TOO CLOSE TO THE BACK AND THE SCREW: CONSTITUTIONAL CONSTRAINTS ON TORTURE IN THE WAR ON TERROR

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INTRODUCTION

There are some articles I never thought I would have to write; this is one.

Torture has never been a favorite of American law. Whatever the transgressions of street-level bureaucrats, it has not been a traditionally reviled instrument of American policy. However, as the current U.S.-style goes, everything has changed after September 11.

In the immediate aftermath of that tragedy, law enforcement officials confronted with recalcitrant suspected terrorists let it be known that they were seriously considering resorting to chemical interventions and outright physical abuse to obtain information that could aid them in preventing a recurrence. According to the Department of Justice’s Inspector General, physical abuse has in fact occurred. As the United States began its military response, reports of harsh treatment of captives who might have information began to filter back to

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3. Justice Joseph Story believed that the Eighth Amendment “would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct.” JEREMIAH B. STARK, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 710 (Carroll Academic Press 1887) (1833).


the United States. Most recently, America's war with and subsequent occupation of Iraq has spawned accounts of physical abuse and torture.

In response to these reports, the current administration issued a statement that has been read as disavowing torture as a tool.1 Parsed carefully, however, the statement may forewarn less than it appears to. The statement accurately recognizes that the United States has ratified the Convention Against Torture,2 then goes on to state that the current administration fully intends to abide by the Convention as rati-

1 See, e.g., Dana Priest & Barton Gellman, U.S. Detainee Abuse at Detainee Interrogations, "Stress and Drown," Torture Cast in Terminal Subjective Him in Secret DEA Detainees, Wash. Post, Sept. 18, 2006, at A1 (providing accounts of interrogation techniques in American detention facilities, including "stress and drown" methods, and the criminal investigation into the death of two prisoners at a U.S.-occupied site); Philip Shenon, Officials Say Qaeda Suspects Have Given Critical Information, N.Y. Times, Apr. 9, 2002, at A12 ("Suspects will not be subjected in any form of torture. But officials and other, nonstatutory forms of coercion were being used, including sleep deprivation and a variety of psychological techniques that are meant to impose fear.").

2 See, e.g., Owen Bowcott, Troops Ahead of Torture Concerns, London, July 21, 2003, at 4 (containing account of interrogation technique of occupation forces); Jim Krane, U.S. Interrogation, Deep-Us, DESERTION Mourns, News (Tah Lake City), July 1, 2005, at A1 (same). There have been reports of reports of threats to "render" suspects as criminals where torture is practiced. See, e.g., John & Gellman, supra note 5, at A1 ("Some who are not cooperate are armed once—rendered, in official parlance—to foreign intelligence sources whose practice of torture has been "humanized" by the U.S. government and human rights organizations."). Such practices suggest American misuse obligations. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments, adopted Dec. 10, 1984, art. 5. 3. 8. TREATY DOC. No. 100- 29 (1988), 1465 U.N.T.S. 85, (hereinafter Convention Against Torture); (prohibiting the use of torture by any State party in any capacity in its jurisdiction and preventing the ad-


1 Convention Against Torture, supra note 6.

2 The Convention Against Torture itself forbids "torture," which it defines as "torture which involves severe pain or suffering for the purpose of punishment. If so, it is not an act of cruel, inhuman or degrading treatment ... which do not amount to torture". See id. at 11 (art. 10). Article 10 does not carry with it the entire series of enforcement obligations applicable to "torture" or the explicit dismissal of "exceptional circumstances" justification. See id. at 114 (art. 12). The statutory prohibitions on...
reveal that this distinction has been advanced as a basis for permitting a variety of physical abuses as techniques of interrogation. The administration’s statement does observe that the Senate’s ratification of the Convention was accompanied by reservations, among which is the

torture invoked by the Hayon letter incorporate a similar definition. See 18 U.S.C. § 2340 (2006) (providing a statutory definition of "torture").

The United States insisted in negotiations on the position that "torture" is limited to extreme forms of cruel treatment, and regulations adopted by the United States to implement the Convention explicitly provide that "interrogation is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 293.10(a)(2) (2002). See Zubeda v. Ashcroft, 353 F.3d 499, 512 (M.D. Ga. 2003) ("The Convention draws a clear distinction between torture acts as defined in Article 1 and acts (of cruelty) not involving torture referenced in Article 5. The severity of the pain and suffering inflicted is a distinguishable characteristic of torture.") (quoting id.); 25 L. & N. Dec. 292, 519 (R.I. Admin. May. 27, 2003)). See also 42 U.S.C. § 1368(10) (Defining the United States' negotiating position). In its JG, a majority of the United States Board of Immigration Appeals invited this distinction to return a Haitian refugee to Haiti, where he would likely face police maltreatment and indefinite imprisonment, reasoning that "[u]nless of police brutality does not necessarily lead to the level of torture." At 323.

In the 1970s in Northern Ireland, the British Army used a combination of five "techniques" (hanging, exposed to standing in painful positions, loud noises, beat deprivation, and deprivation of food and drink) to interrogate suspects in an effort to obtain information use against IRA terrorists. The European Commission of Human Rights found these, in combination, to be "torture" within the meaning of the European Convention on Human Rights Ireland v. United Kingdom, 1976 E.R. 512, 534-54 (Eur. Comms.'s of H.R.). The European Court for Human Rights reversed, determining that the combination of these techniques constituted "inhuman and degrading treatment" prohibited under the Convention, but not torture. Ireland v. United Kingdom, 15 Eur. Ct. H.R. (ser. A) at 66-67 (1978).


The United States may be invoking similar distinctions in its deployment of the "severe and brutal" techniques, referred to as "torture," e.g., Jen Batiste, Nonuprising: U.S. Army Barracks Free Grilling Court, Wall St. J., Apr. 26, 2002, at A1 (describing some of the "brutal techniques taught to instructors at a "interrogation school where instructors claim that the techniques do not constitute torture under international law"), Matt Cooperman, CIA: Advance Undercover, Human Rights Groups Scorn Technique Called 24 Torture, Wash. Post, Dec. 28, 2003, at A9 ("Rick Wedgedon, a professor of law at the University of Chicago, has advised the administration, and it is deplorable whether the CIA techniques constitute torture under the U.N.'s definition, which is the incremental reflection of "severe pain or suffering" to obtain information."), Paul Valley, The Inhuman, Renditions (London), June 26, 2005, at 2 (describing "sever and drastic" techniques).
proposition that the United States understands the convention's prohibition of "cruel, inhuman or degrading" practices to constrain only those practices that violate the Fifth, Eighth, or Fourteenth Amendment. If one reads the Haynes statement with the technicality that has been invoked in other public pronouncements by the current administration, physical or mental pressure to force answers from unwilling subjects that does not meet the technical definition of "torture" is not wholly disavowed. It is denounced only so far as the pressure would violate the Constitution. This reservation might be immaterial if it were clear that American constitutional law prohibited torture. However, in the wake of 9/11, at least one very public commentator, Professor Alan Dershowitz, has advanced arguments that under limited circumstances torture is a constitutional option. It is to those arguments that this Article is addressed.

See 111 Cong. Rec. S17904 (daily ed. Oct. 27, 1995) (proposed amendments of Senator Pell on "U.S. Reservations, Declarations, and Understandings" of the Convention Against Torture). Professor Dershowitz seems to miss the distinction between "inhumane and degrading" practices that fall within the Convention Against Torture which does not, and he curiously misrefers to the Due Process Clause of the Fifth and Fourteenth Amendments in his invocation in ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 12 (2d ed. 2002). [Hereinafter WHY TERRORISM WORKS] (proclaiming that the United States is bound by the Convention Against Torture only to the extent that it is consistent with the Eighth Amendment of the Constitution and referring to it as the "of Geneva Convention Against Torture").

See e.g., ALAN DERSHOWITZ, SHOOTING THEe Fee: CIVIL LIBERTIES IN A TERRORIST AGE 476-77 (2002) (suggesting that there may be some circumstances where extraordinary means, including physical torture, may be justified in the interrogation of accused WOOWORLD WORLDS, supra note 11, at 151-55 (arguing that inflicting maddening pain on a guilty terrorist who illegally withholds information regarding an act of terrorism may be justified by preventing the loss of a large number of lives); ALAN M. DERSHOWITZ, AT HOME IN JERUSALEM: A TERRORIST ROAD TO JUSTICE 118-22 (L.A. TIMES, Nov. 8, 2002), at B15 (proposing that torture should only be conducted where authorized by law); ALAN M. DERSHOWITZ, PAINFUL MIND QUESTIONS: Genesis, How Is One for U.S. Tuo: Coa Torture, or the Threat of It, Be Right L.A. TIMES Apr. 17, 2005, at B15 ("Let's start the public debate about torture, the threat of torture and other unpleasant options and tragic choices."); 60 Minutes: Torture? Using Torture as a Means to Get Truth and Stop Terrorism in Iraq (CBS television broadcast, Jan. 20, 2002) (preventing Dershowitz as willing to accept torture as an interrogation tool as long as "we bring it into the legal realm so that we can control it"); Hambad (MSNBC television broadcast, Jan. 20, 2002) ("We should bring it into the law"); Professor Dershowitz builds on arguments he made publicly in analyzing the state of Israel on how to meet its threats. See generally Alan Dershowitz, It Is Necessary to Apply "Physical Pressure" to Terrorists—And to Lie About It 23 HARV. L. REV. 393 (1992) (proclaiming circumstances where torture could be authorized against terrorists).

The Dershowitz argument has been advanced in courts, as infra note 44 accompanying note 34 discussing the recent Supreme Court case CHENEY v. McManus, 125 S. C. 1994 (2000), invoked a public discussion, and seems to be taken seriously by military contrainaries, whose opinions matter a lot more than those of law professors. See, e.g., Major Susan L. Gent, Book Review, 174 MIL. L. REV. 195, 195-96 (2002) (reviewing WHY TERRORISM WORKS, supra note 11) (arguing that "the book's significance is that it demonstrates that the American public and its government confronts...dilemmas in arriving at a terrorism policy").
1. THE DERSHOWITZ POSITION

Professor Dershowitz does not advocate a prudential return to the regime of the rack and the thumbcreech. Like most moderns, he views torture with repugnance. But in a situation where the only means of avoiding catastrophic loss of life lies in the knowledge of a recalcitrant prisoner, he argues, the course of least evil may be to temporarily sacrifice the physical integrity of a single wrongdoer as a way of saving the lives of a multitude of innocents. It is a "tragic choice," but under circumstances where it is the only sure way to avert looming disaster, "a sterilized needle under the fingernails" may be the option that a government should adopt. Professor Dershowitz further argues it is not an option that is constitutionally barred.

Professor Dershowitz begins by taking the position that as long as the information obtained is not used in a criminal prosecution, the protections of the Fifth Amendment's prohibition on compelled self-incrimination are not triggered. Further, he argues, in addressing the constraints on deployment of force in pursuit of prevention—as opposed to reprisal—the Eighth Amendment's constraints on cruel and unusual punishment are inapplicable. The only relevant constitutional limitations, in his view, are the unreasonable searches and seizures and the general commands of the due process clause. As the relevant Fourth Amendment norm is one of "reasonableness," the same principles that allow the involuntary insertion of a needle to obtain blood-alcohol tests in order to prosecute drunk drivers, would approve the insertion of a needle bearing "truth serum" to prevent terrorism. This would allow proportionately more serious iatrometric to prevent more serious breaches of public order, culminating in torture where absolutely essential to preserve life. So, too, he argues, the due process clauses are "sufficiently flexible to permit an argument that the only process 'due' . . . is the requirement of probable cause and [at least] some degree of judicial supervision."1

The proposal has evoked comment as well in the academy. Compare Sanford Levinson, Sanford Levinson's Reply, Dissent, summer 2003, at 93-94 (hereinafter Levinson, Sanford Levinson's Reply) (criticizing Dershowitz's arguments seriously), and Sanford Levinson, "Punishments" (hereafter Levinson, Sanford Levinson's Reply). Sanford Levinson, Sanford Levinson's Reply, supra, at 93-94, 98-99 (arguing that Dershowitz's approach amounts to limit torture from an ex ante rather than an ex post perspective he (take) seriously), with William J. Stuntz, Legal Thinking After the Events, 113 YALE L.J. 2537, 2559 (2004) (arguing that torture should not be deployed even in pursuance of terrorism), and John T. Ploen & Walsh S. White, Non-"Punishment": Should Torture Be an Option?, 85 U. PA. L. REV. 747, 747—48 (2002) (arguing that torture should not be a 'legally recognized option'). This view (the references Charles A. Mathes, discussed supra Part II.A.2.b, and none of it comes to bear with the full range of constitutional precedents).
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CONSTITUTIONAL CONSTRAINTS ON TORTURE

II. THE LAW

A. Self-Incrimination and Cruel Punishment—And Common Diversity

1. The Limitations of the Clause

Under current Supreme Court doctrine, Professor Dershowitz's account of the constitutional protections against cruel punishment and self-incrimination is technically correct, as far as it goes.

If anything is clear in constitutional law, it seems to be that the Eighth Amendment's prohibition against "cruel and unusual punishment" bars "torture." The original impetus for the Eight Amendment came from the Framers' repugnance towards the use of torture, which was regarded as incompatible with the liberties of Englishmen. Even for those sentenced to death, the Court has held for more than a century that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden." "Wanton infliction of physical pain" has been univer-

68 See, e.g., Estelle v. Mounts, 509 U.S. 4, 9 (1993) ("[E]xcreting torture and barbarous punishment was the primary concern of the drafters of the Eighth Amendment . . . ." (quoting Ex parte Giles, 429 U.S. 97, 103 (1986)); id. at 15-16 (Brennan, J., concurring in the judgment) ("Indeed, were we to look to the century, we might place various kinds of unsponsored torture and abuse—of the kind ingeniously designed to cause pain but without a tell-tale significant injury—entirely beyond the pale of the Constitution."); id. at 28 (Thomas, J., dissenting) ("Many states—bearing with a rather chauvinistic, wanton torture, electric shock, incineration noise, . . . cause great or even cause, no serious injury. The state is not free to inflict such pain without cause just as long as it is careful to stop its marks." (quoting Williams v. businessmen, 443 U.S. 181, 185 (1979)); Cogen v. Georgia, 429 U.S. 135, 143 (1976); "torture of cruel and unusual punishment") in the Bill of Rights of 1689, which prohibited punishments "excessive in nature and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved." For a discussion of the historical background of the American rejection of torture, see infra Part II.B.3.

69 Welfare v. Utah, 58 U.S. 128, 136 (1870). The Court has regularly proclaimed the torture the infliction of lingering and excruciating pain, is one of homicide, even where capital punishment is warranted. See, e.g., Kent, 106 U.S. 536, 547 (1881) ("Punishments are cruel when they involve torture or a lingering death . . . ."); id. at 546, 102 (referring to Kent, 136 U.S. 647); Louisiana v. Friedrich, 320 U.S. 559, 652 (1944). ("Prohibition against the wanton infliction of pain has come into our law from the English Bill of Rights of 1689 [n.42].") Weems v. United States, 217 U.S. 349, 375 (1910) (quoting Kent, 136 U.S. 647).

As applied to capital cases, the boundaries of the prohibition on torture have allowed substantial pain to accompany execution, but nothing approaching the punishments proposed by Professor Dershowitz. Compare Gray v. Logue, 503 U.S. 1297, 1240-41 (1995) (Burger, J., concurring in denial of certiorari) (concurring in denial of certiorari) ("arguing the decision of the court of appeals for the death by cyanide is not so different from other methods of constitutional execution."); id. at 1240-42 (Marshall, J., dissenting from denial of certiorari) (describing cyanide gas and painful death by cyanide gas that can extend over several minutes). See generally Gomez v. United States Dist. Ct., 503 U.S. 583, 655-56 (1992) (Stone, J., dissenting from denial of stay) (describing painful death from cyanide gas, which extended over ten agonizing seconds); Gask v. Louisiana, 47 U.S.
sally conceded to be outside the scope of legitimate punishment, even for the most heinous of crimes. 1

Professor Derhovanis, however, citing Ingraham v. Wright, 2 takes the position that this prohibition applies only to "punishment," and that the effort to extract information where no judicially imposed punishment is contemplated lies outside of the prohibition. 3 Ingraham involved a challenge to the imposition of corporal punishment on students in the Dade County, Florida, school system. The punishment was referred to as "paddling," but included assaults comprising twenty to fifty blows with a wooden slab which on occasion left the

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1080, 1087-40 (1985) (Brennan, J., dissenting from denial of certiorari) (describing electrocution as a painful experience lasting several minutes).

2 Professor Derhovanis asks erroneously, "What moral principle could justify the death penalty for past individual murders and at the same time condemn nonlethal torture to prevent future cases of murder?" See TERRORISM WARFARE, supra note 1, at 148. The answer, of course, is the moral principle embodied in the Eighth Amendment.

3 See Hope v. Pelter, 536 U.S. 790, 797 (2002) (holding that shackling in a painful position at a "kicking point" for extended litter is unconstitutional because it is "unnecessary and wanton infliction of pain," excessive cruel and unusual punishment forbidden by the Eighth Amendment" (quoting White v. Allen, 445 U.S. 488, 510 (1980))).

4 Professor Derhovanis incorrectly states that the prohibition is coextensive with international standards of torture (quoting Gregg v. Georgia, 428 U.S. 153, 197 (1976)). (See Ingraham, 536 U.S. at 56 (Thomas, J., dissenting) (reiterating that the state cannot inflict serious injury, whether physical or not, without cause).)

5 Professor Derhovanis correctly states that the Eighth Amendment was intended to curb torture (quoting FRANKEN, supra note 4, at 217 U.S. at 575-76 (holding that screening defendants at labor under painful conditions violated Eighth Amendment, which was reenacted by Framers' suggestion that "power must be tempered with cu-

6 Professor Derhovanis' approach to the issue of torture padlable established by the French legal system during the Ancien Regime, in which torture was applied after criminal conviction to the menaces of accomplices. See JOHN H. LANGER, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME 16-17 (1977); EDWARD PETER, TORTURE 43 (1995). The torture padlable was intended to affect abetment of the torture perpetrator, which sought to obtain confessions. See id. at 71; see also LANGER, supra at 16-17; (To the French, tortures ordinary judicial use is known as torture pailable, as opposed to this torture of a common, so-called torture padlable literally 'preliminary torture' in the sense of being preliminary to the execution of a capital sentence.)
recipients incapacitated and in need of medical treatment. None-theless, a five-member majority of the Court found the punishments in question to be outside of the ambit of the Eighth Amendment, construing the ban on "cruel and unusual punishment" to apply only to punishment imposed as part of the criminal process.

So too, the most recent Supreme Court pronouncements lend support to Professor Dershowitz's claim that the protection against self-incrimination bars the use of coerced disclosures at trial, rather than the coercion itself. While earlier language in the Supreme Court seemed to establish a right against coercive interrogations rooted in the Fifth Amendment's self-incrimination clause, a majority of the Court in Cedar v. Marion1 refused to entertain an action for damages based on a violation of the self-incrimination right on behalf of a plaintiff who had been interrogated for forty-five minutes while screaming in pain and awaiting medical treatment after being shot in the face by the police. Justice Thomas's opinion, joined on this point by Chief Justice Rehnquist and Justices Scalia and O'Connor, found no violation of the self-incrimination right because the plaintiff was never brought to trial on any criminal charge. According to Justice Thomas's opinion:

"[A] statement compelled by police interrogations of course may not be used against a defendant at trial, but it is not until trial's use in a criminal case that a violation of the Self-Incrimination Clause occurs. The text of the Self-Incrimination Clause simply cannot support the... view that the mere use of comprensive questioning, without more, violates the Constitution."2

Notwithstanding a vigorous dissent by Justice Kennedy, joined by Justices Stevens and Ginsburg, the case lends support to Professor Dershowitz's position on self-incrimination.

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1 458 U.S. at 606-07 (noting that one of the plaintiffs received more than twenty blows, required medical care, and could not return to school for several days; a second plaintiff could not use one of his arms for a week); id. at 608 (White, J., dissenting) (noting that another plaintiff received fifty blows).


4 Id. at 1061 (citations omitted).

5 Justice Breyer concurred in the judgment on the self-incrimination claim, joined by Justice Breyer, to provide a majority. His opinion began by stating, in his view...
Professor Dershowitz concludes that the only protections the Constitution imposes on nonpunitive government cruelty in and of itself are procedural, and may be met by avoidance of a "torture warrant" on a proper showing of probable cause. His reading of the Fifth and Eighth Amendments exhausts constitutional constraints, a gaping hole opens in constitutional protections against tyranny: a government seeking to cow the citizenry need only dispense with prosecution entirely and administer physical sanctions directly to disfavored individuals on "probable cause.

Not all citizens would be subject to "probable cause," of course, but the threat would be sufficient to intimidate persons who associate with potential suspects. This, of course, cannot be the law and read carefully, the governing cases make the point plodding.

2. The Limitations of the Dershowitz Analysis

We first, as Professor Dershowitz notes, Ingrahm v. Weight found the Eighth Amendment inapplicable to assaults on students, the case also adopted the proposition that bodily integrity is a liberty interest protected by the Due Process Clause. Justice Powell's further discussion focused on the procedures required for the imposition of paddling, because the grant of custodial had excluded the plaintiffs substantive due process claim. The procedural due process analysis that fol-

[The text of the Fifth Amendment (underline here under the doctrine of Fourteenth Amendment, in)pression) focuses on cownpeople cite of a criminal defendant's com-pelled, self-incriminating testimony. Magistrate has offered no reason to believe that the grant was in application to all or many of these circumstances in which its applica-
dication has depended on excluding testimonial admissions or hearing perpil.

The Court specifically refused to address this contention that substantive due process based punishments as to students would be unconstitutional as committed criminals. See Ingrahm, 450 U.S. at 659 n.12. Perhaps this was an effort to avoid the issue that accompanied the substantive due process discourse of abortion, which was raging at the time. Current law, however, seems to have accepted Roe v. Wade, 410 U.S. 113 (1973) as part of the constitutional canon. See Seth F. Kamer, The Second Wave as Tragedy: The Legal VoiceCase and the Heagery of Roe v. Wade, 24 Harv. J. on Legal Probs. 863, 867 (1993) (noting that members of the Court in Washington v. Gaughan, 387 U.S. 792 (1967), approved the vitality of the abortion right). The recent majorities in Lawrence v.Texas was remarkably aggressive in its citation of the abortion cases as binding precedent, 125 S. Ct. 2472, 2481 (2005) (describing Planned Parenthood v. Casey, 505 U.S. 833 (1992), as having affirmed "the substantive force of the liberty pro-
tected by the Due Process Clause"); id at 2492-2498 (providing other citations to Casey).

Likewise, notwithstanding the periodic writings of dissatisfaction by Justices Thomas and Scalia, there is little indication that the Due Process Clause bears a substantive content, however conceived in precise boundaries may be. See, e.g., Lawrence 125 S. Ct. at 2481, 2485, 2492 (2005); Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992) ("Despite the
lowed was not a blanket grant of deference to executive decisions to deploy physical force, but rather a tightly focused (not to say idiosyncratic) set of reasoning. It was predicated on both the teacher's common law privilege of "moderate correction" and on a concern for the local educational autonomy. Justice White's dissent for himself and Justices Brennan, Marshall, and Blackmun, in addition to disagreeing with Justice Powell's analysis of the Eighth Amendment issues suggested—without contradiction—that given the recognition of a liberty interest in bodily autonomy, review of physical assaults by school officials and other executive officers could take place under the rubric of substantive due process.26 Soich, indeed, has been the subsequent development over the last generation.

Despite its professed humility to make the Constitution a "font of tort law," the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment "was intended to prevent govern- ment... from abusing its power, or employing it as an instrument of oppression," 27 and has enunciated a series of constitutional limits on the capacity of government to deploy force against the bodies of the cápricio. In law enforcement, the Fourth Amendment has been held to bar police from either employing excessive force in carrying out acts even with probable cause, 28 or engaging in brutally invasive searches for evidence even with a warrant. 29 For convicted prisoners, the Eighth Amendment has been held to bar guards from engaging in calculated brutality and to forbid the state from denying necessities of a safe and minimally decent existence. 30 In other 31-

26. "We hold that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitu- tion imposes substantive limits on the discretion." (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001)).
28. "We hold that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitu- tion imposes substantive limits on the discretion." (quoting Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 435 (2001)).
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tudial settings, the Constitution similarly bars officials from physical assault and the denial of minimal standards of decent treatment. Indeed, actions against officials to enforce standards of minimum decency came to represent the largest part of the civil constitutional caseload of lower federal courts during the 1990s.72

In the last decade, the Court has also come to emphasize a more general protection: if not covered by a specific constitutional constraint, the Court has held that due process substantively protects against physical abuses that "shock the conscience of the Court." This line of cases originates in Rochin v. California, which began when Los Angeles deputy sheriffs pursued a tip that Antonio Rochin had been dealing narcotics. They burst into his apartment and observed two suspicious capsules on the nightstand beside the bed, on which Rochin lay partly undressed. When Rochin swallowed the capsules, the deputies handcuffed him and conveyed him to a hospital where "[a]t the direction of one of the officers a doctor forced an enema solution through a tube into Rochin's stomach against his will."73 Rochin vomited, revealing the suspect capsules; over Rochin's objection, the capsules and the morphine they contained were introduced into evidence at his subsequent trial.

Justice Frankfurter, writing for six members of the Court, found this course of conduct violated the demands of due process, which guarantee "respect for those personal immunities which . . . are 'so rooted in the tradition and conscience of our people as to be ranked as fundamental . . . or are implicit in the concept of ordered liberty.'"74 Observing that due process requires the state to "respect cer-

72 See the Court summarized these cases in Colwell.

73 As the Court summarized these cases in Colwell. We have held, for example, that apart from the protection against cruel and unusual punishments provided by the Eighth Amendment, if Althea v. Scafe, 425 U.S. 728 (1976), the Due Process Clause of the Fifth Amendment requires that conditions of confinement satisfy certain minimal standards for prison facilities, as Bell v. Wolfish, 441 U.S. 520, 533, 542 (1979); for private in mental institutions, v. 67 U.S. 307, 315–316 (1982), for convicted felons, Turner v. Safley, 482 U.S. 78, 94–99 (1987), and for persons under arrest, v. 463 U.S. 276, 284–289 (1983).

74 U.S. at 127. See also West v. Atkins, where Justice Scalia explains: "[A] physician who acts, on behalf of the state or in its behalf, to provide medical treatment to a person involuntarily in state custody (in prison or elsewhere) and prevents from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment's protection against the deprivation of liberty without due process." 473 U.S. 1, 26 (1986) (Scalia, J., concurring in part and dissenting in the judgment).

75 See Kreiner, Dark Mode, supra note 1, at 70–71, presenting detailed statistical breakdown of the bases for constitutional claims.

76 Rochin v. California, 342 U.S. 150, 166 (1952).

77 Id. at 169 (citing Lindsey v. Massachusetts, 308 U.S. 312, 169 (1956)).
tian deccesities of civilized conduct," the opinion declared of Mr. Roh-
chen's treatment at the hands of the deputies: This is conduct that shocks the conscience. Illegally breaking into the pri-
vacy of the prisoner, the struggle to open his mouth and remove what
was there, the forcible exaction of his drooling's contents—this
course of proceeding by agents of government to obtain evidence is
bound to offend even hardened sensibilities. They are methods too close
to the rack and the screw to permit of constitutional differentiation.12

While the issue before the Court in Rochin was the use of evidence
in a criminal prosecution, it rapidly became clear that the shock to
the Court's conscience arose from the "coercion, violence or brutality

12 In re De. See also at 175 ("It would be a disillusionment to the responsibility which, the course
of constitutional history we can spot, this Court must hold in order to consider a suit the po-
lice cannot extract by procuring what is in the mind but cannot extract what is in his stomach.")

13 In re De. California, 307 U.S. 128, 135 (1939), see also Batson v. Abner, 392 U.S. 422, 427 (1968)
(disclosing that an involuntary blood test was not sufficiently "legal" or "offensive" to invoke Rochin); Schenk v. California, 304 U.S. 478 (1938) (holding that an involuntary
blood test on to measure blood alcohol level is unreasonable).

14 In re De. See also at 561, 725-76 (1977).

(disclosing that the Court has often dealt with the same issues in the body reg-
by imposing the interest protected by the Due Process Clause."); West v. Atkins, 481 U.S. 42, 58
(1987) (Stevens, J., concurring) (discussing a confession coerced by the police's promise to
(auguring that the concept of fair trial principles, including the violation of the Fifth
An Amendment 7 also violates the Eighth Amendment) (see also Johnson v. Glick, 411 F.2d
1195, 1202 (2d Cir. 1969) ("Blackman... must stand for the proposition that, quite apart from the
principle of the Bill of Rights, application of undue force by law enforcement officers deprives
a defendant of liberty without due process of law.").

16 See, eg, Washington v. Gladden, 317 U.S. 531, 539 (1942) (recognizing "bodily integ-
ity" as included in liberty "specifieally protected" by due process); id at 577 (Boyer, J., con-
curring in the judgment) (citing Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992) (citing
Blackman to argue that the Constitution places limits on a state's right to intrude into bodily in-
55 (Hecht, J., concurring in part and dissenting in part) (same) at 577 (Blackman, J., concurring in part,
dissenting in the judgment in part, and dissenting in part) (same).
In County of Sacramento v. Lewis, the Court announced a general approach to the problem of executive abuse of force. Relying on Rochin, the Court held that in circumstances covered by neither the Fourth Amendment nor the Eighth Amendment, the Due Process Clause bars executive officials "from abusing [their] power or employing it as an instrument of oppression" in a fashion that "shocks the conscience of the court." Thus today, notwithstanding the fact that the Eighth Amendment does not constrain school teachers, a student like the plaintiff in Ingham v. Hight, living sustained incapacitating injury caused by subjecting to twenty "licks" with a wooden paddle at the hands of a public school teacher, would have a good cause of action against his assailant under substantive due process theory.  

b. Coercive Interrogation

Rochin, it will be recalled, ground its analysis in an analogy to the values of the Self-Incrimination Clause: the state's assault was "too close to the rack and the screw to permit of constitutional differentiation." In Chee v. Marvin, while a majority of the Court denied...
the application of the Fifth Amendment's Self-Incrimination Clause to coercive interrogation simpliciter, the opinions in that case simultaneously made clear that the powers of the government to inflict injury in the search for information are constrained by substantive due process.

Clause was argued a little over a year after the September 11 attacks, against the backdrop of the ongoing war on terror. The brief for the petitioner, seeking to exonerate the police officer who persisted in questioning the wounded and screaming suspect, invoked the image of an official questioning a "suspect [who] has been arrested for kidnapping [sic] a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out, on his life," and invited the Court to refer to Professor Dershowitz's analysis. One amicus brief invited the Court to consider issues of "national security" in limiting the rights of those subject to interrogation. The Solicitor General, on behalf of the United States as amicus curiae, argued for "breathing space" needed "for law enforcement to confront imminent threats," putting before the Court the picture of police seeking "life-saving information" from a suspect regarding a "bomb...about to explode," and inviting the Court to approve such measures as "grabbing of the throat," pointing a gun at the suspect's temple, and threatening to "knock the suspect's remaining teeth out of his mouth if he remains silent."

The Court pointedly declined these invitations. Five of the six opinions in the case renounced the position that torture to obtain relevant information is a constitutionally acceptable law enforcement technique if the information is not introduced at trial. In deciding

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26 Brief for the Petitioner at 27 n.3, Chavez v. Martinez, 123 S. Ct. 1994 (2003) (No. 02-944) (citing West邊.isHidden.WORKS, supra note 11, at 372, 377 n.3) (concluding Court to expect Lee v. Washington, 728 F.2d 771 (11th Cir. 1984), and Dershowitz, to admit statements made sufficiently subsequent to an incident of torture.

27 Brief of Amici Curiae California Cities in Favor of Petitioner and Reversal at 28, Chavez (No. 02-1146).

28 Brief for the United States as Amicus Curiae Supporting Petitioner at 44-45, 21, 29, Chavez (No. 01-1444): See Reply Brief for the Petitioner at 7, Chavez, (No. 01-1444) (stating the "beer is about to explode"). See also Transcript of Oral Argument at 31, Chavez, (No. 01-1444), available at http://www supremecourts.gov/oral_argумент_transcripts/

29 QUESTION. [Justice Alito]:... you think he's going to blow up the World Trade Center or whatever... we have... he doesn't have to protect... you could have had a rubber hose.

30 Both the United States and the Petitioner cited former Marshal's dissent in New York v. Quarles, 463 U.S. 649, 688 (1983), for the proposition that, "if a bomb is about to explode... the police are free to interrogate suspects without adhering to their constitutional rights." Of course, the United States and the Petitioner argued that the police were free to do much worse.

31 Chavez, 123 S. Ct. at 2004 (Thomas, J., holding opinion). "[O]ur view is the proper scope of the Fifth Amendment's Self-Incrimination Clause does not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not admitted at trial...", id. at 2010 (Souter, J., concurring in part and dissenting in part)
this, they followed established law. Many cases condoning physical abuse in the search for evidence as unconstitutional involved the invalidation of convictions obtained on the basis of coerced confessions. But there’s sound precedent, as well, for the proposition that such physical abuse, in and of itself, violates the mandates of the Due Process Clause. Almost half a century ago, the Supreme Court upheld the criminal conviction of special police who physically abused a series of suspects in the effort to obtain both confessions and evidence against alleged accomplices. The Court held that the physical abuse took place beyond the limits of the protective scope of the privilege against compulsory self-incrimination. The Court held that the physical abuse took place beyond the limits of the protective scope of the privilege against compulsory self-incrimination.
abuse itself constituted a deprivation of constitutional rights under color of law.29

All of the Justices in Chavez accepted the proposition, based in Ro
to and County of Sacramento v. Lewis, that egregious physical abuse in police questioning that "locks the conscience of the court would violate the substantive requirements of the Due Process Clause.30 The
Justices splintered, however, on whether the actions of Officer Chavez rose (or sank) to that level of egregiousness. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have relied on an absence of evidence that Officer Chavez "acted with a purpose to

29 Williams v. United States, 351 U.S. 97, 101 (1956) ("[w]here police take matters in their own hands, seize vicious beat and pound down until they ordain there cannot be the slightest doubt the police have deprived the victim of a right under the Constitution."); United States v. Bryce, 353 U.S. 705, 709 & n.6 (1956), holding that police officers also subjected, beat, and killed civil rights workers violated due process rights, and quoting Williams on "beating and pounding until they confess"; Robinson v. California, 390 U.S. 228 (1968) (holding that forcing a suspect to vomit evidence was unconstitutional). As the Court put it with the facts in Big Tree:

A rubber hose, a pistol, a blackjack, a sai, a stick, and other implements were used in the process. One man was forced to look at a light for fifteen minutes while he was being kicked, he was repeatedly hit with a rubber hose and a sai stick and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the process was repeated. One man was kicked against the wall and jammed in the chest with a club. Each was beaten, threat-
ed, and insincerely punished for several hours until he confessed. 391 U.S. at 98-99.

30 Chavez, 125 S. Ct. at 1000 (Thomas, J., joined by Rehnquist, C.J., O'Connor and Scalia, JJ.), at 1008 (Scalia, J., joined by Breyer, J.), at 1010 (Kennedy, J., joined by Breyer and Ginsburg, JJ.) ("Under the Due Process Clause of the Fourteenth Amendment, "... the Court held in Ro
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31 Id. at 1017-18 (Kennedy, J., concurring in part and dissenting in part).

32 Id. at 1008 (Breyer, J., opinion of the court on discretion). Justice O'Connor's position on the issue does not seem to be recorded.
In light of this evolution, how should we approach the question of "torture warrants"? Whatever else may be true, it appears that Professor Dershowitz’s procedural position is no longer tenable. Although neither the Self-Determination Clause nor the Eighth Amendment apply by their own force to investigative torture, brutal inquisition violates the Constitution as a substantive matter if it brutalizes "the conscience of the court." This conclusion, however, simply sets the terms of further discussion, for it does not answer the question of exactly what level or type of brutality will shock the judicial conscience. Professor Dershowitz’s proposed torture is brutal, and would be undertaken with a "purpose to harm"—the absence of which undermined the Thomas opinion’s exoneration of Officer Chavez. But will a claim of sufficiently compelling circumstances persuade brutality’s shock? Conversely, the recurrent accounts of “stress and duress” techniques deployed by United States interrogators in the “war on terror” fail short of Dershowitz’s proposed needle under the fingernail, and only two justices fully joined Justice Kennedy’s position in Chavez that "no reasonable police officer would [have] believe[d] that the law permitted him to prolong or increase pain to obtain a statement." Would what is referred to by some former American officials as “torture lite” shock the judicial conscience? An answer to these questions requires further investigation into the contours of the judicial conscience.

III. THE CONSCIENCE OF THE COURT

A. What’s Wrong with the Rack and the Screw?

In sounding the depths of the judicial conscience that finds “the rack and the screw” repugnant, it is worth beginning with the basis that repugnance. Torture is alien to our Constitution both because the event on remand, the Ninth Circuit was exactly stripped, but more emphatic, in Matter v. City of Grand, 197 F.3d 1195, 1192 (9th Cir. 2000), holding that the police’s action was not constitutional, because "GA clearly established "right, fundament to ordered liberty, a freedom from coercive public interrogation."

Professor Dershowitz acknowledges the “torches of conscience” constraints of Rack. "TERRORISM WORK5" supra note 11, at 255, 267-68, but concludes that only procedural protections are required in the case of "a terrorism suspect of refusing to disclose information necessary to prevent a terrorist attack." His opinion for this proposition, Lein v. Wainwright, 769 F.Supp 275 (11th Cir. 1990), is in odd light since Lein appears to acknowledge that a constitutional violation occurred when police诱导 a kidnapper to determine the location of the kidnap victim, but determined that the violation had been disproved by the passage of time and advice of his lawyer between the abuse and a subsequent confession.

Chavez, 124 S. Ct. at 127-128 (Kennedy, J., in concurring in part dissenting in part, joined by Stevens and Ginsburg, J.J.).

cause it impinges on bodily integrity, and because it assaults the autonomy and dignity of the victim.

1. Bodily Integrity

Torture in the form that Professor Bershowitz contemplates involves an assault on the body. Yet from the early days of the Republic, physical security against government has been a defining characteristic of the American constitutional system; protection against physical assault by their rulers is one of the hallmarks of free people. The Fourth Amendment protects the "person" against unreasonable searches and seizures; the protection of "liberty" against deprivation without due process builds on Blackstone's definition of liberty as including personal security. The concern for bodily integrity draws force as well from the background of the Thirteenth Amendment's ban on slavery. In American law before the Civil War, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master's "uncontrolled authority", physical assault could yield no legal redress. Indeed, the standard

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Note that some forms of "stress and drudgery" involve severe deprivation, rather than sensory stimuli.

* Ingraham v. Wright, 430 U.S. 651, 651, 675 n.1 (1977) ("Blackstone catalogued among the 'indulgence rights of individuals' the right 'to secure from the corporal insults of ministers, officers, beatings, and wounding...'" (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *111)).

* See, e.g., Ex parte Milligan, 75 U.S. (9 Wall.) 296, 320 (1869) (recognizing "absolute security of person over the slave's body"); Commonwealth v. Turner, 20 Mass. 676 (1837) (ministering master's demeritory or injurious charge of beating his slave); Americk Fees,
PPLER NOVEMBRED 1979.

The master's authority did not extend to killing the slave. See, e.g., State v. Will, 18 N.C. (1 Dec. & Bl.) 125, 131, 133, 177 (1854) (holding that slave's death at master's hand, absent malice, was not murder but was a "suicide by violence"); A. Laver Higginbotham & J. R. Roark, THE "LAW OF THE FREEDMEN," 32-33 (1965) (providing a variety of prosecutions and convictions for the killing of slaves by masters or others). Some cases by master prohibited "cruel and unusual" punishments of slaves. See, e.g., Wimber v. State, 29 Tex. 945 (1867) (citing Texas statute under which "shame or cruel treatment of slave leading to death was murder"); Kelly v. State, 11 Miss. 20, 24 (1854) (holding masters of any other person entitled to the service of the slave shall not inflict upon such slave cruel or inhuman punishment, under which a verdict of one of the fifth hundred dollars. F. Y.) Turpin v. State, 6 Ala. 694, 695 (1844) (citing Alabama escaped slave code provision that "[s]uicide or unusual punishment shall be inflicted on any slave"); Whipping, however, was the normal mode of punishment on plantations. LAWRENCE M. TRIDEMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 85-87 (1965), and for many antebellum antislavery forces, "whipping religiously conducted as ends of proper and humane", MICHAEL E. MORRIS, LABOR TECHNOLOGY OF VIRTUAL PUNISHMENT: REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1765-1855, at 239 (1986).
form of a legal suit for freedom was an action for battery against the purported master. A constitutional prohibition of slavery brings with it a presumption that the bodies of citizens are subject to neither the "uncorroborated authority" of the state nor that of any private party. As Justice O'Connor has observed, "Because our notions of liberty are intrinsically entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause."

2. Pain, Suffering, and Autonomy: The Meaning of Torture

Torture, of course, is not a mere infringement on bodily integrity. It is an infringement designed to produce excruciating pain. Both the Eighth Amendment's strictures against cruel punishment and the antitorture background of the Self-Determination Clause bespeak hostility toward such practices. Justice Kennedy in Chaeze took the position that "no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement." So, too, in Glucksberg, Justice Stevens would have held that "[a] voiding


68 Cruzan v. Director, Mo. Dept. of Health, 490 U.S. 261, 267 (1989) (O'Connor, J., concurring) ("the state's failure to provide medical treatment raises questions of [first constitutional importance] under the Due Process Clause"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[A]ll fundamental interests protected by the Due Process Clause include the right to . . . bodily integrity . . . ."); Planned Parenthood v. Casey, 505 U.S. 833, 863 (1992) (though the nomination does not affect a woman's right to choose abortion, a state may limit a woman's ability to choose where a child will be born).

69 See, e.g., R.P. v. State of Nevada, 106 Nev. 1167, 496 P.2d 335 (1972) (holding Due Process prohibits a prison from forcing a prisoner from being forced to take antipsychotic drugs "without a finding of exercising justifications and a determination of medical appropriateness"); Cruzan v. Director, Mo. Dept. of Health, 490 U.S. at 276–79 (inferring "liberty inures" to state "unilaterally") (medical care from prison care under the Due Process Clause); Washington v. Harper, 491 U.S. 210, 223 (1989) (especially an evenhanded interpretation of the Due Process Clause that makes the state's interest in preserving a patient's right to obtain antipsychotic drugs "reasonable in light of the clearly expressed wishes of the patient consistent with the patient's"); United States v. Hanes, 494 U.S. 129, 143 (1990) (incomplete due process protections in the Due Process Clause are those protections that require the same scrutiny as other deprivations of liberty).

70 See, e.g., Cleary v. Sessions, 500 U.S. 400, 423 (1991) ("[T]he law is clear that a medical treatment program is a state function only if the state's interest is to prevent a patient's death or serious injury, or to prevent imminent serious injury threatens patient's life or health"); see generally id. at 425–26 ("[T]he state's interest is to prevent a patient's death or serious injury, or to prevent imminent serious injury threatens patient's life or health").
tolerable pain" was a virtually indistinguishable right," and Justices O'Connor, Ginsburg, and Breyer approved the prohibition on assisted suicide at issue only because state law permitted palliative interventions sufficient to avoid agony.44

This perception is not a new one. Even before the Court applied the Fifth Amendment's protections against self-incrimination to the state's tortures to obtain criminal convictions was outside of the usual universe delineated by the Constitution under the fundamentals of "ordered liberty," "[t]he rack and torture chamber may not be substi-
tituted for the worms stand.45 Likewise, it has been clear for over a century that one of the core elements of the Eighth Amendment's prohibition against cruel and unusual punishment is its bar of the imposition of torture or lingering death.46 Almoin three decades ago, in Estelle v. Gamble, the Court concluded that "deliberate indifference to serious medical need of prisoners" can impose constitutionally impermissible "unnecessary and wanton infliction of pain."47 One of the examples cited by the Court in Estelle as "cruel and unusual punish-
ment was the refusal to administer a prescribed pain killer to prisoners after surgery.48 If there are physical sensations that cannot legimatively be inflicted on prisoners in retaliation for even the most heinous of crimes, presumably the state may not inflict these sensa-
tions on individuals whom it has not even prosecuted.49 Although the

44 (O'Connor, 52 U.S. at 741 (Stevens, J., concurring in the judgment) (referring to the right to assisted suicide when in inurable pain)).

45 (O'Connor, J., concurring in part by Ginsburg and Breyer, J.) (noting that a patient "experiencing great pain" is not barred from receiving palliative treatments that might hasten death); at 751 (Breyer, J., concurring in the judgment) (noting that laws under review did not bar lethal injections from "pursuit of severe physical pain").

46 (Gamble, 411 U.S. at 87, 88, 90 (1973); (noting that the Eighth Amendment pro-
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Court may properly hesitate in imposing controversial value choices under the rubric of due process, the proposition that the government is constitutionally constrained from intentionally imposing agony on its subjects does not appear to raise contentious normative issues.\(^5\)

Even in a regime of aggregative constitutional rights, the Court has recognized that when the government takes custody of an individual and renders her helpless, it has a duty to ensure her physical safety and minimal human needs.\(^6\) Torture fluids this duty. It inflicts agony on the helpless; it is at odds with the constitutionally legitimate role of the state. One of Orwell’s final comments in 1984—"If you want a picture of the future, imagine a boot stamping on a human face—forever"—repels us precisely because it is the antithesis of the legitimate relation between the state and those subject to its power.

The pain of torture by design negates the vision of humanity that lies at the core of liberal democracy. Justice Kennedy recently set forth the constitutional importance of the "autonomy of self" in *Lawrence v. Texas.* Torture seeks to shatter that autonomy. Torture’s evil

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6. In a parallel discussion in recent political philosophy, Professor Barry has suggested that avoiding physical harm is a good candidate for a core value because such harm "distorts from the point of view of a very wide range of perceptions of the good... [and] any conception of the good life goes better in the absence of physical injury." *BARRY, JUSTICE AS INSTITUTINGITY* (1995) (citations omitted). See id. at 25 (noting confusion on "induces of harms"). See also *SCHEER, THE CONSTITUTION VINDICATE 15-16, 18-19, 50, 57 (1995) (citing states to refrain from coerced violence and to minimize violence against culture)

7. *STEWART, INNOCENCE AND EXPERIENCE* (1989) (discussing the "first cells of human experience, reaffirmed in every age... murder and the devastation of life, institutional, social experience... physical pain and emotion"). Cf. *GLADIS SCARR, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD IN 1983* ("[I]t is the existential aspect of pain in its sheer and raw sensuousness. While other sensations have content that may be localize, or cognizable, the very content of pain is itself pure sensation."); *M. WALTZ, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1996) (arguing for universal applicability of "marginal injuncions... inhere within... desires, urges, oppression, and terror") that "respond to other people’s pain and oppression"); *JEREMY WILSON, HONOR IN A UNIVERSAL GLASS,* no COLUMN, HUM. Rts. L. Rev. 365, 365 (1999) (asserting the "standard, predictable absorbance of torture in every culture and every society").

8. For such a recognition, see, for example, *Delaney v. Wyoming County Department of Social Services,* 890 P.2d 662 (Wyo. 1994).
extends beyond the physical; extreme pain totally occupies the psychi
cratic world; the agony of torture is designed to make choice impossi
ble. Effective torture is intended to induce the subject to abandon
her own volition and become the instrument of the torturer by re
vealing information. Such government occupation of the self is at
odds with constitutional mandate. 2

B. Justifiable Violations? 3

Not every governmental action that results in pain or impinges on
bodily integrity is barred by the Constitution. A state may uncontra
versially require smallpox vaccinations in the midst of a threatened
epidemic; a priori, guard rats concededly use firearms to quell a
prisoner riot; a police officer may unreasonably use appropriate
force to subdue a resistant suspect. 4 Can the principles that justify
such actions similarly come to constitutionally justify torture in suf
ficiently desperate circumstances? To begin with, it is worth clarifying the precise issue under discus
sion. It is not the question of whether it is moral for an individual to

1 See [cite].

2 See [cite] supra note 70, at 31 ("[I]n serious pain the claims of the body utterly nullify
the claims of the soul.").

3 The case in which the Court has accorded to the state's request to literally extract the
will of the subject by involuntary administration of psychiatric medication is in order to bar
then from competent to avoid trial have been predicated on a finding that the ingestion is both
"material for the sake of [the prisoner's] own safety or the safety of others" and in the medici
nal interest of the patient. See [cite] United States, 123 S. Ct. 2174, 2183, 186 L. Ed. 2d 399
(2003) (quoting Riggs v. Nevada, 354 U.S. 124, 134 (1957)); see also id. at 2195 (requiring that the reviewing
court conclude, among other things, that the medication is for the "patient's medical inter
est"); Riggins, 504 U.S. at 132 (overruling in dicta that the treatment must be "in the patient's medi
n8 (mandating determination by treating physician that "medication is appropriate").

4 One must be exceedingly careful with such countenances; the implication also sought to
"snares" in subject by using their immortal souls, and doctors have not infrequently con
vinced themselves that medical means coincide with their research agenda or other Interests.
Cf United States v. Stanby, 482 U.S. 429, 436 (1987) (Breast's); dissenting (["in experiments
designed to test the effects of lysergic acid diethylamine (LSD), the Government of the United
States tested thousands of its citizens as though they were laboratory animals, using them with
such dangerous drugs without their consent."]); Gordon, THOMAS JOURNEY INTO MADNESS: THE
TRUE STORY OF SECRET CO. MIND CONTROL AND MURDER, 1985 (pointing stories of pa
tients in CIA-funded mind-control research program). They are, in any event, inapplicable to
the sort at hand, for one claims that the torture condoned by Professor Dershowitz is in the
individual's best interest.

5 See, e.g., Jacobson v. Massachusetts, 187 U.S. 31 (1902) (upholding state's mandatory vac
inations as valid exercise of police power).

6 See Whaley v. Allen, 475 U.S. 311, 316 (1986) (holding that the shooting of a prisoner in
the course of ejecting a car did not violate the Eighth Amendment).

7 See Tennessee v. Garner, 471 U.S. 1, 9 (1985) (reasoning that "apprehension by the use of
deadly force" is torture sanctioned by the Fourth Amendment).
engage in a particular sort of assault or physical imposition, but whether the Constitution allows the state to do so. Individuals may be morally free to engage in a variety of actions—from peremptory dismissal from employment for political views, to refusal to accord benefits because of sexual preference, to prayer—that are nonetheless barred by the government under our constitutional scheme. The question, therefore, is not a single abstract moral choice but one of constitutional law, national identity, and institutional structure.

1. Purposeless Restraints?

One formulation of the demands of substantive due process suggests that it bars "arbitrary impositions and purposeless restraints on liberty." So, too, there is language in Eighth Amendment precedents that the Cruel and Unusual Punishment Clause bars "unnecessary and wanton" infliction of pain. Some of the abuses held to violate the constitutional protections against official abuse have been entirely without public justification.

Judged by this standard, some tortures would certainly be unconstitutional. American actions replicating the policies of the former regimes of Greece, Iraq, Uruguay, Uganda, or Argentina would be impermissible. If an American official were to subject a person to


92 See, e.g., Hope, 536 U.S. at 794-95 (describing how prisoner was handcuffed to a "hanging pole" on two separate days for a total of nine hours in the hot sun, denied water, and starved); United States v. Lanier, 520 U.S. 335 (1997) (requiring dismissal of civil rights prosecution of state judge who sexually assaulted and racially abused litigants and employees); Hudson, 503 U.S. at 5 (recording that, while prisoner was in handcuffs and shackles,Geo. Grant punched him in the mouth, eyes, chest, and stomach, while another held the man's shirt and kicked and punched him from behind); United States v. Perez, 505 U.S. 787, 795 (1994) (describing the preposterous variety of tortures officers could be taught and instructed to inflict).

93 See, e.g., Ellen L. Lutz & Rafael Sikkink, International Human Rights Law and Practice in Latin America, 54 St. Louis U. L. Rev. 649 (2000), opined in LEGALIZATION AND WORLD POLICY 249 (Judith I. Goldstein et al., eds., 2001) (describing systems of torture in Uruguay and
physical agony out of personal spite, because that person resembles an individual who has done wrong, or in order to intimidate a population by showing the barbarity of which the government is capable, a court would have no difficulty finding that official in violation of the demands of due process.

Few analysts, however, seriously suggest rounding up people who look like terrorists and torturing them simply in hopes of intimidating future attackers, or torturing terrorists in custody for the purpose of revenge. Rather, the argument is that torture would be necessary to prevent disaster, or at least to reduce the probability of successful future terrorist attacks. That purpose certainly constitutes a legitimate one. Does this mean that a government in search of information engages not in “purposeless” but “purposeful” deprivations of liberty or “necessary” imposition of pain, and therefore acts constitutionally when it tortures?

The demands of due process are not so anemic. In the recent case, Rochin v. California,8 the actions of the police were not from gratuitous cruelty or personal spite, but from tangible law enforcement objectives. Mr. Rochin’s stomach was pumped in an effort to secure evidence needed to enforce the criminal penalties against drug possession. The intrusion was eminently reasonable as an instrumental matter; indeed, once the drugs had been swallowed, no less intrusive alternative could have achieved the objective. Nonetheless, the Court found the deputy sheriff’s actions to be unconstitutionally shocking to the judicial conscience.9 If Rochin is the model, cruelty cannot be justified simply because it seeks to achieve a legitimate objective.

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8 342 U.S. 165 (1952).
9 Id. at 172.
When claims of liberty contend with concerns of public interest, due process analysis often adopts a rhetoric of "balancing" or "comparison." For example, the Court in Youngberg v. Romeo, in evaluating the treatment of inmates in a hospital for the mentally retarded, announced that "[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance the liberty of the individual and the desirability of an organized society." The presence of a legitimate purpose is not enough to justify a severe imposition unless the "weight" of the purpose is commensurate with the imposition.

Similarly, in evaluating efforts to obtain evidence from the bodies of criminal suspects under the Fourth Amendment, the Court has taken a count of both the magnitude of the imposition on the suspect and the exigency of the government's need for the evidence."
In Schmerber v. California, the Court approved an involuntary blood test to determine the blood-alcohol level of a driver who had been involved in an accident. In determining that the action met "Fourth Amendment standards of reasonableness," the Court—by a five-to-four vote—observed that while the blood test intruded on the body of the driver, the intrusion involved "virtually no risk, trauma, or pain," was performed "by a physician in a hospital environment according to accepted medical practices," and was a commonplace test comparable to those required for military service or a marriage license.

On the government's side, in the majority's view, the need was both pressing and ineluctable. Inebriation was difficult to prove by other means, "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to expel it from the system," and "[i]ntoxication of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." A minimal imposition was warranted by an overriding government necessity.

At the other end of the spectrum, in Winston v. Lee, the Court unanimously viewed the balance as tilting unambiguously toward the individual. In Winston, the state sought to require Rudolph Lee, a suspected armed robber, to undergo surgery under total anesthesia to remove a bullet from his shoulder in order to compare it to the gun which was fired at the actual perpetrator of the robbery. Adopting a "case-by-case" approach, in which the individual's interests in privacy and security are weighed against society's interests, the Court evaluated "the extent to which the procedure may threaten the safety or health of the individual," and the "extent of intrusion upon the

**Note:** The text provided is a condensed version of the original document. The full citation and page number are not included in the provided text. For a complete reference to the source, please consult the full document.
individual's dignitary interest in personal privacy and bodily integrity, compared to "the community's interest in fairly and accurately determining guilt or innocence." On the individual's side, the Court saw the potential of substantial medical risk and viewed the intrusion on privacy as "severe." On the government's side, the interest in recovering the bullet was "hardly persuasive" given the "substantial additional evidence" against the suspect. Nonetheless, the legitimate purpose, a minimal gain to society, did not render the intrusive surgery reasonable. On this analysis, the constitutional fault of the deputies in Rochin was the disproportion between the level of intrusion and the magnitude of the police justification; the "brutal" invasion of the body was carried out in an effort to enforce a prohibition of a virtually victimless crime.

Such a standard would place constitutional constraints on the use of torture. If the magnitude of the interest necessary to justify an intervention rises with its intrusiveness on bodily autonomy, health, and safety, surely torture lies at the top of the scale. Torture is hardly a commonly accepted medical procedure. Unlike the blood test in Schmerber, which carried with it "virtually no risk, trauma or pain," even the surgery in Winston, which was to be carried out under anesthesia, torture is specifically designed to induce trauma and pain, and carries with it the risk of severe and lasting psychiatric damage. Even the "stress and threat" techniques of "torture lite" would require substantial justification under a Fourth Amendment balancing test; the mere possibility of obtaining useful information for the "war on terror" would not be sufficient.

The struggle against illegal narcotics was viewed as an important one, but was not adequate to justify pumping Mr. Rochin's stomach; urging him to reveal the location of his stash would be equally improper. The need to punish armed robbers is crucial to a civilized society, but the marginal addition of strength to the case against Mr. Lee did not justify surgery, for his conviction seemed likely in any event. The possibility that he could reveal the whereabouts of an accomplice would not have justified subjecting him to torture.

67 Id. at 786. The Court later noted: [The Government proposes to take control of respondent's body, to "surgically explore the victim", no yet convicted of a criminal offense, with narcotics and barbiturate into a state of unconsciousness, and then to scrape beneath his skin for evidence of a crime. This kind of surgery involves a virtually total diversion of the body's circulatory system over a surgical probe beneath his skin.
68 Id. at 785 (citation omitted).
69 Id.
70 Schmerber, 384 U.S. at 771.
71 See, e.g., Campbell, supra note 56 (discussing the use of " torture lite" by the United States after September 11).
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Analysis such as Professor Denhoff, who make the case for the possibility of torture, tend to gravitate toward the ticking bomb scenario, where the captor terrorizes an innocent until she and the police learn the location of a devastating device about to explode. Real life is likely to generate examples substantially less clear-cut and compelling. The suspect may be innocent or ignorant, her information may be of only collateral or speculative value, the device may not exist, or alternative sources of information may be adequate to the purpose. It is important to emphasize that even an analysis of "reasonable" analogous to the Fourth Amendment limits cannot be read to authorize physical abuse simply on the basis of the aggregate magnitude of harm that might be avoided. The requirement is that the incremental gain in avoiding a great harm be sufficient to justify imposing the contemplated level of harm on the individual. A speculative benefit in the future cannot be said to reasonably justify the real and present imposition of abuse on a person screaming under the authorities' ministrations. 2

2 The deployment of deadly force to prevent the flight of a dangerous felon, if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm," upheld in Tamez v. Gomez, 671 U.S. 1, 2 (2005), is, on one level, justified by the magnitude of a continuing threat. But it is justified as well by the felon's defiance of police orders and the threat that the felon potentially poses to law enforcement and the community. By definition, a suspect under interrogation is no similar threat. It is precisely his helplessness that makes the tactic repugnant. See Henry v. Rawlings, 491 U.S. 95, 104-05 (1989) (noting that torture is not a "fair fight"). Notwithstanding the "importance" of law enforcement efforts, the doctrine of Garner would not consider an effort to gain with an apprehended kidnapper part of revealing the whereabouts of an accomplice who had escaped.

The former Court did not engage in uncontrolled fantasizing. Rather, it relied substantially on both common law practice and prevailing rules in individual jurisdictions to map the boundaries of legitimate use of force in arrest, 471 U.S. at 14-16 (discussing process of "cross-filing," common law principle to present day). The Court has regularly relied on common law practice to "define and the fabric of American law to delineate the scope of consecutive searches and seizures." 484 U.S. 336, 343-44 (1988)

Noting that the common law practice of obtaining warrants across states for recidivists was "limited with exception" and could not serve as basis for judging such-issues "unreasonable," with Wilson v. Lockman, 114 U.S. 929 (1885) (holding that the "being a burglar and armorer" requirement of common law was "written into American practice and become part of the Fourth Amendment definition of unreasonable"). Unlike the use of force to apprehend fugitives, there is neither common law warrant nor contemporary model for the use of force against torture suspects. See infra Part III.B.B.

To be sure, it could be that the suspect violates law by resisting arrest if subject to a legitimately supported grand jury inquiry, or by giving misleading answers to law enforcement officials. But Garner would not constitute deployment if police force to apprehend fleeing persons of serious crimes witnesses. See 471 U.S. at 14 (Where police pursuit no immediately threat to officer and no chance to other, the harm resulting from failing to apprehend them does not justify the use of deadly force to do so.). After appropriate process the reasonable suspect may be incapacitated indefinitely or subjected to heavy fines or imprisonment. No arrest law imposes the distress that the mere pursuit, however, the punishment for such a fault cannot exceed the level of brutality precluded by the Eighth Amendment. It would be an
On the other hand, if the judicial conscience is shocked only where there is not a reasonable arithmetic proportion between the incremental expected benefit to the public and the harm to the subject of torture, a sufficiently large fear of catastrophe could conceivably authorize almost any plausibly efficacious government action. Even a small increase in the probability of avoiding a nuclear or biological holocaust could be argued to swamp almost any harm to a single individual. The danger, to borrow the formula of Dostoevsky's Ivan Karamazov, is that since 2.819 World Trade Center victims are dead, everything is permitted.

In this respect, a principle of arithmetic proportionality rooted in the prohibition against "unreasonable searches and seizures" does not exhaust the demands of "ordered liberty." As a matter of precise legal analysis, the Fourth Amendment's prohibition of "unreasonable searches and seizures" is inapplicable to the situations under discussion. By definition, a suspect in custody and available for torture is one who has already been "seized." An effort to physically extort information is not a "search" for physical objects; it is an effort to break the will of the subject in order to force the subject to reveal information in the subject's mind. It is precisely because the physical "searches" involved in the blood-testing cases upon which Professor Dershowitz relies do not seek to force "communicative" actions that courts have held they fall under the Fourth Amendment rather than the more stringent provisions against compelled self-incrimination.

The fact that torture is neither a search nor a seizure limits the usefulness of Fourth Amendment cases in construing the demands of "ordered liberty" and "due process of law," for the balancing dor-
trines under the Fourth Amendment evolved to apply to a relatively small spectrum of actions. No matter how important the issue, the capacity of individuals to resist the search for physical objects can be overcome by a relatively constrained expenditure of force. The material capacity of the suspect for a natural upper limit of the harm that is necessary to effect a "search or seizure." For a suspect who is in custody, the upper limit will usually involve the Zorcich deployment of handcuffs, or in an extreme case, anesthesia. A "reasonable" search by definition will not reach the degrading and deprivating limits of torture, so it is not necessary to be concerned with the possibility of "reasonable" atrocities. Interrogation, by contrast, is subject to no similar upper bound; the pain and degradation that may be said to be "necessary" is limited only by the will of the torturer and the resistance of the tortured.

Nonwithstanding the fact that a number of substantive due process cases speak in terms of the "accommodation" of competing interests on the basis of their "weighings," that accommodation reaches beyonder arithmetically proportionality; the underlying question is whether the accommodation in question is consistent with the "essence of a regime of ordered liberty" and the "traditions and conscience of our people." As a matter of doctrine, the analysis of the role of physical abuse in "ordered liberty" often diverges from consideration of arithmetical proportionality. The opinions of Justices Stevens, Kennedy, and Ginsburg in *Chen* are uncompromising: torture, or its functional equivalent, is inconsistent with the concept of "ordered liberty." The opinions for the remainder of the Court, as I have noted, are

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30 *Chen*, 123 S. Ct. 1993 (Kennedy, J., concurring in part and dissenting in part) (concluding that the "functional equivalent" of torture clearly included see *Constitution*); id. at 2122 (stating that "of course" the concept includes as an example of a constitutional right implicit in the concept of ordered liberty"); id. at 2139 (Kennedy, J., concurring in part and dissenting in part) ("A constitutional right is reduced the moment torture or its core equivalents are brought to bear"); id. at 2133 ("Torture is its equivalent in an attempt to induce a statement", identifies as an individual's "fundamental right to liberty of the person." *Constitution inalienable*); id. at 2139-20 (Ginsburg, J., concurring in part and dissenting in part) (reasoning that due process and self-incrimination protections are "connected with the struggle to eliminate torture as a governmental practice").
more allusive. They refer to the statement in County of Sacramento v. Lewis that conduct "most likely to rise to the conscience-shocking level," is the "conduct intended to injure in some way unjustifiably by any government interest."

Lewis, in turn, though the most extensive modern discussion of the issue, is likewise less than fully informative. There, the Court addressed the question of whether police who pursued a fleeing suspect in a high-speed chase had deprived the suspect's passenger of life without due process of law when that passenger was killed as a result of what his representatives alleged was deliberate or reckless indifference on the part of the pursuing officers. The Court's opinion began by twice reiterating the proposition that the substantive dimensions of due process "prescribe government officials from 'exercising [their] power, or employing it as an instrument of oppression,'" but emphasized that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" Citing Rochin and Daniels v. Williams, the Court declared that only conduct that "shocks the conscience" would implicate "the lies concerns of the governors and the governed." In determining that the representatives of Mr. Lewis had made no such showing, the Court focused on the officer's purpose. It held that in the context of a high-speed chase "even precipitate recklessness fails to reach close enough to harmful purpose to spark the shock that implicates the 'lies concerns of the governors and the governed.'" In a high speed chase, the conscience would be shocked, the Court stated, by a "purpose to cause harm" or to "terrorize, cause harm, or ill." If this is the test, the torture proposed by Professor Dershowitz fails, for torture involves the specific intent to terrorize and inflict pain on a helpless suspect in government custody.

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11 Id. at 2698 (quoting Lewis, 537 U.S. at 840); id. at 2688 (Souter, J., concurring) (same). As noted, Justice O'Connor seems to have noted one of the questions on this point. See Oregon v. Elrod, 429 U.S. 347, 357 n.5 (1976) (O'Connor, J., concurring in part) (taking as given that a constitutionally "obstructed through overly or libelously "exercised" would "strike against Fifth Amend- ment trial due process concern" (emphasis added)).


13 Id. at 846 (quoting Collins, 509 U.S. at 125).

14 Id. at 847 (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

15 Id. at 855-56 (quoting Daniels v. Williams, 474 U.S. 327, 337 (1986)).

16 Id. (quoting Daniels, 474 U.S. at 952).

17 Id. at 854-55.

18 The Court in Lewis observed that in Rochin, "the case in which we first proposed and first applied the 'shocks the conscience' test, it was not the ultimate purpose of the government actors to harm the plaintiff, but the apparent anger with full appreciation of what the Court described as the brutality of their acts." 342 U.S. at 170-71. The Court also observed that failure 'to provide ... basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety' to those in government custody "transgresses the substantive limits on state action set by
Elsewhere, the opinion made use of the Eighth Amendment as a benchmark for the level of abuse that would rise to administer a "shock to the judicial conscience." In particular, the Court referred to the Eighth Amendment for the proposition that in the usual custodial situations "deliberate indifference" to the safety of those in custody would violate the Constitution, while in situations analogous to the control of a prison riot,本田 should turn on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and wantonly for the very purpose of causing harm,\textsuperscript{50}

Torture, which seeks to break the will of a suspect, is undertaken "for the purpose of causing harm," yet it is not necessarily "cruel and unusual.

By definition, acts of interrogation raise a claim that the torture is necessary to achieve some important government end. Torture need not be sadistic; they may be cold-blooded professionals or even reluctant idealists. On the other hand, torture is not undertaken in an effort to "maintain or restore discipline," "to hasten and under pressure," without time for deliberation.\textsuperscript{51} Torture is not administered at split-second intervals; indeed it is precisely the passage of time that often combines with the physical agony to render the conditions unendurable.

If the Eighth Amendment truly is the relevant source of normative guidance, torture cannot be justified on grounds of public necessity. The words of the Eighth Amendment prohibit "cruel and unusual punishments,"\textsuperscript{52} it is difficult to maintain that torture is not both cruel and unusual today, as it was when the Amendment was adopted. The judicial gloss on the Eighth Amendment prohibits "wanton and unnecessary" imposition of pain. In the abstract one might argue that the pain of torture constitutes "necessary" pain since the legitimate goal of preventing terrorist attacks is achieved only through the deliberate imposition of pain. But the risk and the screw were not viewed as entirely unnecessary by those who wielded them,\textsuperscript{53} and the
heritage of the Eighth Amendment permits neither. The parameters are set by the Court's observation in *Hudson v. McMillian*,
holding that a beating of an inmate by prison guards violates the Eighth Amendment.

[A]n Eighth Amendment claim is . . . contextual and responsive to "contemporary standards of decency." For instance, extreme deprivations are required to make out a condition-of-confinement claim. Because pun-
itive discomfort is "part of the penalty that criminal offenders pay for their offenses against society," only those deprivations denying the mini-
mal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation". . .

In the extreme force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency almost are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how dia-
monic or punitively, inflicting less than some arbitrary quantity of injury.
Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.10

3. "Traditions from Which It Broke"

These constitutional side constraints on the use of physical force cannot be explained by an arithmetic proportionality, rather, they re-

fect the nature of our society, from which our public tradition arises and which it reciprocally constitutes. In evaluating accommodations between order and liberty, as Justice Harlan observed, the Court must
give regard to traditions of our country, both "the traditions from which it developed as well as the traditions from which it broke."

These traditions have no place for official torture.
Though torture was not entirely absent in fifteenth and sixteenth century English practice, it was always exceptional and the common law, by the time of Blackstone, excluded torture for purposes of obtaining information.

[The trial by rack is utterly unknown in the law of England; though once when the duke of Exeter and Suffolk, and other ministers of Henry VI, had tried a design to introduce the civil law into the kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth. But, when, upon the assassination of Villiers's duke of Buckingham by Felton, it was proposed in the privy council to put the assistance to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, so their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men; and yet this is the reason given for it in introduction in the civil law, and is subsequent adoption by the French and other foreign nations.]

"We examining our Nation's history, legal conditions, and practice" (Oving Coom, 605 U.S. p. 418-50, and Crews v. NC, Mo. Dep's of Health, 437 U.S. 293, 298-79 (1990)), at 764 (Slomsky, J., concurring in the judgment) ("[C]lassifying principles...[are to be] weighted against the history of our silence as a people.")

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1 W. Blackstone, Commentaries 720 (2d ed. 1887) ("The punishment occurred in 1428. See Langbein, supra note 79, at 150 ("The trial of Thomas of common law Criminal procedure, the Eng-
lish experiment with torture left no trace"). 2 W. Blackstone, Commentaries 185 (1887) ("It is also clear from the works of Bunce, Smith, and Coke, and from the examina-
tion of the judges in Stoker's Case, and the use of torture in wholly contrary to the common law."); (citations omitted)).

Professor Dworkin, relying on the research of Professor Langbein, maintains that "there was a case in the history of Anglo-Saxon law when torture was used to save life, rather than to take it, and when the limited administration of medicinal torture was approved by judges." 1985 CRIM. SCI. 764 (1985). He neglects to mention that torture was a

discouraged exception to the common law rule, and ended in the reign of the early Stuart, before the Petition of Right of 1628 or the English Bill of Rights in 1688 that we now recognize for American constitutional thought. Langbein, supra note 79, at 150. (After 1660 (the year of the

abolition of the Star Chamber), torture was never again practiced in England.... [After] 1660 the (Privy Council) never again issued a torture warrant.")

Professor Dworkin also appears to be somewhat confused in suggesting that English prac-
tice reacted to torture to avoid a requirement of "the necessity of two witnesses in the con-
fusion," 1985 CRIM. SCI. 764 (1985). He neglects to mention that the French practice of torture was somewhat less visible than in England, at 158. As the pages in Langbein to which Professor Dworkin refers make obvious, the two-witness/confinement rule and its attendant difficulty of conviction was the Continental, not the common law, rule. Langbein, supra note 79, at 7; and id. at 73. ("The apparent use of torture to investigate one's
ever established itself in English criminal practice.") at 764 (slomsky) that England "developed no institutions to combat torture" in part because James I had already knew the facts of a case and did not rely on "misdemeanors to investigate crimes." The French practice was widely published and

promulgated. Langbein suggests that the lowering of the laws of proof ended the necessity for torture on the Continent, but observes such rules already applied in England. at 77-79."
Like Blackstone, the Framers of the American Constitution viewed torture as a mechanism associated with the vices of Constitutional despotism. Thus, Patrick Henry objected in the Virginia ratifying convention to the absence of a prohibition on torture:

"What has distinguished our ancestors—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arms of government, that they must have a criminal equity, and extend confession by torture, in order to punish with still more relentless severity." 10

These origins have been regularly cited as constitutive of our constitutional tradition. 11

This rejection of torture as alien to the heritage of English liberty held sway through the early decades of the Republic, 12 supplemented by the rejection of sanguinary and afflictive punishments more gen-

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Mr. George Mason replied that the worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that in those countries where torture is used, evidence was extracted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishment shall be inflicted; therefore torture was included in the prohibitions id est.

11 See generally, WILLIAM PITT, THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY BEING THE EIGHTY-SECOND LETTERS OF ENGLAND, at 56 (Phila.: William Bradford, Philosophical Club ed. 1857) (1687) ("In France, and other Nations... if any two Villains will but twist against the poor Party, his Life is gone, they, if there be no witnesses, yet let may be put on the Rack.")


13 Story, supra note 2, at 60–63 ("[t]he self-incrimination clause is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt."); see Colgrove v. Virginia, 51 U.S. 202, 253 (1851) ("[w]e have a recognition of the constitutional right of a person to be free from physical brutality by officials charged with the investigation of crimes... . This principle, happily, into the consciousness of our civilization by the memory of the worst inquisitions, sometimes practiced with torture, which were borrowed briefly from the custom during the era of the Star Chamber, was well known to those who established the American government.")
eraly as anathema to a culture of liberty. When European governments moved to eliminate official torture in the late eighteenth and early nineteenth century, America applauded.

The replacement of local justices of the peace by extensive police forces charged with investigating and suppressing crime in the late nineteenth and early twentieth century America was accompanied by organized physical abuse of suspects designed to achieve those ends. The term "the third degree" gained currency among American police officials during the early twentieth century. "Third degree" brutality by police officials, however, was judged constitutionally anathema by the Supreme Court in the aftermath of the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission Report in the early 1930s. That official rejection was reinforced by the revolution against

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See, e.g., Adams v. Hoyt, THE ROLE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 84 (1992) (explaining that, in building penitentiaries for the establishment of penitentiary in the eighteenth century, "[t]urning corporal punishment toughness to rehabilitative efforts. [American] advocates viewed it as a more "sanitary" solution to crime than "insanity" alternatives, such as capital punishment and, in that functioning, the old corporal punishments"); Lewis P. Masur, Rites of EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1866, at 61 (1989), (["t]he power and exercise of punishment marked modernity, mild and harmless riots would have on characteristic republicanism. The logic of repudiation forced some Americans to reconsider the problem of dominance and to reform capital punishment as unprogressive"); MORSE, supra note 39, at 66 (reporting that "Revolutionary impulses ... linked the process of capital and corporal punishment in the archetypes of liberty and monarchy.

For accounts of the penitentiary punishment of torture, see, for example, Malcolm D. Evans & Rog MUSIC, PREVENTING TORTURE 7-18 (1998); PETERS, supra note 19, at 74-75, 98-102; LAWRENCE O. W. TERRY, TORTURE SUBJECTS: PRIDE, TRUTH, AND THE BORN IN EARLY MODERN FRANCE (1991), and DAMASK, supra note 18, at 82-83. For American reactions, see, for example, JENKINS, supra, at 196-99. [discussing the corruption which resulted from the "corporals" of American police forces and local political forces in the early twentieth century]; Office of Legal Policy, DEPARTMENT OF JUSTICE, THE LAW OF POLICE INTERROGATION, 22 U. MICH. J.L. REFORM 537, 485-86 (1989) (observing that "the use of third degree methods by the police to obtain confessions became common and, perhaps, a widespread practice until after 1937.


torture as characteristic of America's totalitarian enemies. It has now been three generations since American law enforcement has of-

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Constitutional Constraints on Torture

By Terry J. Moe

Nov. 2005

Constitutional constraints on torture are not merely a matter of the government's respect for the rule of law. They are a matter of the government's respect for the rule of law in the context of national security. This is because the government's ability to enforce the law is based on the government's ability to garner public support for its actions. Public support for the government's actions is based on the government's ability to demonstrate that it is acting in the best interest of the nation. This is because the government's ability to enforce the law is based on the government's ability to garner public support for its actions. Public support for the government's actions is based on the government's ability to demonstrate that it is acting in the best interest of the nation.

Constitutional constraints on torture are not merely a matter of the government's respect for the rule of law. They are a matter of the government's respect for the rule of law in the context of national security. This is because the government's ability to enforce the law is based on the government's ability to garner public support for its actions. Public support for the government's actions is based on the government's ability to demonstrate that it is acting in the best interest of the nation. This is because the government's ability to enforce the law is based on the government's ability to garner public support for its actions. Public support for the government's actions is based on the government's ability to demonstrate that it is acting in the best interest of the nation.

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At the time of its founding, America invoked "a decent respect to the opinions of mankind," and over the centuries we have cultivated a self-image as a country at the vanguard of human rights. As a jurisprudence of human rights has taken root around the world, Supreme Court majorities have begun to refer to consensus opinion in international law as one guidepost to the nature of acceptable practice under our own constitutional guarantees. These references have not been uncontroversial, and I have myself registered some doubt about the process of uncritical constitutional borrowing. Nonetheless, in my view, official international consensus is relevant to the domestic "conscience of the court," particularly where it points to dangers of abuse that could plausibly threaten our own polity. It is clear that the international prohibition against torture and its cognates is rooted in an array of official declarations and conventions, but it has evolved into a jus cogens norm of international law, grounded in the fundamental moral perceptions of the international community and the temptations that arise in mortal international confrontation. In a globalizing world, these moral commitments

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56 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
57 See, e.g., Lawrence v. Texas, 125 S. Ct. 2479 (2005); (referring to the European Convention on Human Rights); reconsidering abhorrent practices (Akins v. Virginia, 396 U.S. 334, 342 (1969); see also United States v. Shirley, 540 U.S. 300 (2004)).
58 See, e.g., Lawrence, 125 S. Ct. at 2499 (Volks, J., dissenting) ("The Court's discussion of these foreign norms ... is therefore misleading data. Dangerous data, however, since this Court ... should not impose foreign models, facts, or fashions on Americans."); see also U.S. v. Florida, 557 U.S. 990 (2009) (Thomas, J., dissenting in part, concurring in part).
reinforce the revision against torture which arises from our own history.

IV. THE EFFECT OF A CONTINUED PROHIBITION

Professor Dershowitz closes his account by declaring his belief that, paradoxically, "a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects." The argument proceeds in three steps. First, Professor Dershowitz believes that the record shows that "torture sometimes does work and can sometimes prevent major disasters" that can be averted in no other fashion. Second, in light of this efficiency, he believes that public opinion would condemn a refusal to utilize it to prevent terrorist attacks, and that American officials would in fact engage in torture. From these premises Professor Dershowitz concludes:

The real issue, therefore, is not whether some torture would not be used in the ticking bomb case—it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law.

As between the two options, he maintains that the use of open and established procedures is likely to result in less torture.

"Off the record" abuse, according to Professor Dershowitz, could take place on the basis of the decision of a single executive official. Such abuse, his argument continues, would be deplored under the

25 F.M 1407, 1421 (9th Cir. 1994). See also In re Estate of Frischkorn E. Marcus, Roman Riga Long, 329 F.2d 349, 349 (10th Cir. 1964): "(T)here would be unanswerable to conclude, other than this act of official brutality violate customary international law," filed with approval by Abraham- Martin v. United States, 371 F.Supp. 655 (N.D. Cal. 1974); Flatters v. Peninsula, 350 F.2d 876, 880 (2d Cir. 1965) ("Indeed, for purposes of civil liability, the torturer has become—like the plain and fair trade before him—within human practice, an enemy of all mankind."); Xuncos v. Esquadro, 862 F. Supp. 582 (D. Mass. 1993) (defining torture by Guatemalan military to be an act of international law made in violation of the ATCG and ESTATUS (T126) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 781 (1985) ("A law violates customary international law if, as a matter of state policy, it permits, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment of punishment . . .")

26 WEEK IN REVIEW WORK, supra note 11, at 158. See also LEWISON, PREVENTION, supra note 17, at 2948. "If one believes that there is a genuine probability of what might be termed the condemnation of the act against society—and in any event willfully made—then we should take seriously Dershowitz's suggestion that we look at events from an ex ante perspective more than the presumptively independent ex post one.

27 WEEK IN REVIEW WORK, supra note 11, at 158.

28 See id. at 154-55 (referring to "a ticking bomb," a "preventable act of terrorism," a "preventable act of terrorism," that was of the magnitude of the attacks of September 11, and "the care of treason suspect"). It is unclear in which sense Professor Dershowitz believes that torture would invariably be used.

29 Id. at 158.
unguided discretion of street-level bureaucrats. It would take place in secret and would be subject to substantial sanction only if it were discovered, a prosecution were brought, and a jury could be persuaded to convict after resolving conflicts of testimony.

By contrast, argues Professor Dershowitz, a torture warrant would not issue unless both executive officials and judges agree it is appropriate (and presumably a lawyer would be required to file the application). Officials, he claims, are unlikely to seek torture warrants and judges are unlikely to authorize torture warrants in the absence of "compelling evidence." A torture warrant would leave an official record; both judges and executive officials, argues Professor Dershowitz, would be held accountable for their excesses.

Though some commentators express skepticism, for present purposes I would grant the first step in Professor Dershowitz's argument as he articulates it: torture "sometimes" can be the only mechanism that will prevent major terrorist attacks. Likewise, I would not disagree with Professor Dershowitz that a significant number of Americans might well condone torture to prevent terrorist attacks, as they might condone a variety of other unconstitutional practices, and that American officials would in some circumstances act in accord with those opinions. Indeed, if torture could be confined to a limited situation in which it represented the only way of preventing vast devastation, there are not inconsiderable arguments that, as a matter of both policy and public ethics, an official might choose to violate legal and otherwise peremptory moral norms by ordering such torture.

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90 Id. at 154.
91 Id. at 158-60, 158-59.
93 See Abraham McLaughlin & Seth Stroo, How the Americans Would Go to War Times, CHRISTIAN Sci. MONITOR, Nov. 14, 2003, at 1 (reporting that thirty-five percent of respondents could support government-sanctioned torture of terrorism suspects); Nancy L. Torner, U.S. Spy RY. ON TERROR, PUB. INT. L. REV. 1996, at 101, 101 (1999) ("Twenty-one percent of Americans believe it is acceptable to torture prisoners of war to obtain important military information, according to a survey commissioned by the Anti-Torture Committee of the Red Cross."); But see Reza Fakh, Pub No. 5, Apr. 20, 2003, at http://www.rezafalk.org/anal.htm (last visited Sept. 22, 2003) (providing "small nonprofit polling organization's survey of 213 people, which found that 88.1 percent rejected the 'use of torture as interrogation technique such as torture' in the war on terror").
Professor Dershowitz’s analysis, however, diverges from mine in his implicit assertion that torture would, in fact, be so confined. Professor Dershowitz asserts that “sometimes” torture will be inadmissibly necessary; the converse of this assertion, that “sometimes” torture will wreak human havoc without any discernable, much less proportionate public benefit, and “sometimes” the benefits sought could be achieved without resort to torture. It is far from clear that an institutional structure that contemplates “torture warrants” would minimize these latter “times.” Indeed, under current circumstances, such an institution is likely to encourage officials to yield to what General Jacques de Bollardière referred to in the aftermath of the Battle of Algiers as the “moral temptation of instantaneous efficacy.”

Let us begin with the question of accuracy. Assume for the moment that there is a limited class of cases involving: (1) “licking bombs;” (2) convicted terrorists who set the bombs and hold information that could prevent devastation; and (3) the absence of any alternative means of obtaining the information in question and that an omniscient, dispassionate, and impartial magistrate should issue a “torture warrant” against such terrorists. How likely is it that warrants will issue in those and only those cases?

Judges are not, in fact, omniscient. They must rely on the showings made by the officials who seek the warrants for their information. Current experience with search warrants suggests that even in situations in which the stakes are considerably lower, officials have embellished the truth in their efforts to secure the perceived ends of law enforcement. In Professor Dershowitz’s hypothesis, officials

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34 In 1996, after the French judicial office in the ROLE of Algiers, Paul Trifog, the secrctary-general of the Algiers prefecture, received the promise of his chief of police to authorize the torture of a terrorist who had been apprehended while placing a bomb in a gendarmerie. A second bomb was allegedly set to explode in the gendarmerie, and could have triggered an explosion of toxic gas that would have engulfed the entire city. In fact, no second bomb exploded, and it is not clear whether such a bomb existed. See ELLIS & MORGAN, supra note 122, at 44-45 (describing the “licking bombs” dilemma that faced Trifog). Mayor Trifog’s response was based on the proposition that “if you see a thief go into a torture bunker, you lock—... All our societal civilization is covered with symbols.” RITA MORA, TORMENT: THE RULE OF EXECUTION IN THE FRANCOPHILES WAR 118 (1989) (quoting AURÉLIE HOFIB, A SWING WAR, OF PAGE 194 (1997)).

35 Id., supra note 111, at 117 (quoting JACQUES DE BOLLAIRIÈRE, BATAILLE DE L’ALGÈRE 98 (1972)).

36 When much less than a potential terror suspect is held, police are known to lie on occasion. See, e.g., ALAN M. DERSHOWITZ, READABLE DOUGLAS 40-41 (1996) (describing Professor Dershowitz’s public discussion of the problem of police lying to admit institutional reliance obtained in violation of the Fourth Amendment); MONEY W. GORFELD, JR., DINNER, TERROR, and the House Fault in the Constitutional Rule in the Chicago Criminal Courts, 65 U.C. L. REV. 75 (1972) (summarizing interrogations with law enforcement and courts permitted suggesting that police perjury in Fourth Amendment context triggers in nearly ninety percent of cases); L. TIMOTHEY PORTER, et al., P. 21’S Body, Pin It Matters Beyond the Executive Order: A New and Extensive Empirical Study of the Executive Order and a Call for a Civil Administrative Reentry to Partially Reopen the
would be willing to violate a prohibition of torture to achieve antiterrorist goals; one might suspect these same officials would be inclined to "sex up" applications for torture warrants. On the judges' side, a "torture" warrant may not be the most skeptical bench, and they, like executive officials, would be subject to public pressure to do everything possible to prevent a recurrence of September 11.19

Armed with a doctrine that requires them to "balance" the rights of suspects against the needs of the public, it seems entirely plausible to predict that judges would issue warrants in cases far short of the "sickening bond." Each warrant granted would be the starting point for an argument that a subsequent warrant should be granted at circums-

Rota, 10 Iowa L. Rev. 840, 725-27 (1995) (finding suggestive in a survey of nearly 300 police officers that "the explanatory role of motives does not interfere with the problem of incapacitating the fact to avoid the loss of the evidence"). Christopher Robichaud, Torture: Police Prejudice and What to Do About It, 67 U. Colo. L. Rev. 1037, 1049 (1996) (describing the scope of police lying and suggesting that reasons for truth telling, the rededication of probable cause and the elimination of the extraordinary role may be adopted). Police prejudice can also be problematic for courts outside the Fourth Amendment context. See Prey, Before the Los Angeles County District Attorney's Office: Doing,43 Attorneys: Police Reform at Final Cases Released (Nov. 15, 2002), available at http:// docs.law.ucla.edu/ rtr/119444b.htm (revealing the scope of a scandal at the Los Angeles Police Department's Rampart Division, in which a former, new acting chief admitted that he had otherwise covered up improper police conduct by, in his words, in criminal cases against gang members, leading to "willful and flagrant" cover-up of evidence. [M. B. and C. M.]).

See, e.g., United States v. Miranda, 384 U.S. 436, 442 (1966) (establishing that the right to counsel and the right to warn in an application for a material witness warrant is in the afternoon of September 11). One could hypothesize an adversarial procedure in which the suspect's counsel could con-
The process can be observed in Professor Deshowitz's own account. Professor Deshowitz acknowledges the danger of the slippery slope, but maintains that the appropriate response is to build a "principled break." He proposes that nonlethal torture could be "legally limited to convicted terrorists who had knowledge of future massive terrorist acts." As articulated, this "principled break" allows torture even if the act is not imminent but is threatened in the "future." So too, the stipulation of "massive" terrorist acts raises the question of whether the threatened act must endanger dozens, hundreds, or thousands of persons—or indeed, even "massive" loss of property or earnings. The only hard "break" seems to be a requirement that the torture be "legally limited to convicted terrorists."

Yet, in a true "nicking bomb" situation, there would hardly be time for a criminal trial and conviction. Professor Deshowitz's show piece is a hypothetical in which suspected terrorist Zacarias Moussaoui is detained and subjected to torture shortly before September 11. As we know, in reality, criminal prosecution of Mr. Moussaoui remains unfinished after two years; torturing a terrorist after his conviction seems unlikely to achieve much in the way of error prevention. Indeed, Professor Deshowitz's discussion seems to contemplate torturing not only convicted terrorists, but "terrorist suspects," as to whom there is "compelling evidence that they have information needed to prevent a 'terrorist attack'" and those as to whom there is a showing of "probable cause." If Professor Deshowitz has a hard time maintaining the "principled break" in the quiet of his study, it seems unreasonable to expect judges on the firing line to maintain it in the face of insistent prosecutorial assertions of potential devastation.

Let us grant, however, that some requests for torture warrants will be turned down, and that the prospect of a skeletal judicial eye will prevent others from being presented. To carry the weight of his argument, Professor Deshowitz would still need to show that the abuse
avoided by the denial of the warrants exceeds the abuse that his proposal would generate. This is a hard case to make.

The first danger is that, in the words of Judge Posner, "having been regularized, the practice will become regular."

The demand for warrants under Professor Dershowitz's system is likely to exceed the level of informal abuse under the current regime. Under a rule of official prohibition, a functionary who declines to issue a warrant can defend her actions by announcing that she is following the law. If torture becomes an official option, a functionary must be prepared to justify not applying for the warrant in each case. Torture will be an ever-present option, and there will be no precise law in seeking to exercise it, because officials will be able to offload moral responsibility for the torture onto the issuing judge. Modern regimes, moreover, seem to find that torture is most effectively deployed by a corps of trained officers who can dispense with cold and measured precision, and such bureaucracies will predictably seek outlets for their skills. An institutionalized group of torturers will press for judges to issue torture warrants, and some of those warrants will issue erroneously.

In addition, to institutionalize the use of torture would sap the force of norms that constrain potential torturers. Under the current system, the temptation to investigative excess is checked by a bright line rule: torture is impermissible. If torturing is permitted with a warrant, it will become increasingly difficult for officials under pressure to produce results to refrain from torture without one. Those who would engage in abuse under the current system will be encouraged, should they believe the occasion warrants it, those who seek to resist abuse will lose moral stature.

Some officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their approved task. Officials who, in the absence of Professor Dershowitz's system, would be willing to engage in physical abuse in defiance of an absolute legal prohibition would, presumably, be equally willing to engage in "civil disobedience" against the actual as
possible denial of their proffered warrant request. The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.

Other officials will be inclined, by any or morality, to respect the minim of civilized behavior. As long as our law articulates a norm that officials have an obligation to act decently even when confronting terror, the official inclined to act with basic decency but confronted with occupational temptation has a basis to claim that she fulfills her duty, rather than abandon it, when the act is banal. By contrast, in response to pressure from peers or superiors to cut corners, a conscientious official under a torture warrant regime can rely on no infeasible norm of civilized behavior. “The judge would not approve the warrant” is hardly as snappy a retort in the squadron or midnight safe-house as “we are not Nazis.”

In what seems to be one of the earliest discussions of “ticking bomb” cases, Professor Charles Wright posed the problem of whether

90 See, e.g., EVANS & MINGOIA, supra note 132, at 105 ("the ‘law of inevitable intrusions’—whatever powers the police save themselves will exceed by a gram margin."); CITATION ONPAGE 141. "Even Gross noted:

When great calamities (real or presumed) occur, governmental actions tend to do what is necessary to maintain the threat. Yes, it is extremely dangerous to provide for such emergencies within the framework of the legal system—because of the large risk of contamination and manipulating that system and the deleterious sideeffects incurred by legitimate action.


91 See Hirson, Duck Walker, supra note 1, at 104-05 (Carol L. Steinberg, Second Thoughts About First Principles, 107 YALE L. REV. 839, 852 (1998) (arguing that constitutional enforcement programs in “alternative means” or “good faith” follow.

92 MAJAR, supra note 144, at 117 (noting the rationale of General Buller,泡沫, who refused to order torture, the French: “we were not Nazis”); id. at 116 (discussing Buller’s role in efforts to reject “repression, which could claim no cause, but only desire” (noting MAJAR, supra note 144, at 117)).

Professor Lusenberg acknowledges with wherewithal the danger of how a system of torture warrants might allow the chief actors to achieve relative “sanitization” once certain judges would grant the authorities of worthy aggravation criteria applied.” Lusenberg, Argued Lusenberg Rights, supra note 12, at 95. He suggests the possibility, nonetheless, that in the absence of a mythic fit on any review, parallel torture will “render that the actual presence of [some specified] punishment are very low, and conclude that torture is legitimate, if, or else lusen-berg, Premisses, Intro note 15, at 1995-96 (discussing examples of torture avoiding liability or consequences).

In evaluating those two dangers, it seems to me, Professor Lusenberg essentially makes the point that prospective review is likely to legitimize torture on the basis of imaginary deterrents which will never come to pass, while retrospective review will be more likely to respond only to demonstrated failures. More important, Professor Lusenberg underestimates the exiguous power of law, of a humanitarian position and acceptable legal realism. The self-justifying argument of torture approved by Professor Lusenberg are not planted in terms of the fact that torturers may be able to "get away with the torture" or that claims that such torturers have done the right thing. A "public, written opinion" issuing a "human warrant," as in 1998, is likely to give them aid and comfort to such individuals and to amplify those who seek to avoid accountability more than even a high possibility of torture will be avoided at present.
to resort to torture. If an atomic bomb were ticking somewhere in the city, and the roads were closed and the trains were not running, and the man who knew where the bomb was hidden sat grinning and
is[n] in a chair in the police station twenty miles away,\textsuperscript{246} Professor Black argued that while "[t]he right not to be tortured cannot, literally, be an 'absolute'... the right not to be tortured is entirely unsuitable for 'balancing' against competing considerations of convenience, comfort, and safety, as we 'balance'... the ordinary affairs of life, with a view to ascribing the course of prudence."\textsuperscript{247} The situation where a right against torture would be overridden, he maintained, would be so rare that the rule of absolute prohibition "most faithfully approximates and renders the attitudes and probable action of most decent people," and it is the only judge who insists on allegiance to an absolute prohibition whom we can trust to decide such cases.\textsuperscript{248}

The judge who issues a "torture warrant" in the ordinary case of business is not likely to be such a judge; and, mutatis mutandis, the counterterrorist investigator who seeks the warrant is not likely to be such an official.\textsuperscript{249}  

CONCLUSION

Faced with a threat of mass devastation that can be avoided only through torture, could an American official believe, as a matter of morality and public policy, that she should choose the path of the torture as the lesser evil? On this question, I am prepared to concede that there is room for debate, as there is room for debate as to whether under extraordinary circumstances a public official should

\textsuperscript{246} Charles L. Black, Jr., See Justice Black, the Supreme Court, and the Bill of Rights, HARPER'S Mag., Feb. 1961, at 153, 67.

\textsuperscript{247} Id.

\textsuperscript{248} Id. See, e.g., ASHDO CADE EDE, Foreward, Antiterrorism and Constitutional Accountability (The New Human Rights Project), 125 HOGG L. REV. 30, 116 n.158 (1991) (approving Professor Black's position). Judge Calabresi rebuts Black's cherished question: Whom would you trust more to decide both the sort of the hydrogen bomb and torture cases generally, as we were then divided... a judge who had hard and easy cases is always declaring that we must balance the costs and benefits of torture, or the judge who after torture and our systems least absolute prohibition against torture.

GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATIUS 174 (1982); see also YAS KERIMI, PHYSICIAN-ACTIVIST NURSE: THE PROBLEMS ENCLOSED IN THE CAMPING, Interpreting Care R. C. CANA L. & CRIMINOLOGY 127, 1145 & 1145-1146 (1998) ("[B]earing to acknowledge that we should balance the costs and benefits of torture as a general measure, we see through the pre- sentament against torture and transform the likelihood that it will only be required to in the ret-

\textsuperscript{249} In March C. Norgren, The Case of Tragedy: Some Need Limits of Guowin. Analysis, 25] LEGAL STUD. 139, 1399 (2010) ("[A]cknowledging the moral flaws of a 'right' decision is just that the courts firmly on the fact that justice is an inherent action, which is, as always wrong to discuss. The recognition that one can 'right' harm is not yet self-indulgence: it has significance for future action.")
choose to violate any provision of the Constitution. But on the question of whether scholars or courts should announce before the fact that the Constitution permits torture, the answer seems clearer: ours is not a Constitution that condones such action. An official who proclaims fidelity to the Constitution cannot in the same breath claim the right to use methods "too close to the rack and the screw to permit of constitutional differentiation."