson*, 530 U.S. at 444 ("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.").

141. *See generally supra* Part II.

142. Furthermore, as Herbert Packer has observed, judicial exclusion of evidence only results in piecemeal enforcement of constitutional standards. *See* Packer, *supra* note 75, at 30 (noting that exclusion "is still only a retail operation, and the problem is a wholesale one").

143. *See, e.g.*, Kate Zernike, *Detainees Depict Abuses by Guard in Prison in Iraq*, N.Y.

earlier, reform of interrogation practices and perception in Iraq will require a panoply of responses.[144] For example, criminal proscriptions against torture such as those in the Iraqi Penal Code[145] would help deter and punish those who torture to obtain confessions for purposes other than prosecution. Regardless, the drafting of a new Iraqi constitution will present a historic opportunity for enshrining exclusionary principles that not only will ensure fairer trials based upon more reliable evidence, but surely will assist the new democracy in affirming and advancing human dignity and liberty. That opportunity should not be missed.

TIMES, Jan. 12, 2005, at A1 (reporting that Army Reserve Specialist Charles A. Graner Jr., accused by government in court martial of being "a ruthless abuser who took delight in beating prisoners [at Abu Ghraib] and forcing them into sexually humiliating positions," unsuccessfully defended himself on grounds that "soldiers were following orders from military superiors who were under pressure to obtain better intelligence from the detainees").

144. *See supra* Introduction; *see also supra* note 61 and accompanying text.

145. *See supra* notes 13-14 and accompanying text.