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Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience

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"Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the [Convention Against Torture] constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a 'state of public emergency') . . . ."

"[T]he methods of police interrogation which are employed in any given regime are a faithful mirror of the character of the entire regime. . . . [A]ll the more so with respect to the interrogation methods of a security service, which is always in danger of
sliding towards methods practiced in regimes which we abhor.”

“Purity is an idea for a yogi or a monk. You intellectuals and bourgeois anarchists use it as a pretext for doing nothing. To do nothing, to remain motionless, arms at your sides, wearing kid gloves. Well, I have dirty hands. Right up to the elbows . . . . But what do you hope? Do you think you can govern innocently?”

“I'm a lawyer, . . . but if it were my daughter on that bus, I'd want them to beat . . . a suspect to stop it.”

INTRODUCTION

Writing during the early days of the Cold War, Carl Friedrich, a Harvard University professor of political science, described the tension between national security and civil rights and liberties as arising "wherever a constitutional order of the libertarian kind has been confronted with the Communist challenge, and with the Fascist response to that challenge." The collapse of the Communist regimes of Eastern Europe seemed to assign this description to the history pages. Yet, while Communism no longer excites our imagination as a credible threat, terrorism does. And so Friedrich's dilemma still remains valid today, albeit in a somewhat different format: Should a democratic regime that is confronted with a serious terrorist challenge respond to that threat with countermeasures, which while potentially efficient in overcoming the specific dangers at hand, run contrary to the very notion of a democratic order? The tension between self-preservation and defending the “in-
ner-most self" of the democratic regime—those attributes that make the regime worth defending—presents decision makers with tragic choices. This Article explores one such tragic choice, involving one type of "Fascist response," namely the use of torture in interrogations of suspected terrorists.

The traditional story about torture goes something like this: Since the nineteenth century, Western societies have considered torture as "the supreme enemy of humanitarian jurisprudence and of liberalism, and the greatest threat to law and reason." To the extent that torture continues, it is confined to authoritarian regimes. Reflecting strong universal condemnation and reprobation of such practices, torture is absolutely prohibited under all major international human rights and humanitarian law conventions. This absolute ban is considered universal and has become part of customary international law. In fact, it amounts to a preemptory norm of international law.

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7. FRIEDRICH, supra note 5, at 13 (noting that the survival of a constitutional order involves more than self-preservation due to the rational and spiritual content of this order); see also Pnina Lahav, A Barrel Without Hoops: The Impact of Counterterrorism on Israel's Legal Culture, 10 CARDOZO L. REV. 529, 531 (1988) (noting the "tragic dimensions of the tension between terrorism, counterterrorism, and justice in any democratic society").

8. EDWARD PETERS, TORTURE 75 (expanded ed. 1996).


10. See, e.g., Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) (noting that official torture is prohibited under the norms of international law);
In reality, this traditional story has always had a darker side. For example, while outlawed in Europe, European nations continued to employ torture in territories outside the continent.\textsuperscript{11} Numerous studies have shown that, far from being eradicated, practices amounting to torture exist, to some degree, in most countries around the world, including many democracies.\textsuperscript{12} Yet the general perception remains: Torture is exercised on a systematic scale only by nondemocratic governments, while its use in democratic regimes is, at most,

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\textsuperscript{12} As Evans and Morgan rightly noted, “the temptation to use . . . forms of coercion that might be judged to constitute torture lies at best only just below the surface of everyday police and custodial practice.” EVANS \& MORGAN, supra note 11, at x; see also Jerome H. Skolnick, \textit{American Interrogation: From Torture to Trickery}, in \textit{TORTURE} (Sanford Levinson ed., forthcoming 2004) (manuscript at 1, on file with author) (arguing that torture, disguised by other labels, is a feature of America’s heritage).
aberrational. Occasionally we are shocked by revelations that law enforcement agents or military personnel applied excessive force in the context of interrogation of suspects. Usually the government reassures us that such actions were not in any way reflective of a general policy. From time to time such reassurances are supported by disciplinary actions, and even criminal charges, against the "deviant" officers.\(^\text{13}\)

This dissonance explains why discussion of certain questions, such as whether it can ever be legally or morally permissible for a state to apply torture as an interrogation technique to a person who possesses, but refuses to divulge, information that can save the lives of a great number of innocent individuals, has been largely confined to academic writings in moral and political philosophy as well as to discussions about the hard choices facing the State of Israel in its fight against Palestinian terrorism.\(^\text{14}\) Yet many considered the Israeli situation to be \textit{sui generis}, a particular case that was inapplicable to the experience of other democracies. However, the terrorist attacks of September 11, 2001, and the subsequent war on terrorism have added a new chapter to the story about torture.\(^\text{15}\) The question whether the use of torture may ever be justified or excused has become a matter of much public debate extending beyond the boundaries of academic discussion.\(^\text{16}\) Pandora's Box has been opened.\(^\text{17}\)


\(15\). Speaking of the structure of rights as fall-back, Jeremy Waldron suggested that "in ordinary political arrangements between state and citizen, the issue of torture simply does not arise . . . . [However,] people need this as something to fall back on when normal politics collapse." Jeremy Waldron, \textit{When Justice Replaces Affection: The Need for Rights}, 11 HARV. J.L. & PUB. POLY 625, 643 (1988).


\(17\). See Seth F. Kreimer, \textit{Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror}, 6 U. PA. J. CONST. L. 278,
In a recently published book, *Why Terrorism Works*, Harvard Law School Professor Alan Dershowitz, not one to shy away from controversy, added his voice to the growing debate. His arguments boil down to two important claims. First, he argues that there are circumstances when interrogation techniques that amount to torture may be used. Under such circumstances the use of torture is both morally and legally justified. Despite recognizing that torture is an evil to be avoided and prohibited, Dershowitz rejects the notion that such a prohibition ought to be absolute. Second, in an attempt to limit the use of torture and maximize civil liberties in the face of a realistic likelihood that torture will, in fact, take place, he suggests the mechanism of judicial torture warrants as prerequisite to torturing suspected terrorists in interrogations. It is interesting to note that the concept of torture warrants was already invoked by Dershowitz and others long before the attacks of September 11.

Not surprisingly, Dershowitz's "torture warrant" has received much attention and has been the subject of heated debate. While the idea of torture warrants has attracted sharp criticism, it has also garnered some support from leading legal scholars.

This Article challenges both of Dershowitz's propositions by introducing two interlinked claims based on concepts of pragmatic absolutism and official disobedience. I argue that supporting an absolute ban on torture, rather than a qualified

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278 (2003) ("There are some articles I never thought I would have to write; this is one."); Henry Shue, *Torture*, 7 PHIL. & PUBL. AFF. 124, 124 (1978) (describing, but rejecting, the arguments that issues of whether torture may be permissible ought not to be publicly discussed).

19. *Id.* at 142-49.
20. *Id.* at 148-49.
21. *Id.* at 141, 158-63.
23. *See, e.g., Kreimer, supra note 17.*
25. For a discussion of these concepts, see Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in TORTURE, *supra* note 12 (manuscript on file with author).
prohibition, is the appropriate legal position when examined from both moral and pragmatic standpoints. However, in truly catastrophic cases the appropriate method of tackling extremely grave national dangers and threats may call for going outside the legal order, at times even violating the otherwise entrenched absolute prohibition on torture. Thus, I defend an absolute prohibition on torture while, at the same time, arguing that certain extreme circumstances must not be brushed aside as hypothetical, or as morally or legally irrelevant. The way to deal with the “extreme” or “catastrophic” case is neither by ignoring it nor by using it as the centerpiece for establishing general policies. Rather, my proposal focuses on the possibility that truly exceptional cases may give rise to official disobedience: public officials may act extralegally and be ready to accept the legal ramifications of their actions. Whereas Dershowitz argues that torture may be both morally and legally permissible under certain circumstances, I seek to de-link the two spheres by suggesting that even if we recognize that torture may be morally defensible in exceptional cases, that fact should not affect an uncompromising legal ban on torture.

The remainder of this Article focuses on preventive interrogational torture. Henry Shue identified interrogational torture as torture aimed at gaining information. The adjective “preventive” limits the concept to torture whose aim is to gain information that would assist authorities in foiling exceptionally grave terrorist attacks. Hence, the aim is exclusively forward-looking. Preventive interrogational torture does not seek to ob-

26. This Article will not attempt to answer the important question of what precisely constitutes a “truly catastrophic case.” I leave this task for another time. For the purposes of the argument developed in this Article it is sufficient to acknowledge that some catastrophic case is possible. The Article seeks to set out an argument for the plausibility of a solution to the difficulties presented by catastrophic cases, rather than attempt to define more clearly the precise contours of such a solution. For the sake of discussion, however, we may think about the paradigmatic case of the “ticking bomb” as a catastrophic case. See infra note 72 and the accompanying text.

27. See, e.g., Sanford H. Kadish, Torture, the State and the Individual, 23 ISR. L. REV. 345, 354 (1989) (“The distinction is not between what is moral and what is lawful, but between what is moral for a state to do and what is moral for an individual to do.”); Tibor R. Machan, Exploring Extreme Violence (Torture), 21 J. SOC. PHIL. 92, 95–96 (1990) (“Sometimes acts may be morally justified even if the law ought, as a matter of its generality, forbid them. . . . Although it is credible that even a police officer ought to employ extreme violence in certain circumstances, it does not follow from this that the law . . . ought to sanction such violence.”).

28. Shue, supra note 17, at 133.
tain confessions or other evidence that may be used to bring the subject of interrogation to criminal trial. Nor is it concerned with punishing individuals for past actions.29

I should also clarify what “torture” means. Much of the legal discussion in this area revolves around the definition of “torture.” For example, the jurisprudence developed under the European Convention on Human Rights has tended to tackle the issue through the prism of a “severity of suffering” test.30 According to this test, a distinction can be drawn among various categories of ill-treatment (e.g., ill-treatment that amounts to “degrading” or “inhuman” treatment or to “torture”) as well as between ill-treatment and treatment that does not cross the threshold of suffering which would render such treatment impermissible.31 Governments have invoked the “severity of suffering” test to argue that interrogation techniques utilized by their agents, while rough and coercive, did not cause so much suffering as to brand the interrogators’ conduct “ill-treatment.”32 Thus, the threshold test of suffering has been used in an attempt to fly below the radar of the absolute prohibition on torture. I find such definitional wizardry to be uninteresting and unsatisfactory. Rather, the argument developed below seeks to address head-on instances where interrogation methods are used that clearly fall within the ambit of “torture.” Preventive interrogational torture is far too complex to be addressed by definitional juggling.

29. See, e.g., John T. Parry & Welsh S. White, Interrogating Suspected Terrorists: Should Torture Be an Option?, 63 U. PITT. L. REV. 743, 753 (2002) (“U.S. law on torture has developed in situations in which the individual interests at stake are to be weighed against law enforcement’s general interest in solving or punishing a crime; it has not been tested against the more extreme circumstances presented by terrorism.”).


32. See, e.g., Levinson, supra note 10, at 2036–41; cf. Adrian A.S. Zucker- man, Coercion and the Judicial Ascertainment of Truth, 23 ISR. L. REV. 357, 371 (1989) (arguing that the Landau Commission’s sanctioned “moderate measure of physical pressure” can only be effective when, from the perspective of the person undergoing interrogation, the pressure is unbearable).
The debate about the moral and legal nature of the prohibition on torture has followed the fault lines separating deontologists and consequentialists. Part I introduces the two opposing perspectives and suggests that the picture is more complex than either camp would have us believe. It argues that the case for an absolute prohibition on torture can be made stronger and more compelling by wedding together nonconsequential and pragmatic claims. Part II argues that catastrophic cases present open-minded absolutists with a critical dilemmatic choice. It charts some of the traditional methods that supporters of an absolute ban on torture have employed to resolve that dilemma. Part III presents the official disobedience model for addressing the tragic choice between security and liberty that the catastrophic case presents. This model supports a legal absolute ban on torture while, at the same time, recognizing that in catastrophic cases resort to preventive interrogational torture may be morally permissible. According to this model, catastrophic cases may entail public officials going outside the legal order, at times violating otherwise accepted constitutional principles. It is then up to society as a whole to decide how to respond ex post to extralegal actions undertaken by these officials. Ex post ratification is, therefore, a critical element of the proposed model. Part IV outlines the benefits of such ex post ratification. Part V examines Alan Dershowitz's "torture warrants" proposal. It argues that a method of ex post ratification, as suggested by the official disobedience model, is preferable to ex ante judicial approval of interrogational torture.

A final word before going further: The issue of preventive interrogational torture is morally and legally complex. Tackling it is emotionally demanding. Graphic images of people bearing gruesome physical and mental scars inflicted on them by their torturers and images of the mutilated bodies of those who were murdered or critically injured in terrorist attacks, are often used as currency in the debate. Thus, "[i]t is with trembling hand [that] I enter upon [the] difficult and invidious task" of dealing with these issues and with the tragic choices with which they present us.

I. THE CASE FOR AN ABSOLUTE PROHIBITION ON TORTURE

The debate over the moral and legal nature of the prohibition on torture is, for the most part, waged along the fault lines between deontologists and consequentialists. It is but one example (stark, to be sure) of the deep ideological schism in moral philosophy between those who believe that certain actions may be inherently morally wrong, regardless of the consequences of such actions, and those who believe that the worth of such actions is dependent on, and dictated by, their consequences. Thus, one may support an absolute ban on torture even in times of great calamity. Alternatively, one may believe that the duty not to torture, even if generally laudable, is overridden, canceled, or trumped by competing values in certain exceptional circumstances. To put it somewhat differently, the issue at hand goes to the heart of the debate about means and ends, i.e., are there "limits on what may be done even in the service of an end worth pursuing—and even when adherence to the restriction may be very costly"?³⁴ In this debate, each camp seems to have a winning argument up its sleeve. Deontologists challenge the supporters of consequentialist moral theories as incapable of setting any meaningful restrictions and limitations on the performance of horrible acts: So long as the total outcomes of such acts are deemed socially beneficial, they ought to be carried out. Regardless of how abominable we regard certain actions to be, it is only their consequences that matter. Consequentialists counter the challenge by arguing that deontologists are unable to address situations where adhering by preset restrictions on certain actions would bar our ability to prevent the occurrence of a true catastrophe.

The problem is that both sets of challenges, in their pure forms, seem compelling yet, at the same time, mutually exclusive. Whichever side a person assumes, either as a general matter or when attending to a concrete state of affairs, she is bound to be charged with subjectivism. The closer we get to accepting one position, the greater the challenge we face from the opposite perspective. Thus, we are faced with a truly tragic

moral dilemma without any hope of finding a solution that would satisfy both camps simultaneously. We are condemned to act in a way that is deemed bad when judged from at least one of the competing perspectives (and, possibly, both).\textsuperscript{35} As Alan Dershowitz correctly notes, we are ill-equipped to "choose among unreasonable alternatives, each so horrible that our mind rebels even at the notion of thinking about the evil options."\textsuperscript{36}

In fact, we may say that no real debate actually takes place between the two opposing positions since the arguments and counterarguments of the various parties are made on separate levels, each assuming a different set of relevant criteria by which to evaluate the validity and legitimacy of potential claims. Insistence on pursuing deontological arguments, to the exclusion of any reference to potential consequences, is unlikely to help a deontologist convince a consequentialist to see the merits in the former's point of view, and vice versa.

This Article argues that the overall picture is richer and more complex than either side lets on, and that it calls for a more sophisticated treatment. This part begins with a brief review of the traditional opposing poles on the question of preventive interrogational torture and the critiques leveled against each position. I argue that the case for an absolute prohibition on torture is compelling. However, the case for an absolute ban cannot be made solely within the four walls of non-consequentialist arguments. While such arguments support a strong \textit{ban} on torture, they do not, in and of themselves, present a compelling case for an \textit{absolute} ban. More is needed to justify an absolute prohibition on torture. I anchor that necessary addition in pragmatic or instrumental reasons that, in turn, promote and facilitate the noninstrumental goals and values that are usually associated with an absolute ban on torture.\textsuperscript{37}

\textsuperscript{35} Nagel, \textit{supra} note 34, at 24 ("[I]t is naïve to suppose that there is a solution to every moral problem with which the world can face us. We have always known that the world is a bad place. It appears that it may be an evil place as well.").

\textsuperscript{36} DERSHOWITZ, \textit{supra} note 18, at 133.

\textsuperscript{37} See Frederick Schauer, \textit{Commensurability and Its Constitutional Consequences}, 45 HASTINGS L.J. 785, 786 (1994) (arguing that there is nothing morally suspect in choosing strategically to internalize a view of commensurability or incommensurability "based on an admittedly instrumental calculation of which position would better serve deeper noninstrumental values"). \textit{But see} MARTTI KOSKENNIEMI, \textit{FROM APOLOGY TO UTOPIA: THE STRUCTURE OF
A. IN SUPPORT OF AN ABSOLUTE PROHIBITION: MORAL ABSOLUTISM AND RULE CONSEQUENTIALISM

Absolutists—those who believe that an unconditional ban on torture ought to apply without exception regardless of circumstances—often base their position on deontological grounds. For adherents of the absolutist view of morality, torture is intrinsically wrong.\(^8\) It violates the physical and mental integrity of the person subjected to it, negates her autonomy, and deprives her of human dignity.\(^9\) It reduces her to a mere object, a body from which information is to be extracted; it coerces her to act in a manner that may be contrary to her most fundamental beliefs, values, and interests, depriving her of any choice and controlling her voice.\(^10\) Torture is also wrong because of its depraving and corrupting effects on individual torturers and society at large.\(^4\) Moreover, torture is an evil that can never be justified or excused. Under no circumstances should the resort to torture be morally acceptable or legally permissible. It is a reprehensible action whose wrongfulness may never be assuaged or rectified morally even if the consequences of taking such action in any particular case are deemed to be, on the whole, good.\(^42\) Indeed, one may argue that the inherent
wrongfulness of torture and possible good consequences are incommensurable, i.e., they cannot be measured by any common currency and therefore cannot be compared, or balanced, one against the other.\textsuperscript{43} The conclusion drawn from such a claim is that “the wrong of torture can be taken as a trump or side constraint on welfare maximization in all possible cases.”\textsuperscript{44} Under those terms, the ban on torture constitutes an unconditional duty to refrain from torturing others.\textsuperscript{45} For the ban on torture to constitute such an unconditional duty (assuming, arguendo, that such absolute duties actually exist), the duty must override, at all times and under all circumstances, all competing values and rights.\textsuperscript{46} One must adhere to the prohibition on torture even in exceptional circumstances where the use of torture would save the lives of a large number of innocent individuals, even if our loved ones are
among the lives that could be saved. In fact, even if torture would save the life of the individual under interrogation, we must still refrain from applying torture.\textsuperscript{47} As an agent-relative moral theory, the absolutist position informs and directs every one of us not to engage in any way in the act of torture, whatever the circumstances. Thus, I may not torture any individual, even when violating the prohibition may spare others from being tortured.\textsuperscript{48}

Thus, moral absolutists must maintain their support for the unconditional ban on torture even, in fact precisely, when the harmful outcomes of abstaining from use of torture in any given case are of catastrophic proportions. The likelihood that such catastrophic cases will occur, while bearing considerable weight when assessing the pragmatic reasons for an absolute ban on torture, is of little significance when discussing the moral basis for such a ban. True moral absolutists must support a ban on torture no matter how likely the harm and no matter how great the magnitude of that harm.\textsuperscript{49} If one is to

\textsuperscript{47} Consider, for example, a ticking bomb scenario when the suspected terrorist is captured by state agents in the mall where he planted the bomb and as the bomb may go off shortly, he is interrogated on the spot. Should he refuse to divulge information about the location of the bomb and the bomb goes off he, as well as thousands of innocent civilians in the mall, will be killed in the blast.

\textsuperscript{48} A moral theory is agent neutral when it gives every agent the same aim (e.g., overall welfare maximization). A theory is agent relative when it assigns different aims to different agents (e.g., I will not break my promises; you will not break your promises; and so on). An absolute prohibition on torture is deemed to be agent relative. It informs each of us, as moral agents, that we must not torture ourselves. This agent relativism means that we are barred from resorting to torture even when such actions would prevent others from torturing, murdering, or committing any number of heinous crimes. An agent-neutral ban on torture can only assign us all the identical task of minimizing the aggregate number of acts of torture. Thus, according to this logic each of us may be morally permitted to use torture when this would result in a lower number of acts of torture overall. See Robert Nozick, Anarchy, State, and Utopia 28–33 (1974); Nagel, supra note 34, at 12 (“Absolutism requires that we avoid murder at all costs, not that we prevent it at all costs.”); see also Rosa Ehrenreich Brooks, The New Imperialism: Violence, Norms, and the “Rule of Law”, 101 Mich. L. Rev. 2275, 2316–18 (2003) (arguing that the absolute prohibition on torture is not concerned about reducing violence and suffering, but rather it is concerned with “mak[ing] a statement about the moral meaning of human action. It is not in fact terribly interested in anyone’s death or suffering. Mostly, it is concerned with how we live our lives.”).

\textsuperscript{49} Gewirth rejects the claim that the absolutist is indifferent to consequences. In his view, the absolutist is concerned about the consequences that may emerge “so long as he does not regard them as possibly superseding or diminishing the right and duty he regards as absolute.” Gewirth, supra note
maintain a position that recognizes the existence of absolute rights and duties, in general, and the duty to refrain from torture, in particular, one must define the relevant right or duty without reference to catastrophic cases. One must accept a definition of the relevant right or duty that is truly unconditional.  

However, even those who generally believe that no aggregate social benefits may ever justify or excuse preventive interrogational torture are hard pressed to maintain that position in cases where there is a real likelihood that a harm of catastrophic proportions will materialize if torture is not used. Many who support absolute, categorical rights (and, where relevant, prohibitions) realize that their position is untenable, not only practically but also morally speaking, when applied to such catastrophic cases.  

Another possible source of support for an absolute ban on torture comes from some advocates of rule-consequentialist moral theories. Rule consequentialists would typically argue that consequential reasoning (e.g., long-term utility if one is rule utilitarian) justifies the adoption of an absolute prohibition on torture. And once such a rule is adopted, when we come to make decisions about particular cases, we ought to adhere strictly to the rule and ignore calls to recalculate costs and benefits that are case specific. Contextual considerations of expediency cannot serve as a valid reason to deviate from the general rule. An uncompromising rule consequentialist would argue that once the rule is formulated, particular circumstances become irrelevant. All that matters is the rule. No second guessing is permissible.

46, at 10. The absolutist can seek ways to mitigate the threatened disastrous consequences, but if all else fails he must maintain his commitment to the absolute prohibition. Id.  
50. Id. at 5.  
51. See infra Part II.  
52. Rule consequentialism focuses on the consequences of general rules or principles for action. Its adherents judge the rightfulness or wrongfulness of an action by the goodness or badness of the consequences of a rule that states that everyone ought to perform such action in like circumstances. See the definition of "Consequentialism" in BRIAN BIX, A DICTIONARY OF LEGAL THEORY (forthcoming 2004). See also J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 9–11, 118–34 (1973).  
53. See, e.g., FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 78 (1991) (discussing, and rejecting, such "rule-based" decision making).
Rule consequentialists may start off, for example, by arguing that the social costs of permitting the use of torture, even in narrowly defined exceptional circumstances (assuming that such exceptional circumstances lend themselves, at all, to narrowly tailored definitions), would always outweigh the social benefits that could be derived from applying torture. Torture would always be a good-diminishing, rather than good-enhancing, activity. Hence, there is no point in balancing on a case-by-case basis with respect to the question of torture. A correctly calibrated cost-benefit analysis must always, ab definitio, lead to the same conclusion, i.e., that torture should not be allowed regardless of any specific context. A case-specific analysis can only lead to a conclusion contrary to the general rule when based on a distorted calculation. Such distortion would result from biased focus on isolated cases that ignores long-term and systemic implications of particular courses of action. If a cost-benefit analysis was correctly applied in each particular case, the results would only uphold the basic prohibition. Moreover, even if one could conceive of concrete incidences when particularist reasoning permitted, after accounting appropriately for all the relevant factors, torture in that specific case—namely, that resorting to torture in the specific case at hand may be, on the whole, socially beneficial—rule consequentialists would still argue that this should not matter. The general rule against torture must be followed and applied, and particular consequentialist analysis resisted, even if doing so may lead to less beneficial consequences in the particular instance than a contextual decision-making process would yield. Applying the rule to all circumstances is beneficial inasmuch as it minimizes the possibility of errors in the decision-making process.

But it is precisely this last point that presents the most critical challenge to rule consequentialism by exposing it to the charge of "rule worship"; it leads to "preferring abstract conformity to a rule to the prevention of avoidable human suffering." The charge is that in those concrete cases where it seems

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54. For a recent defense of "acontextual decisionmaking," see FREDERICK SCHAUER, PROFILES, PROBABILITIES AND STEREOTYPES 21–24 (2003).

55. Note that Schauer suggests that acontextual decision making may even be defensible when it leads to more, rather than fewer, errors as compared with a particular, context-based decision-making process. SCHAUER, supra note 54, at 24.

56. SMART & WILLIAMS, supra note 52, at 6. John Smart explains the charge of "rule worship" in the following way: "the rule-utilitarian presumably advocates his principle because he is ultimately concerned with human happi-
that deviating from the rule may bring about better results than following the rule, one can either follow a rule-based decision-making process or adhere to consequentialist reasoning, but not do both. In other words, in such circumstances rule consequentialism encompasses irreconcilable internal inconsistencies. To strictly follow the rule becomes irrational from a consequentialist point of view and inconsistent with one's general position. Yet to ignore the rule and adopt a particularist view makes the rule meaningless. However, if we want rules, as such, to serve as meaningful limitations on the discretion of decision makers and guide their behavior, the rules cannot be subject to particularistic challenges that seek to rebalance the basic values and interests that underlie the rule. Thus we come full circle back to the fundamental dilemma of what is to be done about the particular, concrete case where following the absolutist rule strikes us as unjust or inefficient (depending on our relevant set of values). As I will suggest below, thinking about catastrophic cases may hold one possible solution to the problem.

B. CHALLENGES TO AN UNCONDITIONAL BAN: ACT CONSEQUENTIALISM

Those who, like Dershowitz, claim that use of coercive interrogation methods may be justified in certain—albeit exceptional and extraordinary—circumstances reject arguments in support of an absolute ban on torture. Under this position, which can be termed the "conditional ban" approach, there seems to be no place for a comprehensive and absolute a priori prohibition on the use of torture.

Invariably, most arguments in support of a conditional ban are act consequentialist claims, mostly of the utilitarian flavor, comparing costs and benefits on a case-by-case basis. A par-

57. SCHAUER, supra note 53, at 77-78.
58. See, e.g., Gary E. Jones, On the Permissibility of Torture, 6 J. MED. ETHICS 11, 11 (1980); Posner, supra note 34 (manuscript at 4); Twining & Twining, supra note 33, at 347-48. Posner provides a particularly good example of this argument:

[What is required is a balance between the costs and the benefits of particular methods of interrogation . . . . Certainly the costs include the horror that the term "torture" evokes, but the costs can be outweighed by the benefits if torture is the only means by which to save the lives of thousands, perhaps tens or hundreds of thousands, of peo-
ticularistic calculus may lead to the conclusion that, at least in some cases, the benefits of using torture exceed its social costs. Using torture would, therefore, maximize good consequences or minimize bad ones.\(^5\) Conditionalist argue that the prohibition on torture cannot be defensible as a moral absolute. While an important and fundamental principle, the right to be free from torture (and the concomitant prohibition on torture) is not the only value in play in extreme circumstances. For example, a standard consequentialist argument is that torturing one person may be justified when it is necessary to save the lives of many innocent persons who would otherwise meet a certain death.\(^6\) When the choice is between the physical integrity and dignity of a suspected terrorist and the lives of a great many innocent persons, an absolute ban on torture cannot be morally defensible.\(^6\) The following argument by Dershowitz is representative of this position:

The simple cost-benefit analysis for employing such nonlethal torture seems overwhelming: it is surely better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person.\(^6\)

The fact that all but unabashed Kantians recognize the difficulties that extreme cases present to any absolutist position is further evidence that an absolutist position with respect to the ban on torture is untenable.\(^6\)

Aside from the important question of what yardsticks should be used in measuring the goodness (or badness) of consequences, act consequentialists must contend with several
critical challenges, which, taken together, suggest that act consequentialism leads to too much, rather than too little, use of torture. First, act consequentialists are faulted with treating torture as morally neutral, since all that really matters are results. The value of using torture is dependent on, and determined by, the outcomes. In this respect, consequentialism presents us with an empty justificatory vessel into which we can pour repugnant courses of action.\textsuperscript{64} Act consequentialism has no built-in limitations. No act is undesirable per se.\textsuperscript{65} The consequences of the act in each and every concrete case determine moral worth and value. For example, most of those who would support the possible use of torture on consequentialist grounds are quite clear that they would only support torture when it is directed against a person who is not innocent.\textsuperscript{66} Dershowitz recognizes the need to impose some limitations on “single-case utilitarian justification” for torture, otherwise “we risk hurtling down a slippery slope into the abyss of amorality and ultimately tyranny.”\textsuperscript{67} Yet the problem is that no such inherent limitations are available under a pure act consequentialist rendition. If, for instance, in order to save the lives of a thousand

\textsuperscript{64} See, e.g., Nagel, supra note 34, at 6 (arguing that absolutist intuitions “are often the only barrier before the abyss of utilitarian apologetics for large-scale murder”). One counterargument is that welfare maximization will not lead to the implementation of objectionable preferences because the negative effects of such preferences are bound to outweigh their benefits to the people holding them. \textit{See} \textsc{Louis Kaplow} \& \textsc{Steven Shavell}, \textsc{Fairness Versus Welfare} 427 (2002). Another argument is that not all preferences ought to be accorded the same value. Some are weightier than others. We may say that the ban on torture carries more weight than competing interests and values and therefore it is only permissible to resort to torture under a cost-benefit calculus when the harm to be prevented exceeds, in overall quality, the damage caused by using torture.

\textsuperscript{65} Indeed, as Dershowitz recognizes, “[e]ven terrorism itself could be justified by a case utilitarian approach.” \textsc{Dershowitz, supra note 18, at 146}; \textit{see also} \textsc{Kadish, supra note 27, at 353}.

\textsuperscript{66} See, for example, Machan, supra note 27, at 94: \[\text{[Extreme]}\text{ violence may indeed be morally justified at times but only if some measure of moral guilt is present or highly probable on the part of the party about to experience the violence . . . . [A]ccordingly, I should not torture someone whom I know to be entirely innocent of the relevant evils even if his or her torture would secure some great good.}\]

It is important to note that “innocence” here is not equated with either moral or legal innocence. The relevant criterion is not whether a person is morally good or bad, nor is it whether a person has been convicted in a court of law. As Nagel correctly puts it “innocent’ means ‘currently harmless,’ and it is opposed not to ‘guilty’ but to ‘doing harm.’” \textit{Nagel, supra note 34, at 19}.

\textsuperscript{67} \textsc{Dershowitz, supra note 18, at 146}. 
innocent civilians, we must torture an innocent child (e.g., the suspect's child), cost-benefit arguments appear to still support using torture. Dershowitz attempts to escape this difficulty by suggesting that any act-consequentialist account must be subject to certain external limitations. He identifies potential sources for such limitations and constraints in "rule utilitarianisms or other principles of morality, such as the prohibition against deliberately punishing the innocent." Still, the question remains as to the source and identification of such external limitations and how much of a constraint they are likely to be in truly catastrophic cases.

A second charge leveled against act consequentialists is that of bias towards immediate consequences that discounts (or ignores entirely) long-term consequences of the use of torture. In the example noted above, decision makers will be biased towards the fate of the thousand innocent persons who are going to die if torture is not applied, while not giving adequate weight to long-term detrimental effects of using torture in the particular case. We tend to undervalue future benefits and costs when comparing them with present benefits and costs. Thus, longer-term costs for the rule of law and individual rights and liberties tend to be overly discounted. The intangible and abstract nature of such future costs, in comparison with the very tangible pending catastrophe, exacerbates this defect in our risk assessment.

C. PRAGMATIC ABSOLUTISM

Whether one accepts that there are no circumstances un-

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69. DERSHOWITZ, supra note 18, at 146; see also Peter Railton, Alienation, Consequentialism, and the Demands of Morality, in CONSEQUENTIALISM AND ITS CRITICS, supra note 68, at 93, 108–21 (suggesting that moral aversion places limitations on consequentialist reasoning and may lead to well-motivated individuals being unable to bring themselves to do the right thing—such as torture or otherwise harm others—in particular circumstances); T.M. Scanlon, Rights, Goals, and Fairness, in CONSEQUENTIALISM AND ITS CRITICS, supra note 68, at 74, 75–76 (suggesting that individual rights ought to be given a special place as imposing constraints on consequentialist reasoning).


der which use of torture is morally permissible, or believes that there are situations in which resort to torture may be morally defensible, supporting an absolute legal ban on torture makes sense. The absolute proscription of torture poses no difficulty for the former and requires no further explanation. Yet, even one who recognizes the moral complexities of an absolute ban on torture may, nonetheless, support an absolute legal ban on torture.

As suggested above, insistence on pursuing deontological arguments, to the exclusion of any reference to potential consequences, is unlikely to help a deontologist convince a consequentialist to see the merits in the former’s point of view, and vice versa. While such arguments support a strong ban on torture, they do not, in and of themselves, present a compelling case for an absolute ban (at least they do not present a case that would be deemed compelling when viewed from a consequentialist perspective). Pragmatic, instrumental reasons provide additional support for an absolute prohibition on torture and further promote and facilitate the noninstrumental goals and values that are usually associated with such an absolute ban.

The remainder of this part outlines some of the more salient instrumental arguments in support of an absolute ban on torture:

1. Setting general policy, accommodating exceptional cases. While catastrophic cases are not just hypothetical scenarios conjured up in academic ivory towers, they are extremely rare in practice. Consider the paradigmatic catastrophic case—the ticking bomb scenario. The police have in custody a person who they are absolutely certain has planted a massive bomb somewhere in a bustling shopping mall. The bomb may go off at any moment, and there is not enough time to evacuate the building. Thousands of casualties are expected should the bomb go off. The only lead that the police have to locate the bomb is the person in custody, but she refuses to reveal the location of the bomb. Police investigators are certain, beyond any doubt, that the only way of getting the information from her is by torturing her. They are also confident that if torture is applied, the suspect will divulge correct information about the location of the bomb, thus giving the bomb squad a better chance of disarming it in time.
Each of the elements of this paradigmatic case may be heavily contested and challenged. How would the police be certain that the person actually planted the bomb or otherwise knows of its location? Indeed, how certain can they be that a bomb was, in fact, planted and activated? Is torture the only means to extract the critical information from the suspect, or perhaps is more investigative creativity needed on the part of the police to come up with innovative ways to obtain cooperation from the suspect? How can the police be confident that information disclosed under torture will be correct?

72. See, e.g., Shue, supra note 41, at 91; Eyal Press, In Torture We Trust?, The Nation, Mar. 13, 2003 (quoting Professor David Cole: “You can’t know whether a person knows where the bomb is, or even if they’re telling the truth. Because of this, you end up going down a slippery slope and sanctioning torture in general.”), available at http://www.thenation.com/doc.mhtml?id=20030331&s=press&c=1.

73. See, e.g., John H. Langbein, The Legal History of Torture, in Torture, supra note 12 (manuscript at 13, on file with author) (quoting an observation made to Sir James Fitzjames Stephen: “It is far pleasanter to sit comfortably in the share rubbing red pepper into some poor devil’s eyes than to go about in the sun hunting up evidence.”); Kremnitzer, supra note 39, at 254 (arguing that interrogational torture “may become a refuge for the lazy, impatient, unskillful interrogator” since “[t]he existence of the licence to employ physical pressure . . . is . . . liable to constitute a negative incentive regarding the development and perfection of non-violent means of interrogation”).

74. It is often argued, especially in the context of evaluating the reliability of statements and confessions made under pressure and coercion, that torture does not work in so far as it leads to false statements by the persons undergoing interrogations, since they will say and admit to anything in order to stop the violence perpetrated against them. See, e.g., Levinson, supra note 10, at 2028-31; Michael Ratner, Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and Torture, 24 CARDozo L. REV. 1513, 1521 (2003); cf. William J. Stuntz, Christian Legal Theory, 116 HARV. L. REV. 1707, 1743 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001)) (recognizing the law’s potential to cause worse problems by downplaying the error costs of competing policy alternatives). The risk of false statements and confessions certainly adds weight to the pragmatic reasons supporting an absolute ban on torture. However, we must be careful not to take this argument too far, especially in the context of preventive interrogational torture. There may well be circumstances where such torture does work. See, e.g., DERSHOWITZ, supra note 18, at 137. A recent example where the threat of torture produced the critical information sought by the interrogators was in a kidnapping case in Germany. On September 27, 2002, Magnus Gáfgen kidnapped Jakob von Metzler, the eleven-year-old son of a prominent German banker. Four days later Gáfgen was arrested by the Frankfurt police after police officers watched him pick up the one million Euros ransom paid by the boy’s family. Hours into his interrogation by the police, Gáfgen refused to disclose the whereabouts of the kidnapped boy. Fearing for the boy’s life, the deputy police chief of Frankfurt ordered the interrogators to threaten Gáfgen with torture. Within a few minutes after being so threatened,
really not enough time to evacuate the premises and avoid loss of innocent life in that way? And so on.\textsuperscript{76}

When we set out to chart a general policy on the issue of torture, we must ask ourselves whether our general policy ought to be shaped around the contours of these rare exceptions. Or is there an independent value in striking a strong position in favor of an absolute ban on torture? Those who believe, as I do, that catastrophic cases are hard ones from both ethical and legal perspectives, must be mindful of the risk of creating bad law (and ethics) to answer the particular needs of such hard cases.

However, we must also be careful not to go to the other extreme. There is a difference between ignoring completely truly catastrophic cases and focusing our attention elsewhere when designing general rules and policies. While general policies ought not to be constructed around exceptional cases, one should not ignore the reality of hard cases, however rare they may be. Henry Shue warns us that “artificial cases make bad ethics.”\textsuperscript{76} This is certainly an attractive proposition. Yet its problem lies in the fact that catastrophic cases are not “artificial.” They are real, albeit rare. Ignoring them completely, by rhetorically relegating them to the level of “artificial,” is

Gafgen gave the police the information about the boy's location. Unfortunately, when the police arrived at the scene, Jakob was found dead. It later was discovered that Gafgen murdered the boy less than two hours after he had kidnapped him. See Richard Bernstein, Kidnapping Has Germans Debating Police Torture, N.Y. TIMES, Apr. 10, 2003, at A3; John Hooper, Kidnap Case Presents Germans with Ugly Dilemma over Torture, THE GUARDIAN, Feb. 27, 2003, at 18. Gafgen was eventually convicted and sentenced to life imprisonment. Kidnapper Gets Life in Murder of Boy, CHI. TRIB., July 29, 2003, at 3. At the time of writing an appeal against the conviction, claiming that Gafgen's confession was obtained under coercion and duress, was still pending. Derek Scally, Man Who Murdered Heir (11) Gets Life, IRISH TIMES, July 29, 2003, at 9. At the time of writing, criminal charges have been brought against Frankfurt's deputy chief of police who ordered using threats of torture against the kidnapper, as well as against the officer who actually threatened Gafgen. Hugh Williamson, German Police Officer Faces Charges, FINANCIAL TIMES, Feb. 21, 2004, at 5.

\textsuperscript{75} See, e.g., PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 111–12 (2003).

\textsuperscript{76} Shue, supra note 17, at 141; see also Richard H. Weisberg, Loose Professionalism, or Why Lawyers Take the Lead on Torture, in TORTURE, supra note 12 (manuscript at 8–9, on file with author) (arguing that the ticking bomb hypothetical “lacks the virtues of intelligence, appropriateness and especially sophistication” and suggesting that “complex rationalizers” who peg their theories on such examples “wind up being more naïve than those who speak strictly, directly, and simply, against injustice”).
utopian, or naïve at best.\textsuperscript{77}

2. Symbolism, myths, and education. A categorical legal prohibition on torture is also desirable in order to uphold the symbolism of human dignity and the inviolability of the human body. Such a prohibition not only approximates what decent people believe, but also the society we wish to live in and belong to.\textsuperscript{78} Indeed, even if one believes that an absolute ban on torture is unrealistic, as a practical matter, there is independent value in upholding the myth that an absolute ban exists.\textsuperscript{79} Such a position provides obvious notice that fundamental rights and values are not forsaken, whatever the circumstances, and that cries of national security, emergency, and catastrophe do not trump fundamental liberties.\textsuperscript{80} The more entrenched a norm is—and the prohibition on torture is among the most entrenched norms—the harder it will be for government to convince the public that violating that norm is necessary.

An absolute prohibition on torture also plays a significant educational function. It attaches special—moral, political, social, and legal—condemnation to torture as abhorrent.\textsuperscript{81} This

\textsuperscript{77} See infra Part II.
\textsuperscript{78} Charles L. Black, Jr., Mr. Justice Black, the Supreme Court, and the Bill of Rights, HARPER'S MAGAZINE 63, 67 (Feb. 1961), reprinted in CHARLES BLACK, THE OCCASIONS OF JUSTICE: ESSAYS MOSTLY ON LAW 89–102 (1963); see also H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, 845 (Barak, P). A democracy has “the upper hand” even though it “must sometimes fight with one hand behind its back.” Id. This is because “[t]he rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.” Id.

\textsuperscript{79} On the value of myths see, for example, Judith Olans Brown et al., The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor, 6 UCLA WOMEN'S L.J. 457, 457–58 (1996) (“Myths can create reality and increase meaning, operating not as reflection but inspiration.”); Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 439 (1985) (“Myths serve important functions. They provide goals and ideals, and as such they channel our thinking.”).

\textsuperscript{80} Nagel, supra note 34, at 5 (“There are strong utilitarian reasons for adhering to any limitation which seems natural to most people—particularly if the limitation is widely accepted already. An exceptional measure which seems to be justified by its results in a particular conflict may create a precedent with disastrous long-term effects.”).

\textsuperscript{81} Gross, supra note 9, at 791–93 (noting a similar result achieved by designating actions as “grave breaches”); Kadish, supra note 27, at 352 (“In terms of creating an appropriate moral climate and minimizing the occasions when torture is employed, it is one thing to say that no state may torture period, and another to say that no state may torture except when exigent cir-
message is, in turn, directed not only inward, to the domestic constituency, but also outward, to other nations and other international actors. In addition to complying with a state's obligations under international law, upholding and complying with an absolute ban on torture sends a strong, unequivocal message to countries around the world that such practices are impermissible.

Similarly, maintaining a commitment to an unconditional ban on torture, even—in fact, precisely—in the face of a terrorist campaign aimed against a nation and its citizens and interests, facilitates the government's claim to the moral high ground in the battle against the terrorists. Even in the post-September 11 world, terrorism's most critical threat to democratic regimes lies in provoking the target nations to overreact and employ authoritarian measures, such as interrogation torture. In turn, such overreaction may weaken further moral restraints against using force, discredit the government domestically and internationally, or alienate segments of the population from the government, thereby making it even harder to wage the fight against terrorism successfully.

82. See, e.g., Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 INT'L ORG. 427 (1988) (discussing the notion of two-level games in international relations).

83. See supra notes 9-10 and accompanying text.

84. Beharry v. Reno, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (Weinstein, J.) ("The United States cannot expect to reap the benefits of internationally recognized human rights... without being willing to adhere to them itself. As a moral leader of the world, the United States has obligated itself not to disregard rights uniformly recognized by other nations."); DERSHOWITZ, supra note 18, at 145 ("[T]he legitimation of torture by the world's leading democracy would provide a welcome justification for its more widespread use in other parts of the world."); Levinson, supra note 10, at 2052-53; Parry & White, supra note 29, at 763.


86. David A. Charters, Introduction, in THE DEADLY SIN OF TERRORISM: ITS EFFECTS ON DEMOCRACY AND CIVIL LIBERTIES IN SIX COUNTRIES 1, 1 (David A. Charters ed., 1994) (suggesting that the most critical danger from terrorism is "not that democracies would fail to defend themselves, but rather that they would (and did) do so far too well—and, in so doing, became less democratic"); HEYMANN, supra note 75, at 159.


88. See, e.g., DAVID COLE, ENEMY ALIENS 183-208 (2003).
3. Strategy of resistance. The use of preventive interrogational torture under certain extreme circumstances is inevitable. If government agents perceive this tactic to be the only way to procure critical information that they consider to be necessary to foil an imminent massive terrorist attack, they are likely to resort to such measures, whether they are legally permissible or not. However, even acknowledging that inevitability, it still makes good sense to reject absolutely the use of torture. As Frederick Schauer argues, "[r]esisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous." What is "less inevitable but more dangerous" may be the use of interrogational torture in less-than-catastrophic cases or against persons who are not "suspected terrorists." Once we legally authorize state agents to use interrogational torture in one set of cases, it is unlikely that we will be able to contain the authorization to that limited subset. Such powers and authority will likely expand beyond the scope of their originally intended use.

The insistence on an absolute legal ban on torture may also slow the rush to resort to torture practices even in truly excep-
Such an absolutist position constrains the use of torture because it imposes moral inhibitions on government officials, raises the specter of public exposure and retribution if a measure is subsequently determined unnecessary, and in certain situations, can result in criminal proceedings and civil suits brought against the perpetrators.

4. The imbalance of balancing. It is easier to justify the use of torture when engaging in “balancing.” As Charles Black suggested, “[a]s a matter of attitude, the language of ‘balancing’ is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to a sometimes awkward human freedom which the Bill of Rights set out to protect.” In the context of preventive interrogational torture, any balancing act is going to be factually difficult to conduct and subject to inherent biases that would result in more, rather than less, torture.

5. Slippery slopes. Slippery slope arguments constitute a significant part of the absolutists’ arsenal. They come in the following form: “if X then Y; Y is bad; therefore, even if X is good, we must refrain from X because of Y.” X is, in our context, allowing the use of preventive interrogational torture in truly ex-

92. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 178–79 (1982). Calabresi acknowledges the desire “in situations of uncertainty to slow down change until we are sure we want it.” Id. at 178. Additionally, he suggests that “[t]he use of absolute or categorical language, even when it is inaccurate and leads to inaccurate results, may have substantial merit for this . . . reason.” Id.

93. Black, supra note 78, at 66; see also CALABRESI, supra note 92, at 174; Mordechai Kremnitzer, National Security and the Rule of Law: A Critique of the Landau Commission’s Report, in NATIONAL SECURITY AND DEMOCRACY IN ISRAEL 153, 170–71 (Avner Yaniv ed., 1993) (arguing that if it is true that “in a normal utilitarian balancing process the value of human dignity does not stand a chance against the value of human life,” then “the value of human dignity should be protected by taking it out of the balance, making it . . . a part of natural law” (quoting Winfried Hassemer)); Nagel, supra note 34, at 9 (“Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies.”).


ceptional cases. The feared Ys include, for example: (1) use of interrogation torture for nonpreventive purposes (including for purposes of retribution and extrajudicial punishment); (2) use of interrogational torture in less-than-truly-exceptional cases; and (3) expansion of the use of interrogational torture beyond the particular confines of antiterrorism, such as applying similar methods to "ordinary" criminals.

The risk of sliding down those slippery slopes has to do with more than just the character of the individuals who are likely to engage in acts of interrogational torture. In fact, it exists even if we assume that security services and their members act in good faith and out of the purest motives when deciding whether particular circumstances constitute a catastrophic case that may justify or excuse interrogational torture—an assumption that many are unwilling to accept. This is so because of the creation of a constituency for torture, and the general dilution of moral restraints in the relevant society. Thus, assuming that torture may be deemed a more effective

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96. The slippery slope argument is, in and of itself, a persuasion tactic employed by absolutists. Indeed, if one considers any use of interrogational torture to have negative moral value, then the issue is not one of slippery slopes. Rather, the argument is one that runs against "the instant case" since the use of torture, even preventive interrogational torture in truly catastrophic cases, already places the community in the "danger case." See Schauer, supra note 95, at 365–66.

97. See, e.g., Kreimer, supra note 17, at 319–21; Kremnitzer, supra note 39, at 261–63.

98. Thus, for example, an argument could be made that a short but painful punishment by way of using torture against convicted felons may be better, as far as deterrence is concerned, than imposing long sentences on such individuals. See Paul H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioral Science Investigation, OXFORD J. LEGAL STUD. (forthcoming 2004) (manuscript at 14–15, on file with author).

99. Consider, for example, the description by the Landau Commission of the investigation staff of the GSS as

characterized by professionalism, devotion to duty, readiness to undergo exhausting working conditions at all hours of the day and night and to confront physical danger, but above all by high inner motivation to serve the nation and the State in secret activity, with "duty being its own reward," without the public glory which comes with publicity.

Landau Report, supra note 2, at 148.

100. See, e.g., Langbein, supra note 73, at 13 (suggesting that, "once legitimated, torture could develop a constituency with a vested interest in perpetuating it").

101. See, e.g., Kadish, supra note 27, at 353 ("[T]he legitimation of repugnant practices in special cases inevitably loosens antipathy to them in all cases.").
interrogation technique than its alternatives, we can expect members of security services to become increasingly more dependent on the use of such coercive techniques in specific cases, justifying categorization of a larger number of cases as catastrophic. Their careers depending on their ability to foil future attacks, interrogators are likely, when they believe they can get away with it, to opt for those interrogation methods that are deemed to provide the fastest answers. And what starts off as using exceptional methods in exceptional circumstances may, with time, be internalized and applied in a growing number of cases.

"So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience."

6. Identity of those subject to torture. Consider the notion of the "war on terrorism." War is the ultimate emergency, an emergency in which "no sacrifice is excessive." But as David Cole argued, what is really sacrificed are mostly the rights of "others"—aliens, immigrants, foreigners—not our own rights and liberties. The clearer the distinction and division between "us" and "them" and the greater the threat "they" pose to "us," the greater is our willingness to accept use of more radical measures by the government against "them." We allow for more repressive measures when we believe that those will not not be

102. HEYMANN, supra note 75, at 110.
turned against us in the future. This is certainly true in the context of interrogational torture, where the perception is that torture is "reserved" for "others" and that the distinction between "us" and those "others," namely the terrorists, is clearest. While the benefits that derive from its application (e.g., preventing particular terrorist attacks) accrue to all members of society, its heavy costs are borne by a distinct, smaller, and ostensibly well-defined group of people. The danger is that the state will tend to strike a balance disproportionately in favor of security and impose too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.


108. Soon after the attacks of September 11, President Bush declared, "Either you are with us or you are with the terrorists." President Bush's Address on Terrorism Before a Joint Meeting of Congress, N.Y. TIMES, Sept. 21, 2001, at B4; see also David W. Chen & Somini Sengupta, Not Yet Citizens but Eager to Fight for the U.S., N.Y. TIMES, Oct. 26, 2001, at A1 (reporting on legal permanent resident enlistment in the armed services post–September 11 due in part to "an us versus them thing [as] . . . children of immigrants feel a need to assert which side of the line they are on" (quoting Hunter College sociologist Philip Kasinitz)).

109. See JOHN RAWLS, A THEORY OF JUSTICE 27 (1971). As one writer noted, Rawls's distributive argument against utilitarianism "is far more compelling in the interrogation context, in which one person might be put in complete agony, rather than simply denied some benefit in exchange for a slight enhancement of the personal security enjoyed by all other individuals in the community." Donald A. Dripps, Against Police Interrogation—And the Privilege Against Self-Incrimination, 78 J. CRIM. L. & CRIMINOLOGY 699, 720 n.87 (1988). Arguments that such distributive justice effects of torture can be addressed within, for example, utilitarianism tend to come in two forms: first, extra weight may be given to the interests and the rights of those who are worst-off; second, distributive concerns ought to be taken into account in setting the cost-benefit analysis pertaining to the overall outcome. See, e.g., Scanlon, supra note 69, at 79–82. However, as a matter of theory it would be extremely difficult, if not impossible, to determine the identity of those who are made worst-off by resort to torture. Obviously that group includes those who are subjected to such practices, but, as noted above, the torturers and society at large also suffer certain loss from using torture. Moreover, as a practical matter, it is highly unlikely that the interests of those made worst-off (assuming we focus here on those actually tortured or threatened with torture) will, in fact, be accorded extra weight. See, e.g., Gross, supra note 94, at 1037.

110. See William J. Stuntz, Local Policing After the Terror, 111 YALE L.J. 2137, 2164–65 (2002). Stuntz argues that violent crises tend to result in situations where the cost bearers are sufficiently few and powerless, or have certain substantial, perhaps even insurmountable, barriers to their coalescing to fight the government's actions. Id. at 2165 n.87. "Anytime the government does something that has concentrated costs but diffused benefits, there is a danger that it will do too much—harming one voter to please ten is generally thought to be a good deal from the point of view of politically accountable decisionmak-
Furthermore, times of great danger (real or perceived) bring about a confluence of two mutually reinforcing trends, namely the tendency of the public to fear and hysteria, and nativistic tendencies that are reflected in an "intense opposition to an internal minority on the ground of its foreign (i.e., ‘un-American’) connections." Under such circumstances, use of torture may function to create an "illusory sense of overcoming vulnerability by the thorough domination of others."

However, reliance on the separation between “us” and “them” only provides us with a false, illusory sense of security. History and experience teach us that what we do to others today will be done to us tomorrow. Thus, if for no other reason than self-interest, those that are trigger-happy when it comes to using torture in interrogations of suspected terrorists in the name of national security must be wary of history’s lessons. Counterterrorism measures tend to expand and extend over time beyond their original, “limited” goals and specific targets.

The only realistic barrier against governmental abuse of powers in the context of interrogational torture may be setting an absolute legal prohibition on such practices. Even if a legal prohibition prevents what may be deemed as necessary action in certain situations, this cost may be worth paying, e.g., due to the small probability of such cases arising, further discounted by the small probability that government is unable to deal with them effectively by utilizing available legal measures. Furthermore, such cost may be negligible in comparison with the greater costs entailed in the far more probable abuse of powers by the government in a broader—and arguably more realistic—set of cases.

II. CATASTROPHIC CASES

To deny the use of preventive interrogational torture, even when there is good reason to believe that a massive bomb is ticking away in a crowded mall, is as cold hearted as it is to permit torture in the first place. It is cold hearted because, in true catastrophic cases, the failure to use preventive interrogational torture will result in the death of a great number of in-

111. JOHN HIGHAM, STRANGERS IN THE LAND 4 (1971).
113. See, e.g., COLE, supra note 88, at 85–179; Gross, supra note 94, at 1085–89.
nocent people. Upholding the rights of the suspect will negate the rights, including the very fundamental right to life, of innocent victims. I agree with Sissela Bok's observation that "it is a very narrow view of responsibility which does not also take some blame for a disaster one could easily have averted, no matter how much others are also to blame."\(^\text{114}\)

As the Landau Commission suggested, to deny the use of preventive interrogational torture in such cases is also hypocritical: experience tells us that when faced with serious threats to the life of the nation, government—any government—will take whatever measures it deems necessary to abate the crisis.\(^\text{115}\) In her opinion in Barzilai v. Government of Israel, Justice Ben-Porat of the Israeli Supreme Court wrote:

> [W]e, as judges who "dwell among our people," should not harbour any illusions . . . . There simply are cases in which those who are at the helm of the State, and bear responsibility for its survival and security, regard certain deviations from the law for the sake of protecting the security of the State, as an unavoidable necessity.\(^\text{116}\)

Ignoring the real-life consequences of catastrophic cases may result in portrayal of the legal system as unrealistic and inadequate. As a result, particular norms, and perhaps the legal system in general, may break down, as the ethos of obedience to law is seriously shaken and challenges emerge with respect to the reasonableness of following these norms. Thus, legal rigidity in the face of severe crises is not merely hypocritical; it may be detrimental to long-term notions of the rule of law. It may also lead to more, rather than less, radical interference with individual rights and liberties.\(^\text{117}\) A conditional ban on

\(^\text{114}\) SISSELA BOK, LYING 41–42 (2d ed. 1999).

\(^\text{115}\) See Landau Report, supra note 2, at 183; ARTHUR KOESTLER, PROMISE AND FULFILMENT, PALESTINE 1917–1949, at 134 (1949) ("It is impossible to fight ruthlessness with considerateness, guile with sincerity. Opponents in battle, like partners in understanding, must meet on a common plane—which is inevitably that of their lowest common denominator."); Kamisar, supra note 89, at 1144–45.

\(^\text{116}\) H.C. 463/86, Barzilai v. Gov't of Israel, 40(3) (1986) P.D. 505, reprinted in 6 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1, 63 (1988); see also Dershowitz, supra note 22, at 192 ("We know, of course, what all governments would actually do under these conditions of tragic choice: they (or more precisely, some flack-catching underling) would torture (with the implicit approval of the powers-that-be). But could the government justify it?").

\(^\text{117}\) See, e.g., Bruce Ackerman, The Emergency Constitution, 113 YALE L.J. 1029, 1030 (2004) ("If respect for civil liberties requires governmental paralysis, serious politicians will not hesitate before sacrificing rights to the war against terrorism. They will only gain popular applause by brushing civil libertarian objections aside as quixotic.").
torture imposes high social and individual costs, but so too does an absolute ban.

An uncompromising absolute prohibition on torture sets unrealistic standards that no one can hope to meet when faced with extremely exigent circumstances. Such unrealistic standards would, in fact, either be ineffective or would be perceived as setting double standards. The drafters of the Model Penal Code identify the problem when they suggest that duress ought to be made a valid defense to all criminal charges because:

law is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.118

In fact, even if each of us, as individual moral agents, supported an absolute prohibition on torture, we would still not want those we entrust with keeping us safe from harm to be strictly bound by similar constraints.119 We want our leaders and public officials to possess the highest moral character, but I do not believe we want them to be brazen Kantians. Recall Kant's celebrated example of an unconditional duty, i.e., the duty to tell the truth. According to Kant, the duty to tell the truth is not suspended even when an assassin (A) asks a person (B) whether he knows the whereabouts of a friend of B, whom A wishes to murder.120 I agree with Sissela Bok that "[a] world where it is improper even to tell a lie to a murderer pursuing an innocent victim is not a world that many would find safe to inhabit."121 Very few people would want to have as a friend someone who tells the murderer the truth rather than lie and

120. Immanuel Kant, On a Supposed Right to Lie from Altruistic Motives, in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY 346–50 (Lewis White Beck ed. & trans., 1949). According to Kant, B may respond to A's question with silence, but is not justified in telling a lie to A in order to save B's friend. Kant argues that if B tells the truth to A, and A goes on to murder B's friend, B will not be held morally liable for the negative consequences of his response to A. See id.
121. BOK, supra note 114, at 42.
save her friend. Similarly, few would want a leader who follows Kant's absolutist views to their extreme rather than act to save the lives of innocent civilians. As Judge Posner aptly put it, "if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility." 122 Similarly, Michael Walzer, who considers injunction against torture to form part of a set of standards to which all societies can be held, 123 suggests that a moral politician is recognized by "his dirty hands." 124 Faced with a catastrophic case, a moral person who is not a political leader, i.e., who does not bear the burden of actual decision making, would refuse to act in an immoral way and embrace an absolutist perspective. She would keep her hands clean. A public official who is immoral would merely pretend that her hands were clean (e.g., by resorting to interrogational torture but lying about it and denying the use of torture). A moral official would do the right thing to save innocent lives, while openly acknowledging and recognizing that such actions are (morally) wrong—that is, openly admitting that her hands are indeed dirty. The question then becomes not whether state agents will use preventive interrogational torture in the face of a moral principle to the contrary (they will), but rather what moral judgment and legal effect should accompany such action.

The catastrophic case presents the open-minded absolutist with a truly tragic choice. Relegating the extreme case to mere irrelevance does not make the choice less tragic, nor does it make a real problem "go away." A meaningful solution to the legal and moral dilemmas presented to us by the catastrophic case depends on acknowledging, and accounting for, all the relevant values and interests.

Absolutists that face the dilemmatic choices that catastrophic cases present often focus on redefining the scope of applicability of the prohibition on torture or the scope of the dilemmatic choices presented by the catastrophic case. For example, they may engage in definitional balancing, carving out relatively narrow definitions of, or relatively broad exceptions to,

124. Walzer, supra note 119, at 70.
the relevant rights and duties. Accordingly, it may still be possible to contend that the prohibition on torture is absolute when applied, while conceding that it is not applicable to every situation. For example, Alan Gewirth answers affirmatively the question whether there are absolute rights by using, as his leading example, the right of a mother not to be tortured to death by her son. Similarly, supporters of an absolutist perspective may argue that certain measures taken by government agents in specific catastrophic cases did not amount to "torture" and thus did not violate the fundamental prohibition. In a

125. Black, supra note 78, at 97 (explaining that absolutism is understood as balancing which is limited to definition of the scope of a right). For a defense of limitations on the scope of absolute rights as a means to minimize the moral conflict see Russ Shafer-Landau, Specifying Absolute Rights, 37 ARIZ. L. REV. 209 (1995).

126. Frederick Schauer, Speech and "Speech"—Obcenity and "Obcenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899, 903 (1979) ("[A]bsolute in force is not the same as unlimited in range.").

127. Gewirth, supra note 46, at 8. Gewirth further extends the right not to be so tortured to include other subjects and respondents such as "fathers, daughters, wives, husbands, grandparents, cousins, and friends." Id. at 15. Inflicting extreme harm on any of those would be an ultimate act of betrayal, the performance (indeed, the contemplation of performance) of which would cause the actor to lose all self-respect and regard her life as no longer worth living." Id. at 8. He then goes on to extend the same rationale to all other cases of torture. Id. at 15–16. However, it is unclear how persuasive this extended argument is in light of his heavy emphasis on the special relations between son and mother.

128. See, e.g., Levinson, supra note 10, at 2036–41; Is Torture Ever Justified?, THE ECONOMIST, Jan. 11, 2003, at 9 (expressing support for strict adherence, even at heavy cost, by the prohibition against torture, which expresses one of the West’s most powerful taboos," but accepting, at the same time, that "vigorous questioning short of torture—prolonged interrogations, mild sleep deprivation, perhaps the use of truth serum" may be justified in some cases). Defending his generally absolutist attitude, Charles Black argued that limiting balancing to the question of defining the scope of a right would tend to narrow the possibility of limiting that right itself since at some point the definition would take on a "strained and unnatural flavor, outraging the common usages of the language." Black, supra note 78, at 96. An example of such outrage is evident in Lord Gardiner's minority report as a member of the Parker Committee in the United Kingdom. Report of the Committee of Privy Counselors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism, 1972, Cmnd. 4901, at 11–22 [hereinafter Parker Report]. The early 1970s saw the emergence of persistent allegations of torture and inhuman and degrading conduct against persons undergoing interrogation by the Royal Ulster Constabulary (RUC) and army interrogators in Northern Ireland. Public outrage over the allegations led to the appointment of a committee, headed by the British Ombudsman, Sir Edmund Compton, to investigate certain allegations of physical brutality by the security forces. Report of the Enquiry into Allegations Against the Security Forces of
similar vein, many writers have developed distinctions to determine the extent to which the general prohibition on torture is applicable. One example is Philippa Foot's distinction between "what one does or causes and what one merely allows." Under this distinction, one would violate the ban on torture by torturing another. However, the ban would not be violated when we allow torture to take place in circumstances where we cannot prevent some torture from happening and opt to minimize the social costs by, for example, choosing to save a greater number of individuals from being tortured.

Many have sought to resolve the dilemma by conceding that the catastrophic case calls for a special, exceptional treatment. While the nature of such exceptional treatment may be the subject of further debate—for example, as to whether it calls for the suspension or qualification of otherwise applicable moral norms or whether such general moral norms continue to apply even to the exceptional case, which is still recognized as creating exceptional circumstances—the significant point is recognizing the need to engage in this debate and acknowledging the relevance and significance of the catastrophic case.

Physical Brutality in Northern Ireland Arising Out of the Events of 9th August, 1971, 1971, Cmnd. 4823, at iii. The Compton Report, submitted in November 1971, concluded that RUC interrogators have resorted to an "interrogation in depth" of some individuals. Id. at 21–23. "Interrogation in depth" consisted of the combination of some or all of five techniques of disorientation and sensory deprivation. Id. The Compton Report chose to declare that such interrogation techniques constituted "physical ill-treatment," but did not amount to "physical brutality." Id. at 23. The Report defined "physical brutality" as "an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain." Id. The Parker Committee was appointed shortly after the publication of the Compton Report. Whereas the Compton Committee was assigned the task of reviewing certain allegations about past conduct, the Parker Committee was charged with evaluating the overall procedures pertaining to the interrogation of suspected terrorists. In his minority report as a member of the Parker Committee, Lord Gardiner sharply criticized the Compton Report's notion of "brutality":

Under this definition, which some of our witnesses thought came from the Inquisition, if an interrogator believed, to his great regret, that it was necessary for him to cut off the fingers of a detainee one by one to get the required information out of him for the sole purpose of saving life, this would not be cruel and, because not cruel, not brutal.

Parker Report, supra, at 13.


130. See id. at 28. For discussion of other distinctions see Moore, supra note 38, at 299–312.
Consider Charles Fried's general argument that rights may be absolute within their scope of application.\textsuperscript{131} He acknowledges, however, that this argument runs into difficulties when applied to a case "where killing an innocent person may save a whole nation."\textsuperscript{132} Fried concedes that "[i]n such cases it seems fanatical to maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall."\textsuperscript{133} The regular norms that ought to apply in ordinary times lead to a "fanatical" result when made to apply in exceptional situations. Fried resolves the tension between the general absolutist view of rights and the relativist approach taken in such "extreme cases" by appealing to the notion of the "catastrophic" case and regarding it as "a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply."\textsuperscript{134} It is precisely for this reason that Fried speaks of categorical norms of right and wrong, rather than of absolute norms.\textsuperscript{135}

Fried's argument about the catastrophic case implicitly acknowledges that legal norms presuppose the existence of a "normal" state of affairs and remain applicable as long as this state of affairs continues to exist. Accordingly, "[t]his effective normal situation is not a mere 'superficial presupposition' that a jurist can ignore; that situation belongs precisely to [the norm's] immanent validity."\textsuperscript{136} In the catastrophic case, when the underlying normal state of affairs is fundamentally interrupted, the relevant norms may no longer be applicable as is and cannot fulfill their ordinary regulatory function. "For a legal order to make sense, a normal situation must exist . . . ."\textsuperscript{137}

General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails. Catastrophes undermine this factual basis. Thus, Fried's solution to the conundrum of the catastrophic case treats that case as governed by a wholly different set of "categories of judgment,"

\begin{footnotesize}
\begin{enumerate}
  \item[131.] Charles Fried, Right and Wrong (1978).
  \item[132.] Id. at 10.
  \item[133.] Id.
  \item[134.] Id. (emphasis added); see also Aleinikoff, supra note 42, at 1000.
  \item[135.] See Fried, supra note 131, at 10–11. This type of argument enables Fried to claim that although extreme cases may invoke conduct that does not comport with the relevant categorical right, that fact, in and of itself, does not prove the absence of an absolute, central core of that right. Id. at 10, 31.
  \item[136.] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 13 (George Schwab trans., MIT Press 1986) (1922).
  \item[137.] Id.
\end{enumerate}
\end{footnotesize}
thus resolving the tension by removing one component—the prohibition on torture—from the equation.

Charles Black, another thoughtful advocate of absolutist prescriptions, suggested that speaking of an absolute right not to be tortured “most faithfully approximates and renders the attitudes and probable actions of most decent people when it comes to torture.” However, while generally defending an absolutist view of constitutional rights against balancing arguments, Black also recognized that the right not to be tortured could not be absolute. The ticking bomb scenario undermined, in his opinion, any credible argument to that effect. Black reconciles his general attitude with the particular case of interrogational torture by suggesting that the absolutist position means that justifications for infringing rights should be disregarded unless they rise to an altogether different order of magnitude from usual prudential considerations. Under this “orders of magnitude” approach, the absolute prohibition sets out a strong presumption against the use of torture. However, that presumption is rebuttable. Yet, in order to refute the presumption in any given case a showing must be made of the exceptional magnitude of the risk involved. Only in such extreme cases may the fundamental presumption against the use of torture be overcome. In all other cases, torture is banned.

139. See id.
140. Id. at 67–68.
141. Black seems to focus on the number of innocent lives that are at stake in the catastrophic case as the decisive factor in determining the order of magnitude of the risk involved while taking the probability of that risk materializing as constant. Cf. Posner, supra note 34 (manuscript at 4) (“[T]he less certain is the need for or the expected efficacy of torture, the more lives have to be at risk to justify it . . . .”). Posner apparently supports the use of torture even when only one life is at stake, provided that there is no alternative method of extracting critical information, which is needed to save that life. Id.
142. See Black, supra note 78, at 67–68. Black’s approach here is somewhat similar to Fred Schauer’s “presumptive positivism.” SCHAUER, supra note 53, at 196–97. According to Schauer, decision makers generally follow rules, and consider overriding those only in “particularly exigent circumstances.” Id. at 196. Thus, there exists a strong presumption for rule-based decision making. However, that presumption may be overcome in exceptional circumstances. It is worth noting that this version of presumptive positivism also introduces a certain degree of flexibility into rule-based decision making, enabling it to deal with the challenge of rule worship. Not surprisingly, Schauer accepts the possibility that “unexpected and truly horrific cases” serve as exceptions to any theory about the categorical nature of rights. Frederick Schauer, A Comment on the Structure of Rights, 27 GA. L. REV. 415, 424 (1993); see also Kadish, supra note 27, at 346.
Others, such as Ronald Dworkin, Robert Nozick, Michael Walzer, Thomas Nagel, Michael Moore, and Martha Nussbaum have similarly recognized the catastrophic case as one to which their respective general theories either do not apply entirely or are applicable subject to necessary modifications.

Thus, there are two perspectives from which to approach the question of preventive interrogational torture: the general policy perspective and the perspective of the catastrophic case. Both perspectives are valuable and relevant. Focusing on one to the exclusion of the other is misguided. However, we must not use the two perspectives simultaneously. Instead, I suggest that the primary perspective ought to be the general one, which, as indicated above, supports an absolute legal ban on torture for a combination of moral and pragmatic considerations. Once this general policy is set in place, we should attend to the real problems that the catastrophic case presents. But can we really examine preventive interrogational torture from both perspectives and still make a coherent, morally and legally defensible argument? I believe we can.

III. OFFICIAL DISOBEDIENCE

I peg my belief on the twin notions of pragmatic absolutism and official disobedience. Part I dealt with the former, the claim that an absolute ban on torture is the right thing to do

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143. Ronald Dworkin, The Rights of Myron Farber, N.Y. REV. BOOKS, Oct. 26, 1978, at 34 (arguing that although policy must yield to principle when the two argue in opposite directions, this may be qualified to the extent that "considerations of policy are of dramatic importance, so that the community will suffer a catastrophe if they are ignored").

144. Nozick, supra note 48, at 30 n.* ("The question of whether... side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.").

145. Walzer, supra note 119.

146. Nagel, supra note 34, at 6 ("While it is certainly right to adhere to absolutist restrictions unless the utilitarian considerations favoring violation are overpoweringly weighty and extremely certain—nevertheless, when that special condition is met, it may become impossible to adhere to an absolutist position.").

147. Moore, supra note 38.

148. Press, supra note 72 (quoting an e-mail from Professor Nussbaum to The Nation in which Nussbaum suggests, "I don't think any sensible moral position would deny that there might be some imaginable situations in which torture... is justified.").
when we wed moral and pragmatic considerations. This part adds to the discussion the argument that the way to reconcile an absolute ban with the necessities of the catastrophic case, discussed in Part II, is not through any means of legal accommodation—including the one advocated by Professor Dershowitz\textsuperscript{149}—but rather through a mechanism of \textit{official disobedience}. In circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats may entail going outside the legal order, at times even violating otherwise accepted constitutional principles.

When catastrophic cases occur, governments and their agents are likely to do whatever is necessary to neutralize the threat, whether legal or not. Yet, to say that the authorities are going to use preventive interrogational torture in catastrophic cases is not the same thing as saying that they should be authorized to do so through \textit{a priori, ex ante} legal rules. It is extremely dangerous to provide for such eventualities and such awesome powers within the framework of the existing legal system primarily because of the enormous risks of contamination and manipulation of that system, and the deleterious message involved in legalizing such actions.\textsuperscript{150}

Like everybody else, officials should obey the law, even when they disagree with specific legal commands. However, there may be extreme exigencies where officials may regard strict obedience to legal authority (e.g., an absolute legal ban on torture) irrational or immoral.\textsuperscript{151} Absolutists—in this context, those who insist on an unqualified rule of obedience—would resolve the official's dilemma in such cases by finding that her obligation to obey legal authority is undiminished by the extreme exigency. Some consequentialists may argue that the decision whether to obey ought to be made on a case-by-case basis, carefully comparing the relative costs and benefits of each alternative. As Part I observed, both of these extreme positions are subject to critical challenges.

One possible pragmatic middle position is to regard the rule of obedience as establishing a strong presumption in favor

\begin{itemize}
\item \textsuperscript{149} See \textit{infra} Part V.
\item \textsuperscript{150} Brownlie, \textit{supra} note 11, at 507 (“To try to make the law accommodate... crude necessities... is rather like peopling a monastery with prostitutes and publishing the mere change of lodging as an exemplary rehabilitation.”).
\item \textsuperscript{151} Frederick Schauer, \textit{The Questions of Authority}, 81 GEO. L.J. 95, 110–15 (1992).
\end{itemize}
of obedience that is rebuttable in exceptional cases where the wrong of disobedience is outweighed by the greater wrong that would follow from obeying the rules. While avoiding many of the pitfalls of both the absolutist and consequentialist perspectives, such a "presumptive" approach is not without its own difficulties. There is the problem of oscillation between the opposing poles of rule-based and particularistic decision making. The harder the presumption is to overcome, the more rule-based-like it becomes with all the attendant problems of rule-based decision making; the easier it is to override the rule of obedience, the less meaningful it becomes, with the risk of collapsing the presumption into a mere exercise in particularistic, contextual decision making.

The possibility of a lawful override of the rule, under the presumptive approach, compounds the problem further. That is, in appropriate circumstances, deviating from the rule may be not only morally permissible, but legally acceptable as well. The presumptive approach may fail to present adequate safeguards where we have reasons to believe that errors by public officials that result in overuse of torture are going to be more socially costly than errors related to underuse of torture. Even more significantly, the presumptive approach fails to provide strong enough incentives for officials to play by the rule of obedience rather than justify overriding that rule in a particular case. In the absence of an absolute ban on torture, public officials are left with a "weighted presumption" that may not be amenable to enforcement through sanctions.

152. Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 HARV. L. REV. 1359, 1382–83 (1997) (suggesting that the general rule of obedience may be overridden under certain circumstances). Alexander and Schauer's "rule of obedience" requires public officials to obey the Constitution as it is interpreted by the Supreme Court, regardless of whether or not they agree with the Court's particular interpretations. Id. Although presenting a case for an unqualified rule of judicial supremacy, Alexander and Schauer also concede that President Lincoln was right to challenge the Court's ruling in the Dred Scott case. Id.; see also Schauer, supra note 151, at 103 (suggesting "the idea of overridable obligations that survive the override despite being overridden in a particular case"). The idea of a rule of obedience as a strong presumption follows similar contours to Schauer's "presumptive positivism." See supra note 142.


154. Emily Sherwin, Ducking Dred Scott: A Response to Alexander and Schauer, 15 CONST. COMMENT. 65, 70 (1998) (arguing that while a "serious rule of obedience" has the advantage of determinate application, "[d]etermining whether a decision-maker deserves to be sanctioned for violation of a weighted presumption is a far more complex task").
The proposed model of official disobedience is another middle ground between the diametrically opposed poles of absolutism and consequentialist conditionalism. However, it alleviates some of the concerns associated with the presumptive model. Most significantly, it raises the costs of rule deviation for public officials while, at the same time, maintaining a strong commitment to law abidingness, in general, and to strict adherence to the absolute ban on torture, in particular.

The model of official disobedience calls upon public officials having to deal with catastrophic cases to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions. The officials must assume the risks involved in acting extralegally. Rather than recognize ex ante the possibility of a lawful over-ride of the general prohibition on torture, as suggested by the presumptive approach, official disobedience focuses on the absolute nature of the ban while accepting the possibility that an official who deviates from the rule may escape sanctions in exceptional circumstances.

Consider again the possibility of extreme circumstances where officials may regard strict obedience to legal authority as irrational or immoral because of a contextual rebalancing of values that takes places at a level that is antecedent to the relevant legal rule itself, i.e., the level of the rule's underlying reasons or similar first-order, content-dependent reasons that relate to obedience to the rule. According to the official disobedience model, if an official determines that a particular case necessitates her deviation from a relevant rule, she may choose to depart from the rule. But at the time she acts extralegally, she will not know what the personal consequences of violating the rule are going to be. Not only does the basic rule continue to apply to other situations (that is, it is not canceled or terminated), it is not even overridden (from a legal perspective at least) in the concrete case at hand. Rule departure constitutes, under all circumstances and all conditions, a violation of the relevant legal rule. Yet, whether the actor would be punished for her violation remains a separate question.

155. See generally Gross, supra note 94, at 1096–1113 (discussing the extra-legal measures model in the context of emergency powers).


157. But see Sherwin, supra note 154, at 70–71 (arguing that "the ultimate
imposer of authority, retains the role of making the final determination whether the actor ought to be punished and rebuked, or rewarded and commended for her actions. It should be up to society as a whole, "the people," to decide how to respond ex post to extralegal actions taken by government officials in response to extreme exigencies. The people may decide to hold the actor accountable for the wrongfulness of her actions, or may approve them retrospectively. Thus, even when acting to advance the public good under circumstances of great necessity, officials remain answerable to the public for their extralegal actions. Justice Jackson was right to suggest that "[t]he chief restraint upon those who command the physical forces of the country... must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." At the end of the day, it is those political, moral, and—one may add to the list—legal judgments of the public that serve as the real restraint on public officials.

Society may determine that the use of torture in any given case, even when couched in terms of preventing future catastrophes, is abhorrent, unjustified, and inexcusable. In such a case, the acting official may be called to answer for her actions and make legal and political amends. She may, for example, need to resign her position, face criminal charges or civil suits, or be subject to impeachment proceedings. Alternatively, the people may approve the actions and ratify them. Such ratification may be formal or informal, legal as well as social or political. Legal modes of ratification include, for example, the exercise of prosecutorial discretion not to bring criminal charges against persons accused of using torture, jury nullification where criminal charges are brought, executive pardoning or clemency where criminal charges are brought, executive pardoning or clemency where criminal proceedings result in conviction,"
and governmental indemnification of state agents who are found liable for damages to persons who were tortured.\textsuperscript{162}

Political and social ratification is also possible. A president

vice ("GSS") prior to trial, thus blocking any future possibility of criminal proceedings being brought against them.

On April 12, 1984, four residents of the Gaza Strip kidnapped an Israeli bus. After a chase, the bus was stopped by the security forces. Several hours later special units stormed the bus and freed the hostages. The Israeli media reported at first that two of the four terrorists were killed during the operation. However, the reports were later amended to state that all four terrorists were killed during the rescue operation. Several days passed until an Israeli daily newspaper, \textit{Hadashot}, ran a photograph showing two terrorists being led away from the bus, obviously still alive. A special investigative committee, appointed by the Minister of Defense ("Zorea Committee"), found that two of the terrorists had indeed been captured alive and later killed as a result of fractures of their skulls inflicted by beatings. However, the Committee could not conclusively decide who was responsible for the beatings. In May 1986, it was publicly discovered that the two terrorists were executed by GSS members following a personal order given by the head of the GSS. It was also discovered that GSS witnesses lied to the Zorea Committee, falsified evidence, and corroborated their testimonies before the Committee. The GSS member on the Zorea Committee played a crucial part in concealing the truth, acting as a "Trojan horse" in the Committee. See Landau Report, \textit{supra} note 2, at 151.

When the Attorney General insisted on carrying through the investigation against the members of the GSS responsible for the killings, the government decided to invoke a letter of resignation sent by the Attorney General to the government before the affair exploded (for reasons which were unrelated to the affair) and to replace him in the hope that a new Attorney General could be more easily manipulated. The step was taken by the government despite the Attorney General's clear indication that he wished to remain in office so as to bring to conclusion the investigation of the affair. This was the first time in Israeli history (and, indeed, the only one, so far) in which an Attorney General was dismissed by the government. Interestingly enough, the former Attorney General, Professor Yitzhak Zamir, was appointed some years later to the Israeli Supreme Court. When even the newly appointed Attorney General expressed his determination to pursue the investigation and bring criminal charges, a political deal emerged where eleven senior GSS officers, including the head of the GSS, Avraham Shalom, who gave the order to kill, left the service after receiving clemency by the President of the State of Israel, thus blocking any possibility of future criminal charges being brought against them. The office of the President, as well as the person occupying that office at the time, President Herzog, came under a barrage of legal and public challenges. Among other things, in \textit{Barzilai v. Government of Israel}, the petitioners argued that the president could not preventively pardon persons not yet charged and not yet convicted of any offense. When the Supreme Court rejected the petition in a lengthy decision handed down in August 1986, it too came under sharp criticism. For a legal critique of the judgment, see Mordechai Kremnitzer, \textit{The Case of the Security Services Pardon}, 12 \textit{IYUNEI MISHPAT} 595 (1987); Lahav, \textit{supra} note 7, at 547-56. For more information on the "bus #300 affair," see YECHIEL GUTMAN, A STORM IN THE G.S.S. 15–133 (1995).

\textsuperscript{162} Gross, \textit{supra} note 94, at 1111–15.
who personally authorizes the use of torture may be reelected by a substantial majority in free and democratic elections where the issue of torture constitutes a major part of the pre-election public agenda. Alternatively, she may need to resign her position or face impeachment proceedings. Yale Law Professor Charles Black apparently put the matter to his constitutional law class in the following terms: "[o]nce the torturer extracted the information required . . . he should at once resign to await trial, pardon, and/or a decoration, as the case might be." Honorific awards can establish ex post ratification in appropriate circumstances. Withholding a decoration may also send a strong message of rejection and condemnation. Michael Walzer notes the remarkable "national dissociation" by the British from the R.A.F. Bomber Command. The colorful director of the strategic "saturation bombing" of Germany from February 1942 until the end of the war, Air Marshal Arthur Harris—whose nickname, not at all coincidentally, was "Bomber"—was not, unlike other commanders, rewarded with a peerage. Even more tellingly, although bomber pilots suffered heavy casualties, they are not recorded by name in Westminster Abbey, unlike all other pilots of Fighter Command who died during the war. Walzer describes Harris as having "done what his government thought necessary, but what he had done was ugly, and there seems to have been a conscious decision not to celebrate the exploits of Bomber Command or to honor its leader."


164. One is reminded of La Rochefoucauld's maxim that "[e]vil as well as good has its heroes." 7 THE NEW ENCYCLOPEDIA BRITANNICA 72 (15th ed. 1989).

165. Withholding of decoration, as well as other forms of social ostracism, is one specific example of informal sanctions that society may apply against officials for acting in violation of a recognized rule. Other forms of informal sanctions may involve the discreditation of the actor in the eyes of others, loss of valued relationships with others, and putting in risk past accomplishments of the rule violator. See, e.g., Paul H. Robinson, Should the Victims' Rights Movement Have Influence over Criminal Law Formulation and Adjudication?, 33 McGeorge L. REV. 749, 749 (2002).

166. MICHAEL WALZER, JUST AND UNJUST WARS 324 (3d ed. 2000). But see ROBIN NEILLANDS, THE BOMBER WAR 401–04 (2001) (arguing that there is "no truth in the popular allegations that Harris and Bomber Command were denied any personal or official recognition"). See generally "The Bomber Harris Trust" Home Page (providing links to numerous writings on the Bomber Command), at http://www3.sympatico.ca/jimlynch (last modified Jan. 24,
The proposed model emphasizes an ethic of responsibility not only on the part of public officials, but also of the general public. Officials will need to acknowledge openly the nature of their actions and attempt to justify both their actions and their undertaking of those actions.\textsuperscript{167} This open acknowledgement and engagement in public justificatory exercise is a critical component in the moral and legal choice made by the acting officials. The public then must decide whether to ratify the relevant extralegal actions. During the process of ratification, each member of the public becomes morally and politically responsible for the decision. "[D]ecent men and women, hard-pressed in war, must sometimes do terrible things," writes Walzer, "and then they themselves have to look for some way to reaffirm the values they have overthrown."\textsuperscript{168} Yet it is not only the actors who must attempt to find a way to reaffirm fundamental values they have violated in times of great exigency; society must also undertake a project of reaffirmation. Each member of society, in whose name terrible things have been done, must become morally responsible.\textsuperscript{169} Such responsibility is assumed by, and through, the process of ratification or rejection of the particular terrible things that have been done "in our name."

\textbf{IV. \textit{EX POST} RATIFICATION}

To acknowledge the possibility of extralegal action is not the same thing as accepting willy-nilly limitless powers and authority in the hands of state agents. In a democratic society, where values such as constitutionalism, accountability, and individual rights are firmly entrenched and traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if taken, arguably, to promote the general good. Moreover, we can and should expect public officials to feel quite uneasy about possible resort to extralegal measures, even when such actions are deemed to be for the public's benefit. This feeling of uneasiness would be even more pronounced in nations where the "constitution is old, observed for a long time, known, re-

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\item \textsuperscript{167} Mortimer R. Kadish & Sanford H. Kadish, \textit{Discretion To Disobey: A Study of Lawful Departures From Legal Rules} 5–12 (1973).
\item \textsuperscript{168} Walzer, \textit{supra} note 166, at 325 (emphasis added).
\item \textsuperscript{169} But see Walzer, \textit{supra} note 119, at 67 (suggesting that members of the public may "have a right to avoid, if [they] possibly can, those [political or other] positions in which [they] might be forced to do terrible things").
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spected, and cherished." The knowledge that acting in a certain way means acting unlawfully is, in and of itself, going to have a restraining effect on government agents, even while the threat of catastrophe persists. This is especially true in the context of torture. Here, the strong commitment to the rule of law and the mood of veneration towards the Constitution and constitutional norms are strengthened by the fact that the prohibition on torture "expresses one of the West's most powerful taboos." The absolute ban on torture has been internalized by a great number of people around the world. This internalization inherently makes it more difficult for conscientious officials to resort to torture, whatever the circumstances, since "torture simply is not done." In addition to self-policing

170. GUY HOWARD DODGE, BENJAMIN CONSTANT'S PHILOSOPHY OF LIBERALISM: A STUDY IN POLITICS AND RELIGION 101 (1980) (quoting Benjamin Constant). Constant recognized that in nations where the constitutional experience is as described in the quoted excerpt, the constitution "can be suspended for an instant, if a great emergency requires it." Id. He distinguishes this case from the following: "if a constitution is new and not in practice nor identified with the habit of a people, then every suspension, either partial or temporary, is the end of that constitution." Id.; see also Gabriel L. Negretto & José Antonio Aguilar Rivera, Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship, 21 CARDOZO L. REV. 1797, 1800–03 (2000) (discussing Constant's theory of "self-defeating dictatorships").

171. See Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 TEX. TECH L. REV. 2443, 2451–52 (1990); see also Max Lerner, Constitution and Court as Symbols, 46 YALE L.J. 1290, 1294–95 (1937); Sanford Levinson, "The Constitution" in American Civil Religion, 1979 SUP. CT. REV. 123, 123.


173. The internalization thesis may be challenged from two opposing directions. First, it may be argued that even if conscientious officials may find it hard to resort to torture, torturers are not of high moral character. Only morally deficient individuals are capable, and willing, to engage in the morally filthy job of "cleaning the sewer pipes." See Landau Report, supra note 2, at 183 (quoting a GSS witness as saying "[t]he citizen to sit on the clean green grass in front of his house, while beneath him the refuse is washed away in the sewerage pipes"). The more such morally deficient individuals engage in acts of torture, the more morally deficient they become. See Daniel Statman, The Absoluteness of the Prohibition Against Torture, 4 MISHPAT U'MIMSHAL 161, 176–77 (1997). Second, it has been suggested that many torturers are not "vicious, insane, malicious, disconnected interpersonally, or coerced by a totalitarian state" to engage in acts of torture, but rather they are unaware of the criminal nature of their actions and believe these to be not only legal, but also morally and legally required. See MARK OSIEN, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR 154 (2002); Mark Osiel, The Mental State of Torturers: Argentina's Dirty War, in TORTURE, supra note 12 (manuscript on file with author).
internalization, the fact that the ban on torture is among the most powerful taboos and torture is the subject of special moral and legal condemnation means that an official who elects to deviate from this widely accepted and entrenched norm is likely to suffer significant reputational damage. This adds yet another layer to the ban’s effectiveness.\footnote{174}

My proposal calls for maintaining an absolute legal ban on torture while, at the same time, recognizing the possibility (but not certainty) of state agents acting extralegally—employing preventive interrogational torture in catastrophic cases—and seeking \textit{ex post} ratification of their conduct.\footnote{175} The element of \textit{ex post} ratification is critical to my project. This part outlines some of the benefits of appeal to a subsequent ratification. The next part discusses Dershowitz’s torture warrant proposal, and analyzes the advantages of the \textit{ex post} ratification process over \textit{ex ante} judicial approval of interrogational torture.

The need to give reasons \textit{ex post}, i.e., the need to publicly justify or excuse (not merely explain) one’s actions after the fact, emphasizes accountability of government agents.\footnote{176} The


\footnote{175. I would argue that the possibility of acting extralegally in catastrophic cases facilitates, in and of itself, an absolute prohibition on torture. Consider the dilemma judges face when asked to take an expansive view of constitutional rights, recognizing that such broad constructions may come back to haunt the nation during catastrophes, which may necessitate limitations on those rights. The prospect of official disobedience shifts the pressure away from the courts and places much of the burden on the shoulders of government and its agents. If the situation is serious enough, there remains “the possibility of government officials acting extralegally to protect the nation and its citizens.” Gross, \textit{supra} note 94, at 1122. The very possibility of such action “reduces the pressures for incorporating built-in exceptions to protected rights,” in general, and limiting the scope of the ban on torture, in particular. Id.; Christopher L. Eisgruber, \textit{The Most Competent Branches: A Response to Professor Paulsen}, 83 Geo. L.J. 347, 360–62 (1994).

176. Slavoj Zizek argues that transparency may not be desirable in this context, suggesting that we should . . . paradoxically stick to the apparent “hypocrisy”: OK, we can well imagine that in a specific situation, confronted with the proverbial “prisoner who knows” and whose words can save thousands, we would resort to torture—even (or, rather, precisely) in such a case, however, it is absolutely crucial that we do \textit{not} elevate this desperate choice into a universal principle; following the unavoidable brutal urgency of the moment, we should simply do it. Only in this way . . . do we retain the sense of guilt, the awareness of the inadmissibility of what we have done.}

\textit{Slavoj Zizek, Welcome to the Desert of the Real! Five Essays on September 11 and Related Dates} 103 (2002), \textit{quoted in Levinson, supra}
model of official disobedience puts the burden squarely on the shoulders of state agents who must act, sometimes extralegally, without the benefit of legal preapproval of their actions by the courts or the legislature. 177 Public officials have no one to hide behind. They must put themselves on the front line and act at their own peril. 178 If they believe that the stakes are high enough to merit an extralegal action, they may take such action and hope to be able to convince the public to see things their way. As suggested above, the threshold of illegality provides an intrinsic limit against a rush to employ unnecessary measures. The need to give reasons for the extralegal conduct may also limit the government's choice of measures ex ante, adding another layer of restraint on governmental action. 179 Open acknowledgment of extralegal measures taken by government agents will contribute to reasoned discourse and dialogue between the government and its domestic constituency, between the government and other governments, and between the government and nongovernmental or international organizations. The benefits of the ex post justificatory exercise are not confined to the domestic sphere; it has international implications, both political and legal. 180

By separating the issues of action (i.e., preventive interrogational torture) and public ratification, and by ordering them so that ratification follows, rather than precedes, action, the proposed model adds a significant element of uncertainty to the decision-making calculus of state agents. This "prudent obfuscation" 181 raises both the individual and national costs of pursu-
ing an extralegal course of action and, at the same time, reinforces the general ban on torture.\textsuperscript{182}

With the need to obtain \textit{ex post} ratification from the public, the official who decides to use torture undertakes a significant risk because of the uncertain prospects for subsequent ratification. The public may, for example, disagree after the fact with the acting official's assessment of the situation and the need to act extralegally. Ratification would be sought \textit{ex post}, when more information about the particular case at hand may be available to the public, and possibly after the particular danger (which the use of preventive interrogational torture sought to avert) has been eliminated.\textsuperscript{183} Under such circumstances, it is possible that calm and rationality, rather than heightened emotions, would govern public discourse, emphasizing further the risk for the official in acting first and seeking approval second. The public may also determine that the extralegal actions violated values and principles that are too important to be encroached upon, as a matter of principle or in the circumstances of the particular case. The greater the moral and legal interests and values infringed upon, the less certain the actor can be of securing ratification.

Uncertainty is also important because it reduces the potential risk of under-deterrence that is involved in the possibility of \textit{ex post} ratification. Under-deterrence may be a significant

\textit{tuous}, 96 MICH. L. REV. 127, 139–41 (1997) (discussing "prudent obfuscation" as a means to respond to the penal law's persistent incompleteness). Kahan discusses the use of vague terms in criminal laws, giving courts "the flexibility to adapt the law to innovative forms of crime ex post." \textit{Id.} at 139.

\textsuperscript{182} Richard Posner underestimates the value of uncertainty in this context. \textit{See} Posner, \textit{supra} note 34 (manuscript at 8) (supporting a position where the customary legal prohibitions on torture are left intact, "but with the understanding that of course they will not be enforced in extreme circumstances" (emphases added)). For reasons explained below, I reject both the desirability of such an \textit{a priori} understanding and its self-evident characterization. For another proposal designed to increase the costs of engaging in interrogational torture, see Levinson, \textit{supra} note 10, at 2049, suggesting the possibility of paying "just compensation" to anyone against whom a torture warrant was issued. Levinson argues that "the ex ante assignment of such a price, especially if it is substantial and paid to everyone who is tortured, might itself serve to limit the incidence of torture." \textit{Id.} at 2050.

\textsuperscript{183} One potential problem with this appeal to hindsight is that if the official who tortures is successful, the catastrophic harm will be averted. However, the occurrence of harm plays a significant role in shaping the public perception about the permissibility of using extraordinary measures against "terrorists." Thus, if the harm is prevented, the assessment of the legitimacy of acting extralegally is likely to be more heavily weighted against the acting official. I thank Barry Feld for drawing my attention to this problem.
concern if interrogators have good reason to believe that ratification will be forthcoming in future cases where they employ preventive interrogational torture. This may result, for example, from conditions of low "acoustic separation." According to Meir Dan-Cohen, law contains two separate sets of normative messages that are directed at the general public ("conduct rules") and officials who make decisions with respect to actions taken by members of the public ("decision rules"). Although a complete "acoustic" separation between these two sets of messages is unrealistic, some degree of separation occurs in the real world. Thus, some messages are more likely to register with either the general public or official decision makers. A low level of acoustic separation may result from the sophisticated legal mechanisms that are available to interrogators (e.g., access to legal staff of the relevant security service), the possibility of advance contemplation of different modes of conduct in future catastrophic bomb cases (even without the ability to anticipate in advance all possible features of such cases), and the possible professional and personal links between the interrogators and the service in which they work and other state authorities (e.g., other law enforcement agencies). These conditions of low acoustic separation increase the likelihood that officials will be familiar with both sets of normative messages, i.e., both with the particular conduct and decision rules, and will be able to act strategically based on their awareness of the

184. Parry & White, supra note 29, at 764–65; see also Levinson, supra note 10, at 2045–48 (suggesting that the norm against torture is likely to be under-enforced).


186. Dan-Cohen, supra note 185, at 630–34. One example of such separation addresses the concern about setting unrealistic standards. Thus, Dan-Cohen suggests that the criminal defense of duress should not be understood as constituting a conduct rule directed at the general public, but rather as a decision rule that allows decision makers to express compassion in imposing punishment. Id. at 633–34.

187. Id. at 634.

188. Id. at 636–41.
two sets of messages. Significantly, such conditions of low acoustic separation create substantial risks of undesirable behavioral side effects on the part of officials, e.g., by allowing decision rules—which recognize the possibility that agents who resort to preventive interrogational torture in catastrophic cases may be let off the hook—to affect conduct in specific cases (i.e., state agents resorting to torture, despite the existence of an absolute ban, knowing, or at least having good reason to believe, that they will enjoy immunity against criminal charges and civil claims).

However, the element of uncertainty, which is so critical to the official disobedience model, has similar effects to what Dan-Cohen calls “strategies of selective transmission.” Whereas the means of selective transmission facilitate the channeling of different sets of norms to different constituencies (i.e., the general public and the authorities), the selectivity in our context draws a clear separating divide between conduct and decision rules, thus minimizing the risks of behavioral side effects. A certain role reversal between public officials and the general public takes place under the official disobedience model: conduct rules related to torture will especially target public officials, whereas decision rules would mostly (but not exclusively) be directed at the general public, which assumes the mantle of ex post decision maker. In this context, the relevant conduct rules are crystal clear: torture is prohibited absolutely, whatever the circumstances. At the same time, the more uncertain the substance and the operation of the decision rules are, and the greater the personal risk involved in wrongly interpreting either of those is, the greater the incentive for individual actors to conform their action to the conduct rules that prohibit torture in all cases.

Moreover, even if we accept that there exists a good chance that ex post ratification will be forthcoming, there are still significant costs to acting extralegally. Even if the public ratifies the decision to use preventive interrogational torture in a specific case, there may be personal implications for the officials

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189. Id. at 640–41.
190. Id. at 631–32.
191. Id. at 634–36.
192. Note, for example, the Convention Against Torture defines torture as involving severe pain or suffering that is “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention Against Torture, supra note 9, art. 1.
involved in the decision to apply torture. These implications emanate, for example, from the anxiety that ratification will, in fact, not follow or because ratification may not be comprehensive and fully corrective. Subsequent ratification may, for example, shield the actor against criminal charges, but not bar victims of torture from obtaining compensation in civil proceedings. Similarly, when ratification assumes the guise of an executive pardon or clemency, it eliminates the criminal penalty that was imposed on the individual actor, but it removes neither the ordeal of criminal prosecution nor the condemnation associated with criminal conviction.\textsuperscript{193}

When we broaden our view to incorporate not only domestic, but also international legal rules and norms, the costs of acting extralegally are increased, adding yet another disincentive to engage in such conduct. Thus, even if the use of torture in any given case is domestically excused \textit{ex post}, it may be subject to a different judgment on the international plane. This may have significant consequences both for the individual actor (i.e., the interrogator) and her government. First, torturers may be subject to criminal and civil proceedings in jurisdictions other than their own, and may also be subject to international criminal prosecution.\textsuperscript{194} Second, the ban on torture is non-derogable under the major international human rights conventions.\textsuperscript{195} As such, no argument of public emergency can justify or excuse a deviation from the prohibition. State agents who engage in acts of preventive interrogational torture implicate their government in violation of the nation's international obligations and expose it to a range of possible remedies under the relevant international legal instruments.\textsuperscript{196}

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\item 193. See, e.g., Leon Sheleff, \textit{On Criminal Homicide and Legal Self Defense}, 6 \textit{PLILIM} 89, 111–12 (1997); \textit{see also} Kamisar, \textit{supra} note 89, at 1143–44 (reliance on mitigation of sentence fails to mitigate the “ordeal of a criminal prosecution or the stigma of a conviction”).
\item 195. See \textit{supra} note 9.
\item 196. See American Convention on Human Rights, \textit{supra} note 9, arts. 5(2), 27(2); International Covenant on Civil and Political Rights, \textit{supra} note 9, arts.
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Thus, the official disobedience model imposes a significant burden on public officials. They must act in the face of great uncertainty. At the same time the model does not completely bar the possibility that interrogational torture will be used by officials and later ratified by the public. It simply makes it extremely costly to resort to such drastic measures, limiting their use to exceptional exigencies. As Sanford Kadish notes, "Would not the burden on the official be so great that it would require circumstances of a perfectly extraordinary character to induce the individual to take the risk of acting? The answer is of course yes, that's the point."\textsuperscript{197}

V. UNWARRANTED TORTURE WARRANTS

Counterterrorism measures must satisfy two general precepts. They should provide government with a certain degree of flexibility necessary to respond successfully to unanticipated crises and exigencies.\textsuperscript{198} At the same time, restrictions and limitations must exist to prevent government from amassing unlimited powers.\textsuperscript{199}

Professor Dershowitz seems to support a conditional ban on torture as a response to the need-for-flexibility concern.\textsuperscript{200}

\textsuperscript{4, 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 9, arts. 3, 15; see also Winston P. Nagan & Lucie Atkins, The International Law of Torture: From Universal Proscription to Effective Application and Enforcement, 14 HARV. HUM. RTS. J. 87 (2001).}

\textsuperscript{197} Kadish, supra note 27, at 355.

\textsuperscript{198} As Alexander Hamilton argued in support of limitless government powers essential to the common defense:

\begin{quote}
[It is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.
\end{quote}


\textsuperscript{199} Gross, supra note 94, at 1030.

\textsuperscript{200} I say "seems to support" because at least in one instance Dershowitz claims that his normative preference would be "for the courts to declare all forms of torture unconstitutional." Alan M. Dershowitz, Reply: Torture Without Visibility and Accountability Is Worse Than with It, 6 U. PA. J. CONST. L. 326, 326 (2003). Dershowitz elsewhere argues, however, that the Constitution does not bar the use of preventive interrogational torture. DERSHOWITZ, supra note 18, at 135–36; cf. Kreimer, supra note 17, at 282, 283–317. Since my focus is on the normative questions of whether torture should ever be legally or morally permissible in a way that is not jurisdiction specific, I will not join that important debate here.
However, he does not discount the dangers of untrammeled governmental discretion. His solution comes in the form of judicial "torture warrants."\textsuperscript{201}

The real choice with respect to interrogational torture, Dershowitz tells us, is between two alternatives. Assuming that torture should be, and would be, used in the catastrophic case, the question becomes: Is it worse to make torture part of the legal system, or to have it done "off the books and below the radar screen"?\textsuperscript{202} Dershowitz argues that his "torture warrant" proposal ensures that, to the extent it is going to be used, torture would be "done openly, pursuant to a previously established legal procedure."\textsuperscript{203} The only alternative, which Dershowitz rejects, entails secret use of torture in violation of existing law.\textsuperscript{204} Yet, he misses the possibility, which the official disobedience model presents, of using torture "off the books" while not eschewing transparency and accountability. Indeed, as Parts III and IV above demonstrate, "off the books" need not mean "below the radar screen." In fact, as I argue below, if we follow Dershowitz's own criteria for a working model in this context, i.e., one that "reduce[s] the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use,"\textsuperscript{205} the official disobedience model is superior to torture warrants.

The official disobedience model and Dershowitz's torture warrants proposal start from opposite ends with respect to the question whether torture should ever be legally permissible. Under the former model the answer is negative, whereas under the latter it is affirmative. Yet, both models recognize the need to account for catastrophic cases, and accept the argument that, under certain extreme exigencies, torture may be morally defensible. The official disobedience model conceded that public officials may use preventive interrogational torture under such extreme circumstances, but identifies such actions as extralegal. In contrast, Dershowitz seeks to transform torture into part of the legal system by way of advance torture warrants issued by judges. Accordingly, authorities may utilize torture lawfully, provided that they obtain advance judicial torture warrants. \textit{Ex post} ratification by society is thus substituted for

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\textsuperscript{201} DERSHOWITZ, \textit{supra} note 18, at 141, 158–63.  \\
\textsuperscript{202} Id. at 151–52, 156.  \\
\textsuperscript{203} Id. at 151.  \\
\textsuperscript{204} Id.  \\
\textsuperscript{205} Id. at 141.  \\
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ex ante judicial approval.

However, the torture warrant proposal is problematic on its own terms. Furthermore, the official disobedience model does a better job in reducing the use of torture while creating public accountability for its use.

A. WARRANTS AND CATASTROPHIC CASES

The Fourth Amendment requires the government to secure a judicial warrant based on probable cause prior to conducting searches and seizures. However, the warrant requirement has been subject to several important exceptions. These exceptions usually apply when obtaining a warrant is impracticable under specific circumstances. In such special cases, warrantless searches would still be deemed constitutional. Yet, by its own terms, Dershowitz's torture warrant may only be issued in truly catastrophic cases, such as the paradigmatic ticking bomb case where a grave terrorist attack is imminent. In other words, Dershowitz's warrant requirement is only applicable in extreme special cases! It makes little sense for a legal system to regard judicial warrants as unnecessary in special circumstances, even when those circumstances do not amount to an extreme case, yet require, even in such exceptional exigencies (in fact, precisely in those circumstances), a warrant for preventive interrogational torture. Even if a general "national security" exception is not recognized, catastrophic cases, such as the ticking bomb case, are likely to fall into the "exigent circumstances" exception to the warrant and probable cause requirements of the Fourth Amendment. Courts should not

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207. Such exceptions include the following: investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizure of items in plain view, exigent circumstances, vehicle searches, container searches, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable. See, e.g., Theodore P. Metzler et al., Investigation and Police Practices, Warrantless Searches and Seizures, 89 GEO. L.J. 1084, 1084 (2001).


treat torture warrants any differently than other “exigent circumstances.” If anything, the circumstances surrounding the catastrophic case would present a strong case against the need for judicial warrant. One possible explanation for treating torture warrants differently looks at the nature of the activity for which a warrant is required. Torture, it may be argued, is significantly worse than a search with respect to the nature of the individual interests that are compromised and the degree of harm inflicted on such interests. Use of torture must, therefore, be subject to stricter rules. But against the weightier individual interests, the government is likely to present the most compelling competing interest embodied by the catastrophic case. The persuasiveness of this argument notwithstanding, it seems quite clear that the same forces that carved out exceptions to the Fourth Amendment’s warrant and probable cause requirements would have a similar effect in the context of torture warrants.

William Stuntz suggests that

warrant requirements tend to oscillate between two bad poles. Water down the warrant process to make it affordable, and the process becomes pointless; magistrates turn into rubber stamps and the virtue of asking their permission disappears. Make the process a serious screen, and it becomes expensive enough that the police hardly ever use it; the warrant functions as a de facto prohibition.210

Should torture warrants become part of the interrogation procedure of suspected terrorists, courts are likely to turn into rubber stamps, authorizing governmental torture.211 If, on the other hand, torture warrants are to provide a “serious screen,” they will become prohibitive in the context of the catastrophic case.212 In that case we would find ourselves returning to a de facto absolute prohibition on torture without having resolved the challenge of the catastrophic case while, at the same time, not availing the legal system of the benefits of an outright absolute ban on torture (such as the symbolic and educational value of such a sanction).

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210. Stuntz, supra note 110, at 2183.
211. See infra notes 216–19 and accompanying text.
212. See infra notes 222–24 and accompanying text.
B. COURTS AND TORTURE

It has been argued that the need to come before neutral judges to secure a warrant prior to applying torture in catastrophic cases would add another procedural hoop through which interrogators must jump before they are able to use torture. This additional hurdle may reduce the number of interrogations in which torture is applied by presenting another critical juncture for the assessment and evaluation of the necessity of interrogational torture by independent judges who are removed from the needs of the particular interrogation.\textsuperscript{213} Courts may decide, even if in rare cases, not to grant the request to use interrogational torture. Moreover, law enforcement officials, and the lawyers representing them, may screen the cases where a judicial torture warrant is requested to avoid the embarrassment of coming to court with a weak case.\textsuperscript{214} Finally, when a suspect is made aware that she may be legally tortured, she may decide to "voluntarily" divulge the critical information, thus preempting the need to actually use interrogational torture.\textsuperscript{215}

However, each of these claims is problematic. It is widely recognized that judges assume a highly deferential attitude when called upon to review governmental actions and decisions in times of grave national crises.\textsuperscript{216} Indeed, Dershowitz himself

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\item \textsuperscript{213} DERSHOWITZ, supra note 18, at 158 ("I believe, though I certainly cannot prove, that a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects.").
\item \textsuperscript{214} See, e.g., Yoav Dotan, Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada, 33 LAW & SOC'Y REV. 319, 332–34 (1999) (finding that between 1986 and 1995, whereas Palestinian petitioners formally won just 4.5% of cases coming before the Israeli Supreme Court sitting as High Court of Justice, if we consider cases in which the petitioners achieved their goals in full because the government backed off from its original position during the litigation, or during out-of-court settlements, the overall rate of petitioners' success rises to 62.3%). See generally William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 570–71 (2001); Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 STAN. L. REV. 29, 48–58 (2002).
\item \textsuperscript{215} DERSHOWITZ, supra note 18, at 159; cf. Kremnitzer, supra note 39, at 251; John T. Parry, supra note 112, at 247–48 ("When torture is legal in the sense of being an official policy, the victims' suffering and pain become irrelevant to the law and they become further isolated at the moment they are most in need of the law's protections.").
\item \textsuperscript{216} See Gross, supra note 94, at 1034–35 and sources cited therein; see also John C. Yoo, Judicial Review and the War on Terrorism, 72 GEO. WASH. L. REV. 427 (2003) (noting with approval the fact that courts are developing
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expressed serious misgivings about the courts’ ability to protect individual rights and liberties in times of exigency. The context in which courts are to consider issuing torture warrants exacerbates this problem. Ex parte proceedings will not likely provide a meaningful hurdle to torturing suspects if the government’s representative can plausibly inform the judge (or judges) that unless she issues, without delay, a warrant to torture a suspected terrorist, vital information will not be obtained by the authorities, with the highly probable outcome that a significant terrorist attack will not be averted. Operating under such conditions of uncertainty, with the stakes being so high and the time for informed decision so short, courts will opt to err on the side of caution and defer to the judgment of the government. In fact, even if courts may, on rare occasions, decline to issue a warrant authorizing officials to torture a suspect, such exceptional decisions would, paradoxically, “enable” the courts to grant government its wishes in the vast deferential judicial review in contexts such as the detention of enemy combatants and FISA surveillance).


218. See Gross, supra note 94, at 1038–39 (arguing that acute crises tend to lead to an increased reliance on cognitive heuristics as a means of countering the lack of sufficient time to properly evaluate the situation).

219. See, e.g., Posner, supra note 34, at 8 (arguing that Dershowitz “exaggerates the significance of the warrant as a check on executive discretion,” since it “is issued in an ex parte proceeding, and usually the officer seeking the warrant has a choice of judges or magistrates from whom to seek it”). Amnon Reichman explains the likely cost-benefit calculus this way:

If the Attorney General or the court effectively bar the GSS from applying force in a given case and a bomb does indeed explode, the (un-elected) judicial and quasi-judicial institutions will bear the blame. It is therefore easy to see how, in case of doubt, the scales of risk might lead these institutions to err on the side of permitting the use of force for the sake of security.

Reichman, supra note 177, at 67; see also Kreimer, supra note 17, at 320–21.

220. Since the 1987 publication of the Landau Report, supra note 2, the Supreme Court of Israel has heard a large number of petitions brought before it by detained Palestinians who complained that they had been tortured while in GSS custody. Until the 1999 decision in Public Committee Against Torture in Israel v. The State of Israel, H.C. 5100/94, 53(4) P.D. 817, the Court rejected the majority of the petitions, effectively allowing the GSS, for the most part, to continue to employ interrogational torture. In isolated cases, the High Court issued orders to show cause and interim orders temporarily prohibiting the GSS from using all or some of the methods.
majority of cases.221

Dershowitz acknowledges that "in a democracy it is always preferable to decide controversial issues in advance, rather than in the heat of battle."222 However, the requirement of judicial torture warrants runs against this logic. Courts will be asked to issue such warrants very much "in the heat of battle," with the proverbial bomb ticking ominously in the background.223 Discussion about controversial issues "in advance" may certainly be desirable. Yet, the issue of preventive interrogational torture belies almost any ex ante decision, other than highly general and abstract ones. At the same time, catastrophic cases call for more contextualized, case-specific, and particularistic determinations. However, decisions ex post may still alleviate the concerns that are involved in deciding matters "in the heat of battle."224

Forcing the courts to get involved in the gruesome business of torture through the mechanism of torture warrants comes with a heavy price to the integrity of the judicial branch. Issuing torture warrants will make judges "allied with bad acts," or, at the very least, appear to be so allied.225 This will have signifi-

221. See, e.g., Ronen Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 LAW & SOC'Y REV. 781, 781 (1990) (arguing that decisions that counter some governmental practices allow courts to confer legitimacy on other governmental policies).

222. DERSHOWITZ, supra note 18, at 162.


224. See, e.g., CHRISTOPHER N. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918, at 268 (1989) (suggesting that, in light of judicial practice of abdicating review of executive activities during an emergency, "courts should steer a middle course and defer review until the emergency has abated"); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 222 (1998) ("If, in fact, courts are more prone to uphold wartime claims of civil liberties after the war is over, may it not actually be desirable to avoid decision on such claims during the war?"); CLINTON ROSSITER & RICHARD P. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 38 (expanded ed. 1976) (referring to Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), "It is one thing for a Court to lecture a President when the emergency has passed, quite another to stand up in the middle of the battle and inform him that he is behaving unconstitutionally.").

cant costs in the context of the public perception of the judicial system. To the extent that judges would become mere rubber stamps, "adjunct law enforcement officer[s]," issuing torture warrants in all, or nearly all, incidents where such warrants are sought, questions about the "neutral and detached" role of judges may cast further doubts as to whether a valid judicial authorization could be given to an otherwise unconstitutional interrogational torture. On the other hand, the official disobedience model offers a better prospect for keeping the courts, at least initially, away from the sewerage pipes of torture.

Finally, screening by law enforcement agents and their lawyers may also fail to provide a significant check against government use of torture. Richard Posner notes that "[t]he requirement of a warrant would no doubt make the officers seeking them a little more careful, but perhaps not much more truthful or candid." Realizing that courts are likely to assume a highly deferential attitude when asked to issue torture warrants, and seeking to have such warrants as a shield against potential claims and charges, officials will have positive in-


226. It is worth noting that the effects on public perception, while focusing primarily on domestic constituencies—such as the general public and other branches of government—also have an important transnational component. National courts form part of a wider, global, epistemic community of courts. See, e.g., Anne-Marie Slaughter, A Global Community of Courts, 44 HARV. INT'L L.J. 191, 192-94 (2003).


228. See, e.g., United States v. Leon, 468 U.S. 897 (1984); Aguilar v. Texas, 378 U.S. 108, 111 (1964) ("[T]he court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police.").

229. See supra note 175; cf. Levinson, supra note 10, at 2048-49 (arguing that one advantage of the torture warrant proposal is to be found precisely in the fact that it makes the judges complicit in the act of torture).

230. Posner, supra note 34, at 8; see also Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. COLO. L. REV. 75, 82-83 (1992) (arguing that police officers commit perjury in almost twenty percent of Fourth Amendment cases); Stephen A. Saltzburg, The Supreme Court, Criminal Procedure and Judicial Integrity, 40 AM. CRIM. L. REV. 133, 134, 149-51 (2003) (arguing that the Supreme Court is hinting to law enforcement officials that they can escape the Fourth Amendment's restrictions if they offer "phony explanations for actions"). Together with its findings about the use of coercive methods by GSS investigators in interrogating terrorist suspects, the Landau Commission found an established pattern of GSS officers lying to the courts when the voluntary nature of confessions obtained by such methods had been challenged. Landau Report, supra note 2, at 148-49.

231. Thus, for example, a search warrant would virtually guarantee quali-
centives to take an increasing number of cases to the courts. In fact, this would be true even for borderline cases since the risk of not obtaining a warrant is minimal, whereas the benefits for the officials are significant if a warrant is issued.

C. LEGALIZATION AND LEGITIMIZATION OF TORTURE

At the end of its celebrated decision on GSS investigations, 232 the Israeli Supreme Court, sitting as High Court of Justice, suggested that “[w]hether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people.” 233 Attempts to pass legislation that would, in fact, legalize the use of what is known euphemistically as “physical pressure” in interrogations in exceptional cases have since all failed. 234 The arguments against such legalization of torture are overwhelming. Thus, for example, apart from significant public relations costs, legislative accommodation is likely to induce officials to use their draconian interrogation powers, if only because “they are there.” 235 And by the mere incorporation of a set of extraordinary governmental powers into the legal system, a weakening of that legal system’s resolve against using torture will have already taken place. 236

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233. Id. para. 39.
235. CALABRESI, supra note 92, at 167–68 (discussing the claims that an open assertion of judicial power will lead to the use of such power even when it is generally unwelcomed). The availability of such legal powers is also likely to encourage officials to argue that an increasing number of cases are “catastrophic” so as to enjoy the wider panoply of interrogation powers.
236. Kadish, supra note 27, at 356 (“[C]ertain practices are so abhorrent that seeking to control their use through law only magnifies their horror.”). Justice Brandeis’s famous admonishment in Olmstead v. United States is appropriate in this context: “Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . To
Yet, if one rejects legalization of torture by legislation, she should come to the same conclusion with respect to judicial proceedings that result in the issuance of a warrant. In both situations, the legal system indicates that torture may be lawfully applied. Under my proposed model, on the other hand, insofar as preventive interrogational torture exists, it does so outside the ordinary legal system. It is kept separate and not allowed to penetrate the "normal" legal system and contaminate it.

Judicial involvement in authorizing torture will carry significant legitimating value for the government's actions.\textsuperscript{237} It will also establish a pattern of legal precedents (at least in the broad sense of the term). Analyzing the constitutionality of torture warrants, Dershowitz argues that the only constitutional barriers against his proposal may be the Due Process Clauses of the Fifth and Fourteenth Amendments.\textsuperscript{238} However, he argues that these clauses "are quite general and sufficiently flexible to permit an argument that the only process 'due' a terrorist suspected of refusing to disclose information necessary to prevent a terrorist attack is the requirement of probable cause and some degree of judicial supervision."\textsuperscript{239} Yet, Dershowitz's reading of the Due Process Clauses, assuming \textit{arguendo} that one accepts it, is open to two systemic challenges.

First, there is the matter of Justice Jackson's famous warning in \textit{Korematsu}:\textsuperscript{240}

\begin{quote}
[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not declare that in the administration of the criminal law the end justifies the means... would bring terrible retribution." 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).
\end{quote}

\textsuperscript{237} See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 29–31 (1962); Posner, \textit{supra} note 34, at 8 ("[R]equiring a warrant in cases of coercive interrogation would operate merely to whitewash questionable practices by persuading the naive that there was firm judicial control over such interrogations.").

\textsuperscript{238} DERSHOWITZ, \textit{supra} note 18, at 135.

\textsuperscript{239} Id. It is sentences like this one that are often picked up by proponents of an absolute ban on torture as an example of the pernicious effects of conditionalism. Thus, for example, Dershowitz speaks of a "terrorist suspected of withholding information necessary to avert a terrorist attack." But surely we are still concerned with a "suspected terrorist"? Even if we have every reason to believe that the individual undergoing interrogation was the one, for example, who planted the bomb that ticks away in the mall and is about to explode, the presumption of innocence (in the moral and legal sense, as distinguished from "current harmlessness") still applies here. See \textit{supra} note 66.

\textsuperscript{240} Korematsu v. United States, 323 U.S. 214 (1944).
apt to last longer than the military emergency.... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.  

Dershowitz responds by arguing that "[t]olerating an off-the-book system of secret torture can also establish a dangerous precedent." The official disobedience model, however, minimizes the problem of precedent. The extralegal nature of the governmental action adds another layer of insulation against the normalization of such a "dangerous precedent," and its transformation into part of the ordinary legal system. "A breach of the law, even a necessary one, that ought to be justified, can never destroy the law.... But an act legally done can always be drawn into precedent." Although certain ex post ratifications may work to change existing legal rules, norms, and structures, transforming an extralegal, political precedent

241. Id. at 245–46 (Jackson, J., dissenting).
242. DERSHOWITZ, supra note 18, at 162.
243. Lucius Wilmerding, Jr., The President and the Law, 67 POL. SCI. Q. 321, 329–30 (1952) (emphasis added). Wilmerding explains his statement thus:

A breach of the law, even a necessary one, that ought to be justified, can never destroy the law. It stands upon the records of Congress as an exception out of the law to be transmitted to posterity "as a safeguard of the constitution, that in future times no evil might come of it, from a precedent of the highest necessity, and most important service to the country." But an act legally done can always be drawn into precedent... [and] since "men by habit make irregular stretches of power without discerning the consequence and extent of them," one small wrong must lead to a greater one, and in the end force must become the measure of law, discretion must degenerate into despotism.

Id. Eminent political philosophers have also issued warnings against the potential pernicious effect of violating the law, even for a short time and in the face of an exigency. See, e.g., JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT § 166 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (arguing that any use of the prerogative power creates a precedent for future exercises of such power by less benevolent rulers and contending that "[u]pon this is founded that saying, That the Reigns of good Princes have been always most dangerous to the Liberties of their People"); NICCOLO MACHIAVELLI, THE DISCOURSES 195 (Bernard Crick ed., Pelican Classics 1970) (1513–1517) ("Though [extralegal measures] may do good at the time, the precedent thus established is bad, since it sanctions the usage of dispensing with constitutional methods for a good purpose, and thereby makes it possible, on some plausible pretext, to dispense with them for a bad purpose.").
into a legal one, such a shift cannot happen under my proposed model without informed public participation and accountability in the process.\textsuperscript{244}

Second, the impact of judicial torture warrants, and the loose interpretation of the Due Process Clauses that those judicial decisions would require, may expand to other non-torture-related issues. The "transsubstantive" nature of many constitutional limitations, such as the Due Process Clauses—the fact that they apply to "ordinary" criminals and to suspected terrorists—has two important implications in this context.\textsuperscript{246} First, judicial decisions made in the context of the war on terrorism will also apply in the more general (and regular) context of criminal law and procedure. Second, when judges decide "ordinary" criminal cases, they will take into consideration the impact of their rulings on the fight against terrorism.\textsuperscript{246}

D. VISIBILITY

"Sunlight," said Justice Brandeis, was "the best disinfectant."\textsuperscript{247} Similarly, it is argued that rather than have torture done "off the books and below the radar screen," the need to obtain a judicial torture warrant makes the resort to interrogational torture more visible and more amenable to public scrutiny and accountability. The decision whether to torture in any particular case is not left in the hands of the interrogators who may have a strong bias towards using such coercive techniques.

Clearly, having neutral judges examine the governmental case for using torture, even in the preliminary sense that issuing a warrant involves, adds a certain degree of accountability and visibility to the process. The light of judicial inspection penetrates the darkness of the interrogation chamber. However, it is not entirely clear how bright this light is actually going to be.

Decisions on whether to issue torture warrants, conducted as ex parte proceedings, would have a very limited public visibility.\textsuperscript{248} In fact, even in proceedings where both sides are pre-

\textsuperscript{244} See also infra notes 265–66 and accompanying text.

\textsuperscript{245} See Stuntz, supra note 110, at 2140–41.

\textsuperscript{246} Id. ("One cannot read Fourth Amendment cases from the 1980s without sensing judicial attention to the pros and cons of the war on drugs—even when the cases did not involve drug crime. Crack dealers were the most salient crime problem a dozen years ago; now, terrorists occupy that place.").

\textsuperscript{247} LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1913).

\textsuperscript{248} Recognizing this difficulty, Levinson suggests that "all torture war-
sent, visibility may be relatively low. In Israel, arguments about the use of interrogational torture have been brought before the supreme court through petitions of individuals undergoing interrogation who sought to obtain a judicial injunction that would prohibit the application of coercive interrogation techniques. At least until the court's 1999 decision in Public Committee Against Torture in Israel v. The State of Israel, the vast majority of the court's decisions in those petitions have been extremely brief, often including no more than a few lines and the ultimate conclusion.

More significantly, the sensitive nature of governmental intrusion, the intelligence-sensitive nature of the information relied on to justify that intrusion, and the severity of the governmental interests and the threats that are involved in the catastrophic case are likely to lead to the throwing of a curtain of secrecy over the proceedings. Indeed, Dershowitz himself recognized this possibility when he wrote, back in 1989, that

> Even if the mere public disclosure of the problem would be dangerous to the security of the state... there are secret options which are far more democratic than [the ones adopted by the Landau Commission]. Among these are... judicial panels authorized to approve special measures under extraordinary circumstances.

Consider two examples from different, though related, contexts, where despite judicial monitoring and supervision, secrecy rather than visibility has triumphed.

Since the terrorist attacks of September 11, 2001, the United States government has increasingly turned to immigration law in furthering the fight against terrorism. As David

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251. See Posner, * supra* note 34, at 8, stating:

> [I]t is probably inevitable that in national-security cases the judicial officers authorized to issue such warrants will be chosen in part for their sensitivity to security concerns. Moreover, the warrants and the affidavits supporting them, as well as the judges' reasons for granting the warrants, would be likely to remain secret.

253. See, e.g., COLE, * supra* note 88, at 22-35 (discussing the use by the Justice Department of immigration law for pretextual mass preventive deten-
Cole observes, "[f]rom the beginning, the Justice Department determined that secrecy was critical to its preventive detention campaign."  That need for secrecy found its most startling expression in the decision to conduct secret hearings in accordance with the instructions contained in the "Creppy memorandum," named after Chief Immigration Judge Michael Creppy. According to the Creppy memorandum, all immigration cases designated as of "special interest" to the September 11 investigation are to be conducted in secret. Indeed, such cases are not even to be listed on the docket, and immigration judges hearing such cases were instructed "to refuse to confirm or deny that the cases existed."

Another example is the establishment of the special Foreign Intelligence Surveillance Court (FISC) under the Foreign Intelligence Surveillance Act (FISA) of 1978. Composed of eleven federal district judges, designated by the Chief Justice, FISC meets in secret and is authorized to issue ex ante surveillance orders, which may include search warrants, based on probable cause that the target of the search is "a foreign power or an agent of a foreign power." Proceedings before FISC are conducted as closed, ex parte hearings. The combined effect of

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254. *Id.* at 26.
255. *Id.*
256. *Id.; see also* Ctr. for Nat. Sec. Studies v. United States Dept. of Justice, 331 F.3d 918 (D.C. Cir. 2003); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002).
258. Concerns about the independence of FISC judges have been raised in light of the fact that they are appointed for a seven-year term, but their designation and appointment may be revoked during that term. See United States v. Cavanagh, 807 F.2d 787, 792 (9th Cir. 1987) (rejecting the claim); see also Comment, Constitutional Law—Fourth Amendment—Separation of Powers—Foreign Intelligence Surveillance Court of Review Holds That Prosecutors May Spy on American Agents of Foreign Powers Without a Warrant—In re Sealed Case, 310 F.3d 717 (Foreign Int. Surv. Ct. Rev. 2002), 116 HARV. L. REV. 2246, 2252–53 (2003) (expressing concern about the institutional integrity of FISC).
secrecy and the courts' general proclivity to defer to the executive in matters of national security is clearly demonstrated by FISC's record. For example, in 2002, 1228 applications were made to FISC for electronic surveillance and physical searches. All, without exception, have been approved by the court.262 In over twenty-five years, FISC has approved all but less than a handful of applications.263

The possibility of resorting to preventive interrogational torture presents us with tragic moral, social, political, and legal choices. It is tempting to avoid having to grapple with those. Even the mere talk about torture is disconcerting. We would rather prefer to believe that we, as a society, are above moral reproach.264 The semblance of effective judicial control over the use of torture, through the mechanism of torture warrants, and the maintenance of a veneer of legal normality, would allow the public to live in a fool's paradise, conveniently ignoring crude realities. Court-conferred legitimacy over interrogational torture would make it easier to dispose of the need for a meaningful, and painful, public soul searching.265


263. There is another respect in which the experience under FISC should give supporters of torture warrants a reason to be cautious. Dershowitz argues that use of torture warrants would result in better protection of the rights of suspects, among other things, because coercive interrogational techniques will only be used in order to extract information that is critical to prevent further terrorist attacks and, in return, such information will not be admitted into evidence in any future criminal trial against that suspect. DERSHOWITZ, supra note 18, at 159; see also Zuckerman, supra note 32, at 364–65. However, it should be noted that a FISA warrant does permit a search whose fruits may be used in subsequent criminal proceedings. See Yoo, supra note 216, at 443.

264. See, e.g., Lahav, supra note 7, at 538 (“The complacence of the entire family in hiding the reality is one of the gravest consequences of terrorism and counterterrorism. People develop a dependence upon the security forces, a tendency to defer to their judgment, and above all, a willingness to suppress the unpleasant. It is better not to know.”); Levinson, supra note 10, at 2042–43 (discussing a “don’t ask, don’t tell” policy with respect to using torture in interrogations).

265. As George Alexander explains,

In evaluating the role of courts in emergencies it is important to consider not only the fact that bad decisions such as Korematsu may infest law long after the emergency has passed, but also the fact that they provide an imprimatur for military-executive decisions which might otherwise draw more political disfavor. The absence of court approval, as for example during the war in Vietnam, allows the questions of legitimacy full sway in public discussion.

George J. Alexander, The Illusory Protection of Human Rights by National
It is against this background of limited judicial visibility with no, or at best partial, public transparency and deliberation, that one ought to measure and assess the requirement of ex post public ratification under the official disobedience model. The need for ex post ratification promotes greater public accountability. It also promotes an open debate about the principles and rules that are involved in preventive interrogational torture, as well as over their particular applications in specific cases. It leaves no choice but for both government officials and the public to take a stand on these matters and then be politically, legally, and morally responsible for it.266

E. ACCOUNTABILITY

There is another sense in which the model of official disobedience promotes greater accountability than the torture warrants proposal.

As noted above, the official disobedience model imposes a significant burden on state agents who must act, sometimes extralegally, without the benefit of legal preapproval of their actions by the courts or the legislature. Officials must put themselves in the line of fire and act at their own peril. If they believe that the stakes are so high as to merit extralegal action, they may take such action and hope to be able to convince the public to see things their way. This awesome burden militates against a "rush to torture." At the same time, the need to obtain ex post ratification facilitates greater accountability by the officials who must submit their actions to public scrutiny.

The torture warrant model shifts the burden and the risk to the courts. Rather than having to act at their own peril, public officials can ask for a judicial torture warrant. Once such a warrant is issued, and as long as the official stays within the limitations set therein, the actor bears practically no legal risk related to her actions. Thus, the ex post review process places stronger disincentives on state agents to resort to torture in the first place and hence "reduce[s] the use of torture to the smallest amount and degree possible."267 By shifting the burden of approving interrogational torture from officials to the courts, rather than insisting on official and public responsibility, the torture warrant model may further "lower the quality of the


267. DERSHOWITZ, supra note 18, at 141.
other departments' performance by denuding them of the dignity and burden of their own responsibility."

F. INSTITUTIONALIZATION

Recognizing the possibility of ex post ratification is not the same as authorizing the use of preventive interrogational torture ex ante. Unlike the latter, ex post ratification serves, at most, as an ad hoc, individualized defense to specific state agents against civil or criminal charges in particular cases. It cannot serve as a general, institutional, conduct-guiding rule to be relied upon ex ante. Subsequent ratification may only be available to individual public officials after the fact, and thus, does not set a priori guidelines for action.

The individualized nature of subsequent ratification is significant for yet another reason. Institutionalizing interrogational torture reinforces—for example, by conferring imprimatur of legality and legitimacy—social, hierarchical structures that authorize individuals, namely the interrogators, to act violently. As Robert Cover warned in his aptly named Violence and the Word, "[p]ersons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously." In such circumstances it is much more likely that resort will be made to violence in interrogations. On the other hand, the need to act extralegally and hope for subsequent ratification focuses on individual behavior. It is not amenable to institutionalization. It is left up to the individual interrogator to determine whether to use violence in any given case. Acting at her own peril, the interrogator acts much more as an autonomous moral agent than as an agent for the hierarchical institution which she serves.

268. BICKEL, supra note 237, at 24.
270. See, e.g., Kadish, supra note 27, at 347 ("[W]hile a person may justifiably use cruel methods to obtain information in certain extraordinary situations, a state may not justifiably so provide in its law, but must rather maintain a flat and unqualified ban against such measures.").
Low-ranking officials may seek the guidance of, and approval by, their superiors before acting extralegally if only in order to protect the former against future charges and allegations. Yet, if it takes place, such seeking of approval may carry its own benefits. First, it would create additional opportunities to deliberate and review the question of using torture in the particular case. Second, Dershowitz's torture warrant proposal assumes that courts must be involved in the process to monitor, supervise, and regulate the use of interrogational torture. Yet, these goals may also be obtained effectively by a system of "centering responsibility in the hands of those [high-ranking] police officers who are expected to be the most qualified (because they have the most experience) and who have the most to lose (because of the threat of demotion) if a serious error is made."

Thus, Richard Frase suggests that "contemporaneous police supervision [may] be stricter than after-the-fact supervision by judges, who may be tempted to defer to police expertise." Yet, as argued above, judicial deference to police is also going to be especially strong in the context of issuing ex ante torture warrants. Internal high-ranking authorization within the relevant investigatory bodies may offer a possibility of supervision while keeping public officials accountable for their actions. Under such a centralized system, decisions to employ interrogational torture would only be taken by certain high-ranking officers who may be farther removed from the scene than individual interrogators.

In 1987, Justice Brennan made the following observation:

Prolonged and sustained exposure to the asserted security claims may be the only way in which a country can gain both the discipline necessary to examine asserted security risks critically and the expertise necessary to distinguish the bona fide from the bogus . . . . In this respect, it may well be Israel, not the United States, that provides the best hope for building a jurisprudence that can protect civil liberties against the demands of national security.


273. Id. at 556.

274. Id. (suggesting that police supervision represents a useful intermediate approach between judicial control and no control).

275. William J. Brennan, Jr., The Quest To Develop a Jurisprudence of Civil Liberties in Times of Security Crises, 18 ISR. Y.B. HUM. RTS. 11, 18-20
While this may take the case a bit too far, it certainly is interesting to note that the Israeli Supreme Court—which has been grappling with the tragic choices presented in this Article far longer than any other judicial institution—decided in 1999 to reject the ex ante approach and adopt a position that focused on ex post, individualized review. In *Public Committee Against Torture in Israel v. The State of Israel*, the Israeli Supreme Court, sitting as High Court of Justice, ruled that GSS investigators enjoyed the same interrogation powers that were available to police officers and, by the same token, were subject to the same restrictions and limitations that applied to police investigations, flowing from the requirement that an interrogation be fair and reasonable. The court proceeded to rule that certain specific interrogation methods applied by the GSS were prohibited under Israeli law. Arguing before the court, the state contended that authorization for such otherwise impermissible methods of interrogation could be derived from the defense of "necessity." That argument was squarely rejected by the court, holding that "general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not in defenses to criminal liability. The principle of 'necessity' cannot serve as a basis of authority." At the same time, the court indicated its willingness to presume that if a GSS investigator—who had applied physical interrogation methods for the purpose of saving human life—was criminally indicted, the "necessity defense" would likely be open to her "in the appropriate circumstances." Thus, while no ex ante legal authorization exists

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277. Id. paras. 20, 32.
278. Id. paras. 24–31.
279. Id. para. 33.
280. Id. para. 37.
281. Id. para. 34. While that was not the issue before the court in that case, id. para. 35, the court went on to suggest that, provided the conditions of the [necessity] defense are met by the circumstances of the case, the investigator may find refuge under its wings. Just as the existence of the "necessity defense" does not bestow authority, the lack of authority does not negate the applicability of the necessity defense or of other defenses from criminal liability. The Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from "necessity."

Id. para. 38.
under Israeli law for the use of interrogational torture (and, consequently, there is no room for judicial orders authorizing such use), the court was willing to accept the possibility that "the most lawless of legal doctrines" would serve as an after-the-fact defense to individual GSS investigators who applied such methods of interrogations in catastrophic cases.

VI. TALKING ABOUT TORTURE

The previous parts set out the main features of my approach to the conundrum posed by preventive interrogational torture. My proposed solution is based on the twin concepts of pragmatic absolutism and official disobedience. I support an absolute legal ban on torture while simultaneously suggesting that in catastrophic cases public officials may choose to act outside the legal order, at times even violate the otherwise entrenched absolute prohibition on torture.

Some may charge me with trying to have my cake and eat it too, that is, supporting an absolute legal ban on torture precisely on the ground that it will not function as absolute in real life. Perhaps this is true. Guido Calabresi notes that subterfuges often accompany tragic choices. "We look for solutions which seek to cover the difficulty and thereby permit us to assert that we are cleaving to both beliefs in conflict." To be sure, my proposal attempts to cling to both sets of values involved in assessing torture in general, and preventive interrogational torture in particular. However, rather than cover up the difficulty I seek to expose it and ensure that it is dealt with in as transparent, open, and public manner as possible. This desire for visibility, accountability, openness, candor, and responsibility is shared by proponents of ex ante torture warrants and of ex post public ratification alike.

But is public and open debate about torture, in and of itself, desirable? Or is it better to treat the absolute ban on tor-

282. Dershowitz, supra note 22, at 196.
283. H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, at para. 34 ("[W]e are prepared to accept—although this matter is...contentious—that the 'necessity defense' can arise in instances of 'ticking bombs'...".). The court held that the necessity defense may be available to GSS investigators "either in the choice made by the Attorney-General in deciding whether to prosecute, or according to the discretion of the court if criminal charges are brought." Id. para. 40.
ture as axiomatic and avoid attempts to prove its desirability or usefulness? Does merely engaging in debate on torture reflect "loose professionalism"?286

William Twining once noted (but rejected) the argument that "philosophical analysis of the problem may provide ammunition which could be used or abused by those who seek to justify actions which reflective and reasonable men would condemn without qualification."287 Henry Shue asked similarly, "if practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business?"288

Yet, the alternative to no open debate over the use of torture (or, indeed, to discussion that merely replicates the mantra that torture is absolutely prohibited) is not the disappearance of the practice of torture. While we abhor the detailed medieval codes and procedures on torture, we also ought to recognize that the practice remains. By refusing to discuss torture, we do not make it go away; we drive it underground.289 Moreover, by refusing to acknowledge that the notion of torture is more complex than many supporters of the "torture-is-banned-and-that-is-all-there-is-to-it" approach would have us believe, we run the risk of having the general public perceive the legal system as either utopian or hypocritical. After all, most of us believe that most, if not all, government agents, when faced with a genuinely catastrophic case, are likely to resort to whatever means they can wield—including preventive interrogational torture—to overcome the particular grave danger that is involved. And I believe that most of us hope they will do so.

286. Weisberg, supra note 76 (manuscript at 2) (describing "loose professionalism" as "the phenomenon of legal discourse that slips dangerously towards the known-to-be-wrong").


288. Shue, supra note 17, at 124. Although Shue referred to such discussions as opening Pandora's Box, such fears obviously did not prevent either Twining or Shue from writing valuable contributions to the debate. See Nagel, supra note 34, at 8 (explaining that "if it is not allowable to do certain things . . . then no argument about what will happen if one doesn't do them can show that doing them would be all right" because "absolutism . . . means that we cannot deliberate on whether such measures are justified by the fact that they will avert still greater evils"); Weisberg, supra note 76 (manuscript at 3) ("[t]he lessons of history are clear in demonstrating that . . . rationalizations [of torture] not only help the practice thrive but often provide . . . the main reasons for its baleful success.").

289. EVANS & MORGAN, supra note 11, at 55–60.
The prohibition on torture and the catastrophic case present us with truly tragic choices. Public officials (and, under my proposal, members of the general public) must choose between several fundamental social values, such as the right to be free from torture and the right to life.\textsuperscript{290} We may as well make such choices in as informed a manner as possible, taking into account the widest panoply of relevant moral and legal considerations.

\textsuperscript{290} Guido Calabresi & Philip Bobbitt, Tragic Choices 17 (1978) ("[I]t is the values accepted by a society as fundamental that mark some choices as tragic.").