

TORTURE AND JUSTIFICATION: DEFENDING THE INDEFENSIBLE

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INTRODUCTION

As the images of beaten and humiliated Iraqi prisoners at the Abu Ghraib prison flashed around the world in the spring of 2004, two major themes emerged in the press commentary. First, there was sheer revulsion at the practices by the American service troops who were administering the prison, accompanied by the question of how this scandal would affect American credibility in efforts to rebuild and democratize Iraq. And second, there was speculation about whether these practices reflected simply the bizarre anomalous behavior of a small number of low-ranking servicemen and women, or whether they were an extension of aggressive interrogation policies that had been put into place at the highest levels of military command.¹ While the debate raged on this empirical question, another parallel debate emerged: could any argument be made that some or all of the abuses that took place at Abu Ghraib were, in fact, justified and wise policy?

For centuries, the unequivocal position of the civilized world has been that torture is an abomination, one of the worst violations imaginable of human dignity and moral decency. As St. Augustine put it in *The City of God*, torture is “a thing, indeed, to be bewailed, and, if that were possible, watered with fountains of tears.”²

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¹ See generally THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ (Steven Strasser ed., 2004); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg ed., 2005). Press accounts too numerous to name detailed the Abu Ghraib revelations and the debate over their policy implications. See, e.g., Eric Schmitt, *Abuses at Prison Tied to Officers in Intelligence*, N.Y. TIMES, Aug. 26, 2004, at A1 (detailing how “[a] high-level Army investigation has found that military intelligence soldiers played a major role in directing and carrying out the abuses of Iraqi prisoners at Abu Ghraib prison”); Josh White, *Abuse Report Widens Scope of Culpability: Generals Point to Contractors, Military Intelligence Soldiers*, WASH. POST, Aug. 26, 2004, at A1. See also Jackson Diehl, Editorial, *How Torture Came Down From the Top*, WASH. POST, Aug. 27, 2004, at A21 (arguing that the abuses were the result of top-down interrogation directives).

² See ST. AUGUSTINE, THE CITY OF GOD, bk. XIX, ch. 6, <http://www.ccel.org/fathers/NPNF1-02/> (last visited January 23, 2004) (bemoaning the use of torture to discern innocence or guilt because it

With that preliminary matter out of the way, are there any circumstances in which a government would be justified in employing torture? The most likely such circumstance for its use would be as a technique of interrogation in a “ticking time bomb” situation. If torture were permitted in such situations, how should the law treat the torturers? The September 11 attacks helped spark debate on this issue,³ and there is considerable evidence that the U.S. has placed terror suspects in the hands of foreign governments to “contract out” the severest interrogation techniques.⁴ Many international agreements prohibit the use of torture in any circumstance, including Article 5 of the Universal Declaration of Human Rights,⁵ Article 7 of the International Covenant on Civil and Political Rights,⁶ and the U.N. Convention Against Torture, and Other Cruel, Inhuman, or Degrading Treatment or Punishment.⁷ In 1999, the Israeli Supreme Court ruled impermissible certain methods of physical interrogation employed by the country’s General Security Service.⁸ In his opinion, President Barak, chief of the Court, outlined the fundamental conflict of values inherent to all forms of interrogation:

On the one hand, lies the desire to uncover the truth, thereby fulfilling the public interest in exposing crime and preventing it. On the other hand, is the wish to protect the dignity and liberty of the individual being interrogated. This having been said, these interests and values

often results in the accused being “condemned to death both tortured and innocent”).

³ See, e.g., ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 131-63 (2002); TORTURE: A COLLECTION (Sanford Levinson ed., 2004); Sanford Levinson, “Precommitment” and “Post-Commitment”: The Ban on Torture in the Wake of September 11, 81 TEX. L. REV. 2013 (2003); Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28 (reviewing DERSHOWITZ, *supra*); Philip B. Heymann, *Torture Should Not Be Authorized*, BOSTON GLOBE, Feb. 16, 2002, at A15; Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6; Eric Schmitt, *There Are Ways to Make Them Talk*, N.Y. TIMES, June 16, 2002, §4, at 1.

⁴ See, e.g., Duncan Campbell, *September 11: Six Months on: U.S. Sends Suspects to Face Torture*, GUARDIAN (London), Mar. 12, 2002, at 4; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1; Vicki Haddock, *The Unspeakable: To Get at the Truth, Is Torture or Coercion Ever Justified?*, S.F. CHRON., Nov. 18, 2001, at D1; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

⁵ G.A.Res. 217 A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁶ S. Exec. Doc. E., 95-2, at 23 (1978); 999 U.N.T.S. 171, 175 (1966) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁷ G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984).

⁸ See *Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, 38 I.L.M. 1471 (1999) (H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Gov’t of State of Israel, 53(4) P.D. 817) [hereinafter *GSS Case*].

are not absolute. A democratic, freedom-loving society does not accept that investigators use any means for the purpose of uncovering the truth.⁹

It is this dichotomy—one between categorical imperatives and social utility, between rights and interests, between absolutism and consequentialism—that defines the modern dilemma facing liberal democracies in the fight against terrorism. Part I of this article examines the legal and moral justifications for the use of torture in ticking bomb situations. It argues that torture should be employed by government agents to help avert the death of innocents when no other means are possible.¹⁰ It critiques two broad cate-

⁹ *Id.* at 1481. For analyses of this case and the tough issues it presented, see Emanuel Gross, *Democracy in the War Against Terror—The Israeli Experience*, 35 LOY. L. REV. 1161 (2002); John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73 (2002); Amnon Reichman, "When We Sit To Judge We Are Being Judged": *The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41 (2001); Jason S. Greenberg, Notes & Comments, *Torture of Terrorist Suspects in Israel: The United Nations and the Supreme Court of Israel Pave the Way for Human Rights To Trump Communitarianism*, 7 ILSA J. INT'L & COMP. L. 539 (2001); Catherine M. Grosso, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305 (2000); Matthew G. St. Amand, Note, *Public Committee Against Torture in Israel v. The State of Israel et al.: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?*, 25 N.C.J. INT'L L. & COM. REG. 655 (2000).

¹⁰ This article will not address the constitutional question of whether torture is permissible. It is quite possible that the same government officer who is acquitted of torturing a terrorist suspect due to justification would also be found to have violated that suspect's rights under the Fifth, Eighth, or Fourteenth Amendment. This article will only consider whether criminal liability can be avoided for torturing suspects when the stakes are high enough. For a discussion of the constitutional question of torture, see Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 283-94 (2003).

This article also will not explore at length how, exactly, torture is properly defined. For the purposes of this article, torture will be defined simply as the deliberate infliction of severe physical pain. The majority opinion in the case of *The Republic of Ireland v. The United Kingdom* defined torture similarly, as deliberate inhumane treatment that causes severe and cruel pain and suffering. *Republic of Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H. R. Rep. 25, 80 (1978). There is certainly some borderline question of which methods of interrogation qualify as torture, and which do not, and whether purely psychological torment qualifies as such. The Convention Against Torture defines the term very broadly:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering 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 and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 19 (1988), 1465 U.N.T.S. 85, 114-15. For a discussion of what, exactly, can constitute torture, see Emanuel Gross, Article, *Legal Aspects of Tackling*

gories of arguments against torture. The first argument is that torture is absolutely never justified, no matter how high the costs, even if it can save lives. The second argument maintains that torture, though perhaps theoretically permissible under extreme circumstances, is so subject to abuse and negative side effects that a blanket prohibition is superior to any legal permission for torture, no matter how scrupulous and rarely granted.

Part II examines the proper legal treatment for government officers who torture suspects. It argues that the most effective way of permitting torture when necessary is to allow would-be torturers to rely on the common affirmative defense of justification. It also examines the most audacious recent proposal, which comes from Alan Dershowitz. He has argued that courts should be allowed to issue “torture warrants” to prevent terrorist attacks. This article argues, however, that judges should *not* issue “torture warrants” or similar forms of permission to government officers to engage in such action. The reason for this is not merely because, as the Israeli Supreme Court seemed to fear, that it would legitimize an act almost universally regarded as an affront to human decency and dignity, or that it would inadequately deter interrogators from employing such means when not really necessary. Rather, the reason torture warrants should not be issued is that their use would also *overdeter* officers from employing these extreme means in cases when it really is the right thing to do. Instead of relying on *ex ante* judicial permission, interrogators who later face prosecution for their acts should rely on the justification defense, which provides the proper incentives to perform extreme acts of interrogation when absolutely necessary, and at no other times. Part III concludes, offering a brief comment on whether the Abu Ghraib abuses, and the accompanying government treatment of the question of torture in the war on terror, meet this article’s proposed standards for legal treatment of torture by government officials.

I. THE PERMISSIBILITY OF TORTURE

It is so obvious that it hardly need be repeated that the vast majority of moral, political, and historical commentators have viewed torture as a tool of sadism and barbarism, a sign that those committing it are thoroughly and repulsively immoral, uncivilized, or both. According to Alan Dershowitz, “[t]orture has been off the agenda of civilized discourse for so many centuries that it is a subject reserved largely for historians rather than contempo-

Terrorism: The Balance Between the Right of a Democracy To Defend Itself and the Protection of Human Rights, 6 UCLA J. INT’L L. & FOR. AFF. 89, 94-97 (2001).

rary moralists.”¹¹ But just how strong is this prohibition? Is torture always beyond the pale, a method so taboo in civilized, democratic societies that no humane government actor should even consider it as a policy option? Or are there cases where torture, however disconcerting, is morally permissible or even morally compelled? This section explores the arguments for and against government sanctioned torture, not only from an *a priori* standpoint, but also from a practical, utilitarian one. It argues that torture, when the stakes are high enough, is justified, and the pragmatic objections to its use are unconvincing. It then moves on to some of the most potent arguments that have been made with respect to how the law should treat those who torture, and attempt to explain how these arguments all come up short.

A. *Moral Arguments For and Against Torture*

Evaluating its country’s General Security Services’ practices of interrogation, the Israeli Supreme Court ruled:

[A] reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject [of interrogation] and free of degrading handling whatsoever Human dignity also includes the dignity of the suspect being interrogated This conclusion is in perfect accord with (various) International Law treaties—to which Israel is signatory—which prohibit the use of torture, ‘cruel, inhuman treatment’ and ‘degrading treatment.’ These prohibitions are ‘absolute’ There are no exceptions to them and there is no room for balancing.¹²

This view of torture has found its way into some of the most widely ratified documents of international law.¹³ In international law, according to Geert-Jan Knoops, the prohibition against torture is among those *jus cogens* norms (along with crimes against humanity, genocide, torture, rape, hijacking, and terrorism) that are so engrained that they can never be justified.¹⁴ In 1994, the United States Senate ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which affirmed a universal ban against torture and provided that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁵ In short, the Convention

¹¹ DERSHOWITZ, *supra* note 3, at 136.

¹² *GSS Case*, *supra* note 8, at 1482.

¹³ See sources cited *supra* notes 5-7.

¹⁴ See GEERT-JAN J.G. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 29 (2001).

¹⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), art. 2(2), 1465 U.N.T.S. 85, 114.

stated that torture is absolutely forbidden, no matter how dire the circumstances.¹⁶ This position on torture has been reaffirmed in federal laws imposing civil and criminal liability, including the death penalty, for torture committed by American nationals abroad or foreign nationals in the U.S.¹⁷

Even in the face of the threats of modern terrorism, many of the most conservative commentators have nonetheless shied away from conceding that torture can ever be a morally viable path for a government to take. Columnist Jeff Jacoby, for instance, denies that torture should ever be a legitimate option:

[W]hat if, in an extreme case, torture is the only way to extract information that would save thousands of lives? . . . Don't we have to keep torture available as a last and desperate option? No. The way to win this war is not to adopt our enemies' evil methods. Resort to torture could conceivably stave off a catastrophe. But at what price to our self-respect? . . . We are in a war of the decent against the indecent. We dare not cross the line that separates the two.¹⁸

Likewise, a report on torture in *The Economist* acknowledged that torture might, in extreme cases, be effective, but nonetheless concluded that “for the democratic West, any such gains would be outweighed by greater harm. The prohibition against torture expresses one of the West's most powerful taboos—and some taboos (like that against the use of nuclear weapons) are worth preserving even at heavy cost.”¹⁹ Dershowitz writes that the strongest argument against allowing torture, even in ticking bomb situations, is itself a utilitarian argument: “Experience has shown that if torture, which has been deemed illegitimate by the civilized world for more than a century, were now to be legitimated—even for limited use in one extraordinary type of situation—such legitimization would constitute an important symbolic setback in the worldwide campaign against human rights abuses.”²⁰ He also quotes two Bentham scholars writing that “[e]ven an out-and-out utilitarian can support an absolute prohibition against institutionalised torture on the ground that no government in the world can be

¹⁶ But see Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 *Tex. L. Rev.* 2013, 2018 (2003) (noting that the United Nations Convention appears “to have what may be describable as ‘expressive’ or ‘aspirational’ dimensions that serve to make it a less than completely reliable guide to the actual behavior even of the states that have ratified it—at least with regard to the absoluteness of its prohibitions”).

¹⁷ See 18 U.S.C. § 2340A(a)-(b) (2000) (authorizing criminal prosecution for torture regardless of where it was committed, as long as the perpetrator is found in the United States); Torture Victim Protection Act, 28 U.S.C. § 1350(2) (2003) (establishing civil liability).

¹⁸ Jeff Jacoby, *How Not To Win the War*, *BOSTON GLOBE*, Jan. 26, 2003, at H11.

¹⁹ Editorial, *Is Torture Ever Justified?*, *THE ECONOMIST*, Jan. 11, 2003, at 11.

²⁰ DERSHOWITZ, *supra* note 3, at 145.

trusted not to abuse the power and to satisfy in practice the conditions he would impose.”²¹

But in the face of this nearly universal revulsion, some dissenters have come forth to argue that under extreme circumstances, torture committed by the agents of governments seeking to protect the public can be not only morally permissible but even morally required.²² The utilitarian principle of most of the arguments in favor of torturing suspects under certain circumstances is that it is sometimes worth it to act horrifically toward one person—most probably a highly guilty person—because doing so might save dozens or hundreds or thousands of innocent lives. Our political, legal, historical, and popular literature is filled with the proposition that we would rather allow many guilty persons to go free than to convict one innocent person.²³ But how many innocent lives are we willing to see ended simply to avoid tormenting one person who almost certainly *is* guilty?

Perhaps the most eloquent and best-known argument for the rightness of torturing suspects in ticking bomb situations is Michael Walzer’s “dirty hands” theory of leadership.²⁴ Getting his title from the play of the same name by Jean-Paul Sartre,²⁵ Walzer also quotes some lines by Sartre’s

²¹ *Id.* (quoting W.L. Twining & P.E. Twining, *Bentham on Torture*, N. Ireland Legal Q., Autumn 1973, at 305, 348-49).

²² See, e.g., DERSHOWITZ, *supra* note 3, at 131-63; MARK J. OSIEL, *MASS ATROCITY, ORDINARY EVIL*, AND HANNAH ARENDT 225 n.183 (2001) (“[T]orture is morally defensible when clearly necessary to prevent a much greater evil.”); Posner, *supra* note 3, at 30 (“[Alan Dershowitz] makes a point that only the most doctrinaire civil libertarians (not that there aren’t plenty of them) deny: 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.”).

²³ It is highly varied, however, just how many guilty people we are willing to see go free rather than convict one innocent man. For a fabulous survey of the differing views throughout history of the proper number of guilty men, see Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997). William Blackstone, for example, apparently thought that the proper *n* was ten. *Id.* at 174 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* *352). Charles Dickens, however, preferred “hundreds” to go free rather than see one innocent man executed. *Id.* at 190 (citing Letter from Charles Dickens to the editors of *The Daily News* (Feb. 23, 1846), in *SELECTED LETTERS OF CHARLES DICKENS* 213, 215 (David Paroissien ed., 1985)). There is also the story “of a Chinese law professor, who listened as a British lawyer explained that Britons were so enlightened that they believed it was better that ninety-nine guilty men go free than that one innocent man be executed. The Chinese professor thought for a second and asked, ‘Better for whom?’” *Id.* at 211 (citing Dominic Lawson, *Notebook: The Voters Want Cash, Mr. Clarke*, *DAILY TELEGRAPH* (London), Apr. 8, 1995, at 17) (citation omitted). And finally, there is the lethargic Police Chief Wiggum on *The Simpsons*, who is heard to remarked, “I’d rather let a thousand guilty men go free than chase after them.” *The Simpsons: Saddle Sore Galactica* (FOX television broadcast, Feb. 6, 2000).

²⁴ See Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *PRIVATE AND PUBLIC ETHICS: TENSIONS BETWEEN CONSCIENCE AND INSTITUTIONAL RESPONSIBILITY* 96 (Donald G. Jones ed., 1978).

²⁵ See JEAN-PAUL SARTRE, *Dirty Hands*, in *NO EXIT, AND THREE OTHER PLAYS* 201 (Lionel Abel trans., 1949).

character, the communist leader Hoerderer: “I have dirty hands right up the elbows. I’ve plunged them in filth and blood. Do you think you can govern innocently?”²⁶ Walzer argues that for politicians, “sometimes it is right to try to succeed, and then it must also be right to get one’s hands dirty.”²⁷ To achieve the greater good, people in positions of leadership sometimes must do things they have major scruples about. He gives the example of the exact situation that has been discussed above: the decision whether to torture “a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings around the city, set to go off within the next twenty-four hours.”²⁸ A moral politician making the decision will authorize the torture “even though he believes that torture is wrong, indeed abominable, not just sometimes, but always.”²⁹ In Walzer’s view, this decision, as horrific as it is, is the correct one: “Here is the moral politician: it is by his dirty hands that we know him. If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean.”³⁰ It is this role-specific ethical standard that distinguishes proper behavior by the average person from proper behavior by those who govern us.

Walzer’s dirty hands theory perhaps owes something to Bentham, the original and purest of choice-of-evils utilitarians, who found the question rather easy:

For the purpose of rescuing from torture [a] hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practising or about to be practised, should refuse to do so? To say nothing of wisdom, could any pretence be made so much as to the praise of blind and vulgar humanity, by the man who to save one criminal, should determine to abandon a 100 innocent persons to the same fate?³¹

Bentham’s view also finds a worthy successor in Judith Jarvis Thomson, who presents one classic case of legal justification: the Trolley Problem.³² In this situation, first imagined by Philippa Foot,³³ an out-of-control

²⁶ *Id.* at 224.

²⁷ Walzer, *supra* note 24, at 101.

²⁸ *Id.* at 104.

²⁹ *Id.* at 104-05.

³⁰ *Id.* at 105.

³¹ Bentham, Mss. Box 74b., p.429 (27th May, 1804), *quoted in* Twining & Twining, *supra* note 21, at 347 n.3.

³² See JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 176 (1990) [hereinafter THOMSON, REALM OF RIGHTS]; Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 THE MONIST 204 (1976) [hereinafter Thomson, *Killing*], *reprinted in* JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK 78 (William Parent ed., 1986); Judith Jarvis Thomson, *The Trolley Problem*,

trolley car is hurtling down a track, and five men are in its path. Bloggs is a passerby who happens to be standing by the track next to the switch. If he throws the switch the trolley will be shunted off to a spur. The five men will be saved, but a sixth man, who is immobilized on the spur, will be killed. So Bloggs faces the choice: he can do nothing, in which case five men will be killed, or he can throw the switch, saving the five men but consigning one equally innocent man to certain doom.³⁴ Thomson concludes that Bloggs is morally justified, but not morally required, to throw the switch.³⁵ Thomson also says that “[e]verybody to whom I have put this hypothetical case says, Yes, it is” justified.³⁶ She notes that some even say it is morally required.³⁷ And the moral duty to make the affirmative choice of pursuing the path that minimizes harm falls hardest on those who have been charged with a responsibility to act for the benefit of others.³⁸ Unless torturing is worse than killing, then certainly an adherent to the Thomson/Foot moral view would allow for the torture of a suspect when it can save the lives of many innocents.

Another approach to the possible ways to justify violence comes from Philosopher Jan Narveson, who proposes six scenarios in which private violence might be justified, and ranks them in order of acceptability. They are: (1) pure self-defense; (2) preventing immediate injury to others; (3) preventing longer-range threats to the life of oneself or others; (4) preventing loss of liberty; (5) ensuring a “minimally acceptable” life when no other means is possible (even when others have not clearly deprived one of such conditions); and (6) promoting a better life for oneself or others, beyond the “minimally acceptable” level.³⁹ Narveson concludes that (1) through (4) are “basically acceptable, that (6) is definitely not acceptable, and that (5) is the hard case, but that fundamentally it must be considered marginally accept-

94 YALE L.J. 1395 (1985) [hereinafter Thomson, *Trolley Problem*].

³³ Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5, 8-9 (1967), reprinted in PHILLIPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19, 23 (1978).

³⁴ See THOMSON, *REALM OF RIGHTS*, *supra* note 32, at 176.

³⁵ See *id.* at 176-77.

³⁶ Thomson, *Trolley Problem*, *supra* note 32, at 1395. Thomson’s viewpoint does find a contrarian in George C. Christie, who believes that “Thomson’s conclusions [on this issue] . . . are just plain wrong.” George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 979 (1999). His argument essentially hinges on the fact that Bloggs would be simply doing nothing if he let the trolley keep on its path, while if he throws the switch, he is affirmatively acting to kill the sixth man. See *id.* at 1014-15.

³⁷ Thomson, *Trolley Problem*, *supra* note 32, at 1395.

³⁸ See THOMSON, *REALM OF RIGHTS*, *supra* note 32, at 237-39.

³⁹ Jan Narveson, *Terrorism and Morality*, in *VIOLENCE, TERRORISM AND JUSTICE* 130-31 (R.G. Frey & Christopher W. Morris eds., 1991).

able if at all.”⁴⁰ Torturing suspects to prevent terrorist attack would seem to fit either situation 2 or 3, depending on the imminence of the threat. If Narveson’s calculus for private violence is correct, is this violence somehow less legitimate when it is not private but is committed under the color of government authority? This is so especially if we accept the premise that the state has a monopoly on the legitimate use of force, except in very limited cases.

Some commentators have reacted rather strongly to this view that torture might sometimes be justified, although their retorts tend to be less than fully convincing. According to Paul Butler, for instance, “If you think that the government should be allowed to kill or torture for the greater good, you are a utilitarian. What you have in common with terrorists is either a disregard for morality, or a construct of it that allows the sacrifice of human lives or dignity for the greater good.”⁴¹ Butler may not mean to stack the deck by equating utilitarians with terrorists, but by placing both under an almost absurdly broad umbrella—both terrorists and principled utilitarians are *either* totally immoral *or* believe that sometimes violence is justified for the greater good—he has rendered the comparison virtually meaningless. Butler’s claim is akin to saying that a giraffe and a fire hydrant have in common the fact that they are either really tall or made of metal.

Likewise, Emanuel Gross argues that even from a utilitarian point of view, explicitly permitting torture in certain cases is never a good idea: “[A] statute that permits [torture] in particular circumstances will fail to encourage people to follow a desirable morally conscientious line and the hoped-for result will not be achieved. Legislation that permits the adoption of such tactics will only lead to a worsening of the existing situation, such as occurred in the Middle Ages, when torture was regulated by law.”⁴² This argument fails to grasp the point of legal rules that permit torture when it is justified: since only in the rarest of cases is it truly warranted, it seems strange to argue that people’s moral compasses will truly be damaged if torture is prohibited 99.9% of the time rather than 100%. Gross argues that “[t]he state cannot justify [torture] and enable a person to be injured to achieve social good. This is because such an outcome is not consistent with the respect that a state accords human rights.”⁴³ However, the state can accord great respect to human rights while still acknowledging that, just as it is sometimes necessary to deprive people of their freedom (imprison them)

⁴⁰ *Id.* at 131. For a critique of this formulation of when private violence is acceptable, see Paul Butler, *Terrorism and Utilitarianism: Lessons from, and for, Criminal Law*, 93 J. CRIM. L. & CRIMINOLOGY 1, 9-11 (2002).

⁴¹ Narveson, *supra* note 39, at 15-16.

⁴² Gross, *supra* note 10, at 112.

⁴³ *Id.*

in order to protect the public, sometimes it is necessary to physically hurt people to protect the public. Just because certain human rights norms are not absolute priorities of the state does not mean that the state has entirely lost respect for them.

This is particularly the case when the state's willingness to transgress these norms is compelled by a desire to avoid a greater harm of the exact type that these norms are meant to safeguard against. In other words, norms against torture are meant to prevent physical pain, violence, and death. When government officers torture a suspect to prevent a terrorist attack, they are themselves trying to prevent physical pain, violence, and death. Yes, this harm is not occurring by their hand, but that is the very essence of the dirty hands theory: the difference between proper morality for a private citizen and proper morality for a public official.

At least in the United States, another argument that torture should continue to be subject to a blanket prohibition is that it would set a bad example for other countries. Sanford Levinson cites a conversation with Oona Hathaway in which she cited a possible "contagion effect" if the rest of the world believes that the U.S. sanctions torture.⁴⁴ Supposedly, if the United States sets the example for torturing suspected terrorists to gain information that might be necessary to stop future attacks, then other countries may take this as a cue that they also can torture people for that (or some other) reason. "If we give up the no-torture taboo," Levinson writes, "then why shouldn't any other country in the world be equally free to proclaim its freedom from the solemn covenant entered into through the United Nations Convention?"⁴⁵

The likelihood of the "contagion effect" that Hathaway offers is undermined by her own empirical research. She found that those governments that sign anti-torture treaties and conventions have no better record on torture than those that do not.⁴⁶ If a country that publicly says that it will not torture is no more likely to stop the practice than one that does not, then is it really likely to increase its torturing levels simply because *another* country announces a policy of sanctioning torture in rare cases? Is this really a likely possibility even if that other country is, as Levinson puts it, the "New Rome"?⁴⁷

Another obvious reason why the public announcement of a willingness to commit torture by the United States would be different from such an announcement by an authoritarian regime is that the U.S. would deter the

⁴⁴ Levinson, *supra* note 16, at 2052-53.

⁴⁵ *Id.*

⁴⁶ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1979 (2002).

⁴⁷ Levinson, *supra* note 16, at 2053.

right people. When political dissidents or ethnic minorities know that they are at risk of torture in a totalitarian regime, they take it as a sign to keep their heads down and not make waves. When terrorists know that they are at risk of torture, they will be less likely to plot attacks against innocents.

Another argument Levinson presents against allowing torture in America is that we are less gravely threatened by terrorism than other countries might be: “Our very size and power (and moral pretensions) may require that we limit our responses in a way that might not be necessary for smaller countries far more ‘existentially’ threatened by their enemies than the United States has yet been demonstrated to be.”⁴⁸ This claim depends on the assumption that *X* lives lost in America are less damaging than the same number lost in Israel, or Sri Lanka, or Northern Ireland. In one sense, this is arguably true: Israel has about 2% the population of the United States, and therefore a suicide bombing that kills 60 people in Jerusalem has the same relative impact on Israel that the 9/11 attacks had on us. America’s sovereignty or existence is not at risk to the same extent some other countries’ are, and therefore, its justification for using extreme methods to stop attacks may be weaker.

But this reasoning works only if we take countries, rather than human lives, as the proper baseline. Three thousand lives lost in America *is* worse than 60 lives lost in Israel. That is fifty times as many lives ended, fifty times as many families destroyed. If we are setting policies not only based on how necessary they are to keep the entire country from being destroyed, but also based on whether they are likely to save lives, then America’s position as a large and powerful nation is irrelevant. Saying that we should not torture a terrorist who has planted a bomb that will kill thousands of people because, well, there are 270 million of us left, would ring rather hollow.

Finally, some have argued that judges do not have the moral authority to permit torture unless they themselves get firsthand knowledge of what it is like.⁴⁹ This argument fails to convince for two reasons—one specific to torture and another more generalized.⁵⁰ The generalized reason is that we

⁴⁸ *Id.*

⁴⁹ See, e.g., Levinson, *supra* note 16, at 2049 (“Indeed, perhaps the judges should actually experience what they are condemning the victims to.”).

⁵⁰ One fascinating counter example to the claim that subjecting those who would inflict torture on others to torture themselves will convince them to renounce torture involves Col. Jacques Massu, commander of the French paratroopers in the Battle of Algiers. He willingly experimented on himself with electrical shocks to sensitive parts of the body, and concluded that “such methods . . . ‘did not degrade the individual.’” RITA MARAN, TORTURE: THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR 102 (1989) (quoting JACQUES MASSU, LA VRAIE BATAILLE 165 (1971)). Kreimer suggests that this episode demonstrates that, “given the mechanisms of cognitive dissonance,” requiring judges to submit themselves to torture before authorizing the torture of anyone else “might well make judges more willing to dispense torture.” Kreimer, *supra* note 10, at 320 n.148. This argument, however, depends on the

should no more ask judges to submit to torture before authorizing it than we expect judges who sentence criminals to incarceration to spend time in prison to see what it is like. Furthermore, it would seem rather one-sided to require judges to submit themselves to torture or incarceration but not ask them to step into the shoes of the people victimized by those criminals. And this one-sidedness is even pronounced when it comes to preemptive torture rather than punishment for past crime, because judges who authorize torture (whether before or after the fact) are making a prospective, rather than retrospective, decision. A judge sentencing a defendant for a past crime has no control over whether that crime took place—it has been proven that it happened and the judge can do nothing about it. By contrast, a judge considering whether to issue a torture warrant, or one evaluating whether torture was justified, has a stark choice of evils. If he should be required to experience what torture feels like, then he should also be required to spend some time in the shoes of a victim of terrorism, or to feel some of the grief of a parent, child, or spouse of such a victim. In fact, this choice—minus the direct experience—is the very essence of the choice-of-evils doctrine: the adjudicator decides whether the torture they are asked to validate is worse than the harm that was likely to occur if torture had not taken place.

B. *What Can Torture Accomplish?*

One way to avoid answering the question whether torture should ever be sanctioned is to maintain that it is never necessary—either because it does not work as a means of obtaining useful information or because there are always other means of obtaining the information. For example, a spokesman for Human Rights Watch has said that torture in America is uncommon, because “[l]aw enforcement professionals in this country understand that torture is a wonderful technique for getting confessions from innocent people and a lousy technique for getting truth out of guilty people.”⁵¹

assumption that paratroop commanders are no more pain-resistant than middle-aged America judges. At any rate, Col. Massu may also have gone rather easy on himself in his self-inflicted torture. In his memoir, General Paul Aussaresses says that Massu, “had carefully picked his torturers among his most devoted courtiers. Had I been doing the torturing, he would have been subjected to the exact same treatment as the one we handed to the suspects. He would have remembered and would have understood that torture is much more unpleasant to the victim than to the torturer.” PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH: TERRORISM AND COUNTER-TERRORISM IN ALGERIA 1955-1957*, 128-29 (2002).

⁵¹ Eric Schmitt, *There Are Ways to Make Them Talk*, N.Y. TIMES, June 16, 2002, § 4, at 1 (quoting Tom Malinowski, Human Rights Watch spokesman). Don Van Natta writes:

Dershowitz recounts the argument that “even when torture does produce accurate information that helps to foil a terrorist plot . . . there is no hard evidence that the *total amount* of terrorism is thereby reduced. The foiling of any one plot may simply result in the planning of another terrorist act, especially given the unlimited reservoir of potential terrorists.”⁵² Dershowitz disagrees with this argument on the ground that while it may have merit in cases like suicide bombings in Israel, where one foiled plot is easily replaced by another that succeeds, it is less convincing in cases of “mega-terrorism” like 9/11 and the airline hijackings allegedly prevented by the Filipino officials’ torture of a suspect.⁵³

An even stronger reply to this argument, however, is that it proves too much: the same reasoning can just as easily be applied to other forms of investigation and prevention of terrorist attacks. Foiling an individual act of terrorism through humane detective work is no less likely to beget “substitute” future terrorist attacks than stopping an attack through torturing a suspect. If anything, non-violent investigations are more likely to fail to prevent future attacks, because the threat of being caught and thrown in prison will have less of a deterrent effect on planners than the possibility of torture. Besides, who is to say that any individual act of terrorism stopped is not more likely to decrease rather than to increase the total number of terrorist acts? After all, no single act of homicide that police prevent will have more than an infinitesimal impact on the total number of murders committed in America each year. But that individual prevention matters enormously to the would-be victim and his family.

But others have begged to differ. The Supreme Court of Israel, in its opinion that *disallowed* the torture of terrorism suspects, nonetheless cited the Israeli government’s claim that the severe shaking of suspected terrorists used by the Israeli General Security Services cannot be prohibited “without seriously harming the GSS’ ability to effectively thwart deadly terrorist attacks. Its use in the past has lead [sic] to the thwarting of murderous attacks.”⁵⁴

Some American and other officials subscribe to a view held by a number of outside experts, that physical coercion is largely ineffective. The officials say the most effective interrogation method involves a mix of psychological disorientation, physical deprivation and ingratiating acts, all of which can take weeks or months. “Pain alone will often make people numb and unresponsive,” said Magnus Ranstorp, Deputy Director of the Center for the Study of Terrorism and Political Violence at the University of St. Andrews in Scotland. “You have to engage people to get into their minds and learn what is there.” Don Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1.

⁵² DERSHOWITZ, *supra* note 3, at 137.

⁵³ *Id.* at 137-38.

⁵⁴ *GSS Case*, *supra* note 8, at 1475.

As much as they claim to deplore it, a great many of the governments that publicly condemn the use of torture have not been fully able to resist the urge to employ it when the conditions warrant it. Many of the signatories of the Convention Against Torture do not appear to have completely adhered to its exceptionless admonition against torture. In an empirical study of whether certain countries that have signed on to human rights treaties have exhibited better records than those countries that have not, Oona Hathaway found that the difference between signatories of the Convention and non-signatories is quite small—an almost statistically insignificant average gap of just 0.06 on a 1-to-5 scale.⁵⁵ In fact, signatories of the American Torture Convention⁵⁶ and the African Charter⁵⁷ have *worse* records on torture, according to Hathaway's measurements, than do members of the sponsoring regional organizations that did not sign on to the treaties.⁵⁸

A number of the countries that have signed on to these conventions, including Great Britain⁵⁹ and Israel,⁶⁰ have quite plainly engaged in activities that violate the conventions, indicating that at least some officials in these countries think that torture can be an effective means of extracting desired information. Great Britain has explicitly codified a justification for torture—Article 134(4) of its Criminal Justice Act of 1988 states that acting under “lawful authority, justification or excuse” is a defense against prosecution for torture.⁶¹ And in the United States, we have seen police departments interrogate suspects in ways that also constitute “cruel, inhuman or degrading treatment” forbidden by the Convention Against Torture.⁶²

Indeed, it is far from clear that the United States government is itself completely innocent of charges that it sanctions torture. According to the *Washington Post*, terrorism suspects detained in secret military facilities post-9/11 are “sometimes kept standing or kneeling for hours, in black hoods or spray-painted goggles At times they are held in awkward,

⁵⁵ See Hathaway, *supra* note 46, at 1978.

⁵⁶ Inter-American Convention To Prevent and Punish Torture, Dec. 9, 1985, 25 I.L.M. 519 (entered into force Feb. 28, 1987).

⁵⁷ African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986).

⁵⁸ Hathaway, *supra* note 46, at 1979.

⁵⁹ See, e.g., *Ireland v. United Kingdom*, App. No. 5310/71, 41 Eur. Ct. H.R. (1978) (a claim by the Irish government that several of its citizens had been subject to torture and inhuman and degrading treatment at the hands of the British Government).

⁶⁰ See *GSS Case*, *supra* note 8, at 1482; AMNESTY INT'L, *COMBATING TORTURE: A MANUAL FOR ACTION* 23-30 (2002).

⁶¹ Criminal Justice Act, 1988, c. 33, § 134(4) (Eng.).

⁶² See, e.g., Levinson, *supra* note 16 (citing to JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* 25-26 (2000) (describing how police allegedly beat, burned, and shocked a suspected cop-killer to extract a confession)).

painful positions and deprived of sleep with a 24-hour bombardment of lights—subject to what are known as ‘stress and duress’ techniques.”⁶³ And the Abu Ghraib prison scandal—with highly conflicting accounts of whether the abuses were sanctioned from the highest levels of the Pentagon—also highlighted U.S. practices.⁶⁴

Other than rank hypocrisy, why does torture continue even under the rule of democratic governments that otherwise generally respect the norms of human rights? Part of the likely reason is that a culture that permits brutality when the stakes are high enough can arise among the law enforcement or military officers charged with protecting the public even when they operate under the authority of ostensibly liberal regimes. But part of the reason why torture continues to occur sometimes may be that—put bluntly—it works. In 1995, the Filipino authorities employed torture to obtain information that enabled them to prevent the hijacking and destruction of eleven airliners.⁶⁵ There are some indications that, after its Supreme Court’s 1999 ruling, the Israeli government did, in fact, stop torturing suspects.⁶⁶ And according to Dershowitz, the Israeli security services have claimed that, after their Supreme Court’s ruling on torturing suspects, at least one bus bombing took place which could have been prevented had torture been allowed.⁶⁷

That being the case, categorical opponents of torture have the extra challenge of developing a viable alternative for emergency situations, and they tend to come up short. For example, a recent article by Chanterelle Sung argues against the torture of terrorist suspects on the basis of moral philosophy, international law, and the Due Process and Search and Seizure provisions of the U.S. Constitution.⁶⁸ Her response to the question of what to do in emergency situations is that the need to torture suspects can be averted by developing “alternative, less invasive means of upholding na-

⁶³ Priest & Gellman, *supra* note 4.

⁶⁴ See *supra* sources cited in note 1; see also generally SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).

⁶⁵ See Matthew Brzezinski, *Bust and Boom; Six Years Before the September 11 Attacks, Philippine Police Took Down an al Qaeda Cell That Had Been Plotting, Among Other Things, to Fly Explosives-Laden Planes into the Pentagon—and Possibly Some Skyscrapers*, WASH. POST, Dec. 30, 2001, at W09.

⁶⁶ Catherine M. Grosso, Note, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 307 n.7 (2000) (citing a letter from Joanna Oyediran, Researcher, Amnesty International / International Secretariat, Sept. 15, 2000, reporting that Palestinian detainees held by the GSS had not reported torture since the judgment).

⁶⁷ DERSHOWITZ, *supra* note 3, at 150.

⁶⁸ See Chanterelle Sung, Book Note, *Torturing the Ticking Time Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193, 199-206 (2003) (reviewing DERSHOWITZ, *supra* note 3).

tional security.”⁶⁹ And we should rest assured that “[i]t is through these alternative sources that society should try to prevent a ticking bomb situation from arising in the first place.”⁷⁰ This answer is not merely unconvincing, it is no answer at all. No one is arguing that other means of investigation and interrogation should never be employed or that the use of torture should be the first resort. When people advocate the torture of suspects, they virtually always begin from the presumption that there are no viable alternatives other than allowing the bomb to go off. There are an extremely limited number of situations when “alternative means” will fail and torture is, to the best of our knowledge, the *only* means of stopping a terrorist tragedy.⁷¹ The only choice in these cases is between torture and the death of innocents. It is a sound and morally consistent position to say that, in these cases, torture is still impermissible and the bomb should be allowed to explode. But simply saying that there are always other ways to stop the bomb evades the moral dilemma completely.

C. *Alternative Ways for the Law to Deal With Torturers*

Even if torturers are not fully prosecuted under the law when their acts are viewed (overtly or covertly) by their governments as permissible, there are several ways for governments to sanction torture without actually codifying their approval in the letter of the law.

One way the United States has gotten out of having to torture suspected terrorists is by outsourcing the job to governments with fewer apparent scruples about getting their own hands dirty. As the *New York Times* reports:

Washington is also known to have turned terrorist suspects over to countries like Egypt, Jordan and Morocco that are more willing to use more aggressive questioning, what human rights lawyers have called torture, in efforts to break suspects.

“I am allowed to use all means in my possession” in interrogating a suspect, a senior Moroccan intelligence official said in an interview. “You have to fight all his resistance at all levels”⁷²

⁶⁹ *Id.* at 209-10.

⁷⁰ *Id.* at 210.

⁷¹ It is, of course, unclear just how frequent these situations are. Certainly, it is quite possible that law enforcement officers who want to torture a suspect will exaggerate the threat or downplay the likely effectiveness of other means of extracting information.

⁷² Eric Lichtblau & Adam Liptak, *Threats and Responses: The Suspect; Questioning to Be Legal, Humane and Aggressive, the White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13; see also Priest &

But sending suspects to other countries whose governments have fewer constitutional and moral scruples—even in those cases where time permits—is not a preferable alternative to allowing our own officials to torture suspects. The first problem with such a strategy is the secrecy of what would be done in these other countries. Nothing is more likely to ensure excessive abuse, far beyond anything that is necessary, than sending a suspect off to the Philippines, for example, and telling the authorities there, “Get the information we want, we don’t care how, and we will be immensely grateful.” Even if we admonish them not to go “too far,” this will probably fail for two reasons. First, the only people likely to know exactly how far the torture went will be the foreign interrogators, who have no reason to be truthful about their methods later on, and the torturee, who—even if he is ever able to leave his foreign prison—will not be a particularly credible or sympathetic accuser. Second, if the U.S. government cares enough about obtaining information to send suspects to other countries for interrogation, it will likely be so grateful for the successful interrogation that any revelations about the torture used to get it will probably result in only minor diplomatic grumbling. The secrecy of the foreign interrogations also undermines the notion that we should not have to apologize for doing what is necessary to protect the public.

The second problem is that officials in other countries lack the proper balancing incentive to do only what is necessary to get the desired information, unlike American officials who are subject to prosecution but may invoke the necessity defense. If we posit that the degree of torture employed should be proportional to the harm to be prevented, then the necessity defense offers a very good incentive to weigh the rightness of each method contemplated. Conversely, a foreign officer who is simply told to follow orders and get the requested information for his superiors, has a very different set of incentives, and will be quite likely to step over the line beyond which the necessity defense would not be available (or at least would not work).

Finally, there is the practical consideration of the time pressures that arise when torturing a suspect is truly necessary to stop a terrorist attack. If

Gellman, *supra* note 4 (describing the practice of the United States with regard to prisoners held in Afghanistan who refused to cooperate with their interrogators: “Some who do not cooperate are turned over—‘rendered,’ in official parlance—to foreign intelligence services whose practice of torture has been documented by the U.S. government and human rights organizations.”); *id.* (quoting an anonymous American official regarding non-cooperative captives saying that “We don’t kick the [expletive] out of them. We send them to other countries so that they can kick the [expletive] out of them.”); Levinson, *supra* note 16, at 2022-23 (noting that American politicians have expressed few reservations about the policy of sending suspects to other countries for interrogation too extreme for Americans to perform).

the clock truly is ticking, will it always be possible to cart off a suspect to face heavy interrogation in Pakistan, Israel, or the Philippines? Sometimes there will not be enough time to outsource the dirty work: either we do it ourselves, or no one does it.

Some commentators have argued that torture may sometimes be advisable, but that even in such cases it should never be legally condoned. Dershowitz recounts a debate with civil libertarian lawyer Floyd Abrams, who said that “[i]n a democracy sometimes it is necessary to do things off the books and below the radar screen.”⁷³ Former presidential candidate Alan Keyes, according to Dershowitz, “argued that wrongful and indeed unlawful acts might sometimes be necessary to preserve the nation, but that no aura of legitimacy should be placed on these acts by judicial imprimatur.”⁷⁴ *The Economist*, in an editorial, notes that “Though many authoritarian regimes use torture, not one of even these openly admits it.”⁷⁵ The editorial makes this observation to illustrate just how strong the taboo against torture is in this world. This is the wrong conclusion to draw. The fact that these regimes do all they can to keep their practices secret illustrates how the United States and other civilized countries have put themselves on a par with these authoritarian regimes by not being honest about what they are doing. The way we can distinguish ourselves from the brutal methods of totalitarian regimes is by being absolutely forthright when we find it necessary to torture a suspect. The regimes in Tehran, Damascus, and Pyongyang can never be honest about the torture they commit because the reasons for the torture are so utterly unjustified. If the FBI was ever hot on the trail of terrorists plotting another 9/11, and the U.S. government later made public the fact that it had been able to stop this plot after torturing a terrorist plotter or two, would this act receive the same international condemnation that, say, the Burmese government would receive if it publicly admitted that it tortured political dissidents?⁷⁶ More importantly, should it?

The dangers of the Abrams/Keyes/*Economist* approach to torturing suspects are obvious in comparison with a system of public judicial scrutiny of the torture of suspects. Secrecy would likely do the opposite of what they prefer: it would probably lead to *more* instances of torture—including unjustified ones—than a culture in which the torture of suspects is made public and judicially scrutinized. Proponents of the look-the-other-way

⁷³ DERSHOWITZ, *supra* note 3, at 151.

⁷⁴ *Id.* at 152.

⁷⁵ THE ECONOMIST, *supra* note 19, at 9.

⁷⁶ *See, e.g.*, Statement by Human Rights Watch spokesman Tom Malinowski to the Congressional Human Rights Caucus, June 19, 2003, available at <http://www.hrw.org/press/2003/06/burma061903tst.htm> (describing torture of political prisoners in Burma) (last visited Nov. 15, 2004).

approach apparently believe that when acts so extreme and outside the norm of acceptable human action become necessary, it is for the good of the country that they be kept secret to avoid creating the appearance of general approval which could lead to a lessening of the widespread revulsion at such acts.

But when torture is legally approved only in the rare cases where it is justified, this fear is probably unfounded. This is because every publicized instance of legally permitted torture will be accompanied by a revelation of the terrorist attack that the act of torture helped prevent. True, the nuances of justification law may be more complex than the public can reasonably be expected to understand, but the public is certainly capable of discerning the difference between torture for sadism's sake or even to extract a confession of an already-committed crime and torture inflicted to prevent a grievous crime from occurring. And torture would escape criminal sanction only in these extreme and rare circumstances. Perhaps Abrams and Keyes do not think the American public is capable of telling the difference, and this might numb us to the instances where torture is not justified, but that is a matter of opinion.⁷⁷

How should the law deal with cases where government officers do torture suspects in clear and egregious violation of existing law, but may have been justified in doing so? In a recent article, Oren Gross lays out a more sophisticated model for dealing with them than the "look the other way" approach. Gross constructs an "extra-legal" framework for dealing with the problem of unconstitutional government acts in times of emergency.⁷⁸ Gross advocates a view that treats emergency responses as they are realistically likely to occur: "When great calamities (real or perceived) occur, governmental actors tend to do whatever is necessary to neutralize the threat. Yet . . . it is extremely dangerous to provide for such eventualities within the framework of the legal system . . . because of the large risks of contaminating and manipulating that system, and the deleterious message involved in legalizing such actions."⁷⁹ When government officers ascertain the need to torture a suspect to prevent a bomb from killing innocents, they should neither "deny their actions [n]or argue that, in the circumstances,

⁷⁷ The same can be said of Oona Hathaway's concern that, if the United States were to condone torture under any circumstances, the example it sets would lessen the taboo against torture in other countries.

⁷⁸ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003).

⁷⁹ *Id.* at 1099. Gross seems to leave out another inherent problem with trying legally to legitimize certain drastic actions in times of emergency: the difficulty of anticipating every contingency. Even as clever legal-realist minds try to draft statutes that allow this or that exception to generally accepted principles when the stakes are high enough, there will always be some unforeseen situation that arises, requiring extreme but necessary acts never contemplated by the drafters.

using torture was legal.”⁸⁰ Instead, they should torture suspects and do it openly, without any attempt to claim that their actions are legally authorized.⁸¹ Then, *after* the acts are completed, “it is then up to the people to decide . . . how to respond *ex post* to such extralegal actions. The people may decide to hold the actor to the wrongfulness of her actions, demonstrating commitment to the violated principles and values. Alternatively, they may act to approve retrospectively her actions.”⁸²

The last part of Gross’s model of extralegal acts—leaving it to the general public to decide after the fact whether the horrific acts of the perpetrator deserve legal protection—is unconvincing, because the vagaries of public opinion and legislatures make it likely that such a system would be both over- and under-permissive of emergency acts. As with any other perceived crime, the legal culpability of an extreme act should not be held hostage to the whims of political popularity. If a serious bomb threat has been averted, it is quite possible that the public will be excessively grateful to anyone who helped in that effort—even if some of the actions they took were clearly unnecessary or grossly disproportional. All but the most principled of the public’s elected representatives would be loath to prosecute (or inclined to pardon) people who committed such acts.

And conversely, what if an illegal act of interrogation is clearly justified by the circumstances but, for whatever reason, the public is just not interested enough in the case to make much of a push to absolve the interrogator? Or what if there *is* such a popular push, but any congressional action to legalize the torture gets caught up in all-too-common legislative gridlock before punishment can be averted? What if the chief executive contemplating pardon of the actors is a Kantian believer in natural law and categorical imperatives, utterly appalled at the use of torture in any situation for any reason and unwilling to pardon it regardless of the public outcry?⁸³ These safeguards against punishment of justified actions are far from perfect, and undermine Gross’s model of the proper response to illegal government actions in times of emergency.

D. *The Proper Role of the Judiciary*

Instead of relying on public opinion or legislative and executive action to acquit justified torturers of their offenses, the judiciary itself has a re-

⁸⁰ *Id.* at 1098.

⁸¹ *Id.* at 1099.

⁸² *Id.*

⁸³ The threat that the normal safeguards against unjust, politically unpopular prosecution will occasionally fail is wonderfully expounded in the fictional opinion of the legal realist Judge Handy in Lon Fuller’s classic *The Case of the Speluncean Explorers*. 62 HARV. L. REV. 616 (1949).

sponsibility to weigh carefully the extremity of the acts against their necessity and the benefit they created. Whatever their imperfections, it is courts, sitting in deliberation, carefully weighing evidence and precedent, not concerned with public opinion,⁸⁴ that are best capable of deciding whether the ends were worth the means. In determining whether an act of interrogation falls under the necessity defense, judges will be much more effective than legislatures at considering such questions as: whether the torture went further than was necessary; whether the likelihood of success was high enough to justify the act; whether torture of an innocent (perhaps a family member) to get the cooperation of a suspect is less justifiable than torture of the suspect himself; and how many lives must be saved to justify torturing any person. It is the relatively non-political nature of the judicial process that makes it most likely to distinguish between truly justified acts of torture and simple, unnecessary acts of cruelty. How the judiciary should deal with the problem of torture is the subject of the next section.

II. JUSTIFICATION: THE BEST SOLUTION

The relative costs and benefits of torturing a suspect can perhaps best be expressed through a pair of choices—to torture or not to torture—and a pair of conditions—whether torturing the suspect would or would not make a difference. This leads to four possible results: the true positive, false positive, true negative, and false negative.

	<i>Torture necessary</i>	<i>Torture unnecessary</i>
<i>Person tortured</i>	True Positive	False Positive
<i>Person not tortured</i>	False Negative	True Negative

In this four-way scenario, the worst result is a false negative: the authorities could have tortured someone, and did not, and as a result a terrorist attack occurred. The second-worst result is a false positive: the authorities torture someone, and it turns out to have been for nothing because the plot could have been stopped by other means, there was no way to stop the attack, or there was no plot to begin with.⁸⁵

⁸⁴ Not quite *as* concerned as are legislators and presidents, at any rate.

⁸⁵ The reason for assuming a false negative is worse than a false positive is that the number of people harmed by an unnecessary torture is smaller than the number of people harmed or killed by a

If torture is never committed, then only the bottom half of the chart is operative: every situation will either amount to a true negative or a false negative. If torture is allowed, then any of the four results can occur. The question that utilitarian absolute opponents of torture must ask is whether the risk of false positives is so great that it outweighs both the benefits of true positives and fewer false negatives. To whatever degree a false negative is more harmful than a false positive, false positives must be more *likely* than false negatives to at least that degree for a uniform prohibition to be the preferable policy. In other words, if declining to torture someone and seeing a bomb explode as a result (false negative) is ten times worse than torturing someone fruitlessly (false positive), then a blanket prohibition on torture is preferable to a policy allowing torture in limited circumstances only if the false positive scenario is at least ten times more likely than the false negative scenario if torture is allowed.

It is this balance that makes information so key in decisions whether to torture a suspect. If torture is allowed, the likelihood of false positives depends on (1) the quality of information available to the person making the decision to torture; and (2) whether the decision-maker has the proper incentive to make the right call. Ex post justification has an advantage over ex ante torture warrants in ensuring both that the decision-maker has better information and in creating the proper incentives for acting correctly on this information. The ideal legal response to torture is obviously one that minimizes the false positives and the false negatives. Legal rules that do this should be encouraged, and the one best equipped to accomplish this goal is the subject of the next section.

A. *The Justification Defense*

The defense of necessity or justification can serve as an effective means of policing the extreme interrogation of terrorism suspects in ticking bomb situations. It essentially *requires* a cost/benefit calculation by the trying court, and consideration of whether there the actor had other, less extreme, options. The justification defense is a common-sense legal concept that exists in some form in virtually every jurisdiction. The reasoning behind it is simple: if an illegal act is required to prevent a harm greater than the one caused by the infraction itself, the perpetrator has an affirmative defense and the act is effectively rendered legal.

The Israeli Supreme Court's decision denying judicial authorization for physical torture acknowledged that the necessity defense could be used

terrorist attack that could have been prevented.

to exonerate government agents who take part in such acts, though it refused to allow the justification or necessity doctrine to constitute an *ex ante* permission for severe interrogation of terrorism suspects.⁸⁶ The Court acknowledged that “in the appropriate circumstances, GSS investigators may avail themselves of the ‘necessity’ defense, if criminally indicted.”⁸⁷ But it asserted that “[w]e are dealing with a different question. The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of ‘necessity.’”⁸⁸ It thus held that “a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the ‘necessity’ defense.”⁸⁹

This decision on the question of torturing suspects can be interpreted in two different ways.⁹⁰ The Court *may* have been saying, “Torture is an act that is so out of bounds according to any normative legal standards that this body can never sanction it, *ex ante*. However, we must grudgingly admit that if any government officer were to engage in such awful behavior, they might still be able to use the defense of necessity to exonerate themselves. But that defense cannot be invoked to get our approval of such acts before they take place.”

But perhaps another way to interpret the Court’s decision is that it was really saying, “Torture is an act that is so out of bounds according to any normative legal standards that this body can never sanction it, *ex ante*. However, if torture *is* committed, notwithstanding the courts’ refusal to authorize it before the fact, the culprit may (wink wink) still avoid criminal punishment by use of the necessity defense.”

Was the discussion of the defense of justification a grudging and limited admission, or a sly, loophole-creating mention of a potential get-out-of-jail-free card for more aggressive security officers? A look at other recent writing by President Barak makes it clear that his sentiments are much closer to the former interpretation than to the latter: “The war against terrorism . . . requires the interrogation of terrorists, which must be conducted according to the ordinary rules of interrogation. Physical force must not be used in these interrogations; specifically, the persons being interrogated must not be tortured.”⁹¹ More generally, he writes that “[w]e, the judges in

⁸⁶ See *GSS Case*, *supra* note 8, at 1485-88.

⁸⁷ *Id.* at 1486.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Readers are encouraged to read the opinion themselves to glean the Court’s subtext.

⁹¹ Aharon Barak, *Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 155 (2002).

modern democracies, are responsible for protecting democracy both from terrorism and from the means the state wants to use to fight terrorism.”⁹²

These words are eloquent and admirable, but there is a case to be made that the “wink wink” interpretation of the motivations behind the Israel opinion is actually the more generous one. What, exactly, is shameful about saying that those who see fit to engage in the worst forms of interrogation will be able to resort to the legal defense that they were actually doing the right thing? The necessity defense amounts to a common-law nod to utilitarian principles.⁹³

A number of commentators have weighed in on the characteristics and virtues of the defense of justification or necessity.⁹⁴ The Model Penal Code’s version of the defense defines justifiable lawbreaking as “[c]onduct which the actor believes to be necessary to avoid a harm or evil to himself or to another . . . , provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.”⁹⁵ The use of the word “necessary” connotes that it is not enough to say that torture worked in a particular case to stop a bomb from going off; the defendant must also demonstrate⁹⁶ that he had no alternative means of preventing the explosion. The “greater harm” require-

⁹² *Id.* at 149.

⁹³ For a discussion of the various theoretical and doctrinal questions raised by the necessity defense, see Christie, *supra* note 36.

⁹⁴ See generally, e.g., *id.*; Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking*, 32 UCLA L. REV. 61, 77 (1984); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 280-81 (1995); George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1275-76 (1974); John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397 (1999); Paul H. Robinson & John M. Darley, *Testing Competing Theories of Justification*, 76 N.C. L. REV. 1095 (1998); Robert F. Schopp, *Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience*, 69 S. CAL. L. REV. 2039, 2098 (1996).

⁹⁵ MODEL PENAL CODE § 3.02(1) (1962). The Model Penal Code language is being used here as an illustrative example, although many other states have their own codified versions of the necessity or justification defense. See, e.g., N.Y. Penal Law § 35.05 (McKinney 2004) (“[C]onduct which would otherwise constitute an offense is justifiable . . . when . . . necessary as an emergency measure to avoid an imminent . . . injury . . . which is of such gravity that . . . the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.”); COLO. REV. STAT. § 18-1-702(1) (2004); GA. CODE ANN. § 16-3-20 (2003 & Supp. 2004); N.J. STAT. ANN. § 2C:3-2(a) (West 1995 & Supp. 2004); TEX. PENAL CODE ANN. § 9.22 (Vernon 2003). California has no official statutory justification defense, but its courts have nonetheless recognized it. See *People v. Garziano*, 281 Cal. Rptr. 307, 308 (Ct. App. 1991) (“The necessity defense has been recognized in appellate court decisions in California despite the absence of any statutory articulation of this defense and rulings from the California Supreme Court that the common law is not a part of the criminal law in California.”).

⁹⁶ Or, if the burden of proof is on the other side, the prosecution would have to fail at proving the opposite.

ment ensures that the necessity defense can only be invoked when the act is proportionally less evil than the harm averted.

One problem with the Model Penal Code language is that it appears to impose a subjective rather than objective standard,⁹⁷ which would make a proper judgment on justification hinge on the internal feelings of the interrogator rather than the rightness of his acts. First, it would be difficult for a defendant to prove that he believed that torturing a suspect was necessary, and even more difficult for a prosecutor to prove he did not believe such a thing. Furthermore, if we are trying to create the proper incentive for using torture only when there is absolutely no other alternative, it does not seem sensible to base decisions as to culpability on the subjective feelings of the actor. For example, a bloodthirsty officer who wrongly thinks that torture is necessary in a certain case will be absolved under this reading of the necessity defense.⁹⁸ Or, to take the opposite situation, suppose an officer is under orders to torture a suspect and he does so, even though he feels that it is not the best route to take. Then, the torture does turn out to be more effective than any other means would have been. Should he later be convicted even though his actions, however reluctantly taken, turned out to be the right thing to do after all? According to a subjective intent test, yes. To foreclose these possibilities, a better standard would require that the actor “reasonably believe” rather than merely “believe” torture to be necessary.

Paul Robinson and John Darley highlight the problem created by the difference between objective justification and subjective justification. They distinguish between acts that are justified “because the actor’s deed avoids a greater harm,” and those that are justified “because she acted for the right reason.”⁹⁹ The former is “objective”: the act was justified because it was done to further the greater good. The latter is “subjective”: the act was justified because the actor *believed* it would further the greater good. Most states follow the subjective test of justification,¹⁰⁰ thus allowing exoneration for acts mistakenly thought to be justified, and theoretically condemning criminal acts that are inadvertently justified. The objective test imposes a kind of strict liability, by saying that the defense does not exist if the act turns out to have been unnecessary no matter how well intentioned.

⁹⁷ For a discussion of this strange aspect of the Model Penal Code language, see Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1555, 1555 n.16 (2002).

⁹⁸ The accompanying explanatory note does state that the defense is unavailable “if the defendant was reckless or negligent in appraising the necessity of his conduct.” MODEL PENAL CODE § 3.02 explanatory note (1962). But it does not mention occasions when the belief, though not negligent or reckless, turns out to be faulty.

⁹⁹ Robinson & Darley, *supra* note 94, at 1097.

¹⁰⁰ See *id.* at 1099, 1099 n.11 (citing 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §184(b), at 399-403 (1984)).

Another problem with the Model Penal Code language is that it does not appear to account for the probability that the necessary act will actually prevent the harm. For example, suppose there is a small ticking bomb that will kill exactly two people if it explodes. Say that the police have a suspect in custody, and torturing him is the only way to stop the bomb from exploding. However, the police know that even if they do torture him, there is only a one percent chance it will lead to information that enables them to stop the bomb from killing anyone. The suspect may prove resilient, lie, or pass out from shock. Even if he does reveal the location of the bomb, it may turn out to be simply too far away for the police to get to it and disarm it in time. However, if they do not torture him, the bomb will definitely go off. Is it worth it to torture a suspect in such a situation? Well, maybe and maybe not, but a strict reading of the Model Penal Code language does not allow for consideration of the likelihood of success. Saying that an act is necessary to prevent some harm merely means that there is no other alternative to preventing it—it is irrelevant whether this act is a long shot or a guaranteed success.

A court deciding on the applicability of the necessity defense should consider the likelihood the “necessary” act would actually succeed, and discount it accordingly. In the scenario mentioned above, the court ideally would decide whether it was worth it to torture a suspect to save the equivalent of one-fiftieth of a life (two lives times one percent). The statutory language of a necessity defense should account for the likelihood that the law-breaking act will succeed in its goal.

B. *Torture Warrants Versus the Justification Defense*

Alan Dershowitz has offered the most seductive alternative means of giving legal approval to the act of torture when it is necessary to prevent a terrorist act. To make torture an allowable option in extreme cases yet still give it some official oversight, Dershowitz makes the following proposal: “[I]f you believe that non-lethal torture is justifiable in the ticking bomb case, why not require advance judicial approval—a ‘torture warrant’?”¹⁰¹ This section deals with the arguments for, and critiques of, torture warrants. This section will explore the reasons why the justification defense is a more desirable means of sanctioning torture than warrants. It argues that the justification defense would prove much more accurate in identifying the situations where torture is indeed an advisable course of action, and would ensure that torture will only occur when it is truly necessary. It would also be

¹⁰¹ DERSHOWITZ, *supra* note 3, at 141.

a much better means of ensuring that those who torture when it is *not* necessary are more likely to face punishment.

1. The Problem with Torture Warrants

Seth Kreimer criticizes the Dershowitz position on torture warrants on the ground that it will likely lead to excessive amounts of torture, including in situations where it is unwarranted.¹⁰² Kreimer reaches a convincing conclusion about the inability of torture warrants to confine torture only to situations when it is justified, but then takes the questionable position that this means that torture should never receive official sanction. Kreimer writes: “Professor Dershowitz asserts that ‘sometimes’ torture will be ineluctably necessary; the converse of this assertion is that ‘sometimes’ torture will wreak human havoc without any discernable, much less proportionate public benefit, and ‘sometimes’ the benefits sought could be achieved without resort to torture.”¹⁰³ Kreimer points out that it is quite feasible that public officials seeking to obtain a warrant to torture a suspect will embellish the truth in efforts to obtain a warrant. He cites a number of sources—including, ironically, a book by Dershowitz himself—documenting the frequent willingness of law enforcement officers to lie to serve what they view as the public good.¹⁰⁴ Furthermore, the judges who are charged with evaluating the requests for a torture warrant may feel intense public pressure to avoid future terrorist attacks.¹⁰⁵ Consequently, torture warrants may be granted in situations that fall well short of the “ticking bomb” that Dershowitz contemplates.

To avoid a slippery slope in which warrants are sought and issued in situations that gradually move further and further away from the scenarios of extreme urgency and necessity, Dershowitz proposes a “principled break”: limiting such warrants to “convicted terrorists who had knowledge of future massive terrorist acts.”¹⁰⁶ Kreimer points out several problems with this formulation. First, it allows torture even when it is not imminent,

¹⁰² See Kreimer, *supra* note 10, at 317-24.

¹⁰³ *Id.* at 319.

¹⁰⁴ See *id.* at 319 n.146 (citing ALAN M. DERSHOWITZ, REASONABLE DOUBTS 60-61 (1996); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992); L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 725-27 (1998); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1059 (1996)).

¹⁰⁵ Kreimer, *supra* note 10, at 320.

¹⁰⁶ DERSHOWITZ, *supra* note 3, at 147.

as long as it is threatened some time in the future.¹⁰⁷ Second, it raises the question of how large a possible terrorist attack must be to qualify as massive. Does it have to threaten thousands of lives, or merely hundreds, or dozens or can mere massive destruction of property qualify?¹⁰⁸ Third, it is limited to “convicted” terrorists, but in a true ticking bomb situation, “there would hardly be time for a criminal trial and conviction.”¹⁰⁹

All three of these objections are properly addressed under a system of post hoc justification of torture rather than ex ante grants of warrants. First, when invoking the justification defense, there would be no need to legally distinguish “imminent” threats from mere “future” ones. When there is a choice of evils, all that should matter is whether the threat was real, and whether there was no other practical means of preventing it. Of course, public officials facing an imminent threat of terrorist catastrophe are less likely to have means other than torture of preventing the attack than do officials facing a mere “future” attack. Any post-torture trial determining whether the torture was justified would have to determine whether there were, indeed, other means of preventing the attack. If there were not, then the torture may have been justified, no matter how distant it was.¹¹⁰

Kreimer’s second objection—that there is too much uncertainty in sorting out which attacks are “massive”—is also less of a problem when justification, not a warrant, is invoked to permit torture. The justification defense is a *deliberately* flexible legal tool, whose effectiveness depends on its proportionality, and thus accounts for the severity of the torture and the severity of the terrorist attack it seeks to prevent. Unlike a “principled

¹⁰⁷ Kreimer, *supra* note 10, at 321.

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* (noting that even Zacarias Moussaoui, whose foreknowledge of the 9/11 attacks Dershowitz says makes him a good example of the type of suspect whom it would be acceptable to torture, had yet to be convicted of anything more than two years after the attacks).

¹¹⁰ In cases of non-imminent threats, the defendants would have to demonstrate that even though the threat was not going to be carried out for some time, they had tried and exhausted all alternative possible means of halting the attacks. Realistically speaking, it is highly unlikely that any torture to prevent non-imminent threats would win acquittal through justification. When a threat is not imminent, it is not likely that alternative means of investigation and prevention could be exhausted until the threat truly is about to be carried out. A fact finder would not respond well to a defendant’s argument that even though a terrorist attack was not going to occur for, say, another month, the investigators had no other means of preventing the attack. In such a case, the prosecutor would counter with “If you knew the attack was not going to happen for another month, then could you not at least hold off on torturing the suspect for a while in case other leads developed?”

Of course, interrogators trying to get information on how to prevent an attack might also not know when it is going to occur. In cases where torture is committed to prevent attacks that turn out not to have been imminent, the best defense to many of them would be that the interrogators did not know when the attack was going to occur. Such attack may well have been imminent, so they could not have risked the time it would have taken to pursue other avenues of investigation.

break” that requires a “massive attack” (whatever that is) to allow torture—and presumably allows *any* method of torture to prevent such attacks—the choice of evils doctrine balances the harm inflicted on the suspect with the degree of harm aimed at being prevented. The more serious the impending terrorist attack, the more severe the torture that would be permitted—and the larger the number of suspects who could be subjected to extreme interrogation. After the justification defense was invoked enough times, a set of legal precedents would eventually develop to define just how severe the interrogation may be to prevent a spectrum of harm: from ten likely deaths to another 9/11-type attack or an atomic bomb.

The proportionality inherent to the justification defense is also the reason why it survives Kreimer’s third critique of torture warrants as advocated by Dershowitz. This criticism says that torture warrants are of highly limited practical use indeed if they are limited to interrogating only “convicted” terrorists. But a torturer needs not establish that the suspect is a convicted terrorist to successfully invoke the justification defense when the threat is sufficiently grave.

This is not to say that whether the suspect has actually been convicted is irrelevant, because it may well be a legitimate factor in the balancing that is required to evaluate of a claim of justification. The degree of guilt of the suspect is relevant for two reasons. The more obvious is that a suspect who has been found guilty of terrorist activity is more likely to actually possess knowledge of an impending attack than a person about whom the interrogators have mere suspicions. Thus, the more obvious the suspect’s guilt, the more likely he is to have information that can be used to prevent an attack.

The other, more controversial reason why the degree of guilt of a suspect is relevant to whether it is permissible to torture him is that the more guilty suspects may “deserve” it more, so torturing them is less morally objectionable than torturing an innocent. This objection seems to contravene the utilitarian principle that pain is pain, and it is just as bad if it is inflicted on a criminal as it is when inflicted on an innocent—particularly when the pain is intended not as punishment for past deeds but rather to prevent future harm. But there is little question that fact-finders evaluating a justification claim will take into account whether the person subjected to torture was a convicted terrorist, a mere suspected one, or a complete innocent. Part of the reason for this is the psychological tool of attribution: the actual terrorists, the trial court will say, brought it upon themselves. Another possible reason, more in line with utilitarian ideals, is deterrence. If torture is more permissible for suspected terrorist plotters than for innocents, then terrorists will see that they may well be subjected to legal torture if they continue in their activities.

If the degree of a suspect's guilt is proportional to the permissibility of torturing him, then it raises the inevitable question whether there are situations in which the stakes are so high that it would be permissible to torture a complete innocent to prevent an attack. One might object that anyone who possesses information on a looming terrorist attack and refuses to cooperate with public officials to prevent it is not, in fact, innocent. But imagine a situation where officials investigating an imminent attack know that a certain terrorist has information that could allow them to prevent the attack, but cannot get it by torturing him either because he has proven highly immune to physical interrogation or because they simply do not have him in custody. What if they have his young, completely innocent son in custody? Can they torture the son in the hopes of getting the father to talk? The logical extension of the justification defense is yes, where the threat is extreme enough, it would be permissible to torture the innocent son to obtain critical information from the father. If an atomic bomb were planted somewhere in New York, and only the torture of the terrorist's completely innocent son could induce the terrorist to reveal the location of the bomb, would it be morally acceptable to torture the boy? After all, the boy's only crime was being born to the wrong father. However, the justification defense—as an extension of utilitarian principles—permits just about *any* preventive action, no matter how severe, so long as it is meant to prevent some even greater evil. Certainly, a case can be made that torturing a terrorist's innocent son is far worse than torturing the terrorist himself. However, as far as the justification defense is concerned, this difference would only mean that the looming threat in question has to be worse to justify torturing the boy than it does to justify torturing the terrorist father.

There are also two larger problems with Dershowitz's "principled break," according to Kreimer. The first is that if torture is given the imprimatur of legality in some situations, it will desensitize law enforcement officers to its moral objectionability: "Torture will be an ever-present option, and there will be no psychic cost in seeking to exercise it, because officials will be able to offload moral responsibility for the torture onto the issuing judge."¹¹¹ The second problem is another variation on the slippery slope position, arguing that "to institutionalize the use of torture would sap the force of norms that constrain potential torturers."¹¹² Currently, the flat prohibition is a clear bright-line rule that officials violate at their peril. But "[i]f torture is permitted with a warrant, it will become increasingly difficult for officials under pressure to produce results to refrain from torture without one."¹¹³ Some officials, it is true, will be morally compelled to fol-

¹¹¹ Kreimer, *supra* note 10, at 322.

¹¹² *Id.*

¹¹³ *Id.*

low the civilized norm against torture, but if they are under pressure by their colleagues or superiors to get information from a suspect by any means necessary, “[t]he judge would not approve the warrant’ is hardly as snappy a retort in the squadroom or midnight safe-house as ‘we are not Nazis.’”

One problem with Kreimer’s objections here is that they depend on the assumption that requests to torture suspects will be common enough that they will move the norms of acceptable behavior downward. But terrorist attacks on American soil have, fortunately, proven exceedingly rare—that is part of the reason why 9/11 was so devastating to our national consciousness. Consequently, it seems unlikely that necessary torture would become so common that the norm against torture would be significantly diminished. If the need to torture is a truly rare event, then the typical official will face the choice whether to torture a suspect maybe once or twice in his career. If the need to torture is rare, it is hard to see that public officials will view these requests with anything other than the graveness with which they now view it.¹¹⁴

If, at some future date, torture becomes more frequently necessary to prevent terrorist attacks—either because of a higher frequency of planned attacks or a reduction in the alternative means of preventing them—then the taboo against torture *should* be tempered. If America is really so under siege that the regular torture of terrorism suspects is truly the only way to safeguard national security, then the norms of civilized behavior will have to change to accommodate these realities. This is not to say that such a scenario is likely; it is not. In the three-plus years since 9/11, there have been no serious terrorist attacks on America and the norm against torture in America has not diminished.

And even if Kreimer is correct that torture warrants would have the effect of allowing public officials to effectively pass the buck, morally and legally, on to the judges who grant the warrants, this would not occur if the justification defense were the primary means of avoiding punishment for torturing a suspect. When exoneration occurs *ex post* rather than *ex ante*, the interrogators had better be sure that they are making the right call when they decide to torture someone, because they are going to have to explain it afterward, when more of the relevant information comes out.

This inaccurate information is another problem with torture warrants. Judges are not typically expected to apply cold utilitarian calculus to their decisions on whether to authorize certain investigative techniques. This is not to say that judges never worry about the proportionality of the harms they are trying to prevent or punish in relation to the investigative tech-

¹¹⁴ If public officials do not now see torture as an extreme and very serious method of obtaining information, then the possibility of receiving official sanction might not do much to change this.

niques requested. For example, in the classic search-and-seizure case *Terry v. Ohio*,¹¹⁵ Chief Justice Warren allowed a police officer to engage in “a reasonable search for weapons . . . where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.”¹¹⁶ Rather, the point here is that decisions about “probable cause” and “reasonable suspicion” tend not to be viewed in terms of how many lives the methods in question might save, but rather as the simple yes-or-no question of how likely it is that a crime (of whatever magnitude) has been or will be committed.

Even if they are willing to do it, can we expect judges to make accurate decisions about the likely degree of harm they are being asked to help prevent? For example, a judge is asked to authorize the torture of a suspect, and there is a 40% chance that torture will lead to the prevention of a bomb explosion. If the bomb goes off, it will kill 100 people. How will the judge decide? Will he just put on his law and economics hat and say, “Well, rational expectations tell us that authorizing torture will save 40 lives, which is worth more than tormenting one evil person, so let’s do it”? If there is an 80% chance of successful interrogation but the bomb would kill 50 people, would the judge be more or less likely to grant the petition for a torture warrant? What about a 20% chance of success with 200 lives at risk? According to “rational expectations” calculations, these three scenarios all have precisely the same net effect, but does anyone really expect judges, who are generally accustomed to applying similar probable cause standards regardless of the crime at issue, to treat these situations similarly? In fact, the psychological effect of diminishing marginal returns would probably apply for the different types of bombs: judges might not view a bomb that kills 50 as half as destructive as one that kills 100, but rather as nearly as awful. In fact, individuals’ and government agencies’ perception of the value of a single human life vary immensely depending on the context.¹¹⁷

Perhaps even more importantly, even if a judge is willing and able to make such calculations in deciding whether torture is warranted, how will he know that the probability-of-success and body-count numbers that the authorities give him are accurate? It seems as though the authorities have a major incentive to exaggerate the magnitude of the threat, or the likelihood

¹¹⁵ 392 U.S. 1 (1968).

¹¹⁶ *Id.* at 27 (emphasis added).

¹¹⁷ A review of thirteen “value of life” surveys, of differing methodologies, found respondents giving average “implicit value of life” figures that ranged from \$700,000 per human life to \$6.4 million. See W. KIP VISCUSI ET AL., *ECONOMICS OF REGULATION AND ANTITRUST* 673 tbl.20.3 (3d ed. 2000). An analysis of the costs of numerous government risk-reducing regulations found that the cost per life saved ranged from less than \$100,000 per life saved for a ban on unvented space heaters, to \$6.8 trillion per life saved for the hazardous waste listing of wood-preserving chemicals. W. Kip Viscusi et al., *Measures of Mortality Risk*, 14 J. RISK & UNCERTAINTY 213, 228-29 (1997).

that torturing a suspect will prevent it. Judges are not likely to have many past experiences of torture requests to draw upon, let alone independent evidence of the case at hand to look at on short notice. So how can they distinguish between realistic assessments of the risk and likelihood of interrogatory success and simply wildly over-optimistic (or pessimistic, in the estimates of the number of deaths likely to occur) predictions of the efficacy of torturing suspects?

Finally, Dershowitz argues for torture warrants on the ground that “[a]t the most obvious level, a double check is always more protective than a single check Requiring [the] decision [to torture a suspect] to be approved by a judicial officer will result in fewer instances of torture even if the judge rarely turns down a request.”¹¹⁸ But the same can be said for a system where the defense of justification is used for allowing torture in ticking bomb situations. The two checks Dershowitz lauds are also in place in such a system, except that the second check—a legal advisor to the would-be torturer’s agency—would have better information on which to make a decision than a judicial officer would.

2. The Incentive to Torture

In addition to the problems with torture warrants discussed above, the justification defense also has a clear advantage over torture warrants in giving the proper incentives to government officers who are deciding whether to torture a suspect. An officer who is granted judicial permission to torture a suspect has a strong defense against prosecution, even if the torture later turns out to have been unnecessary or ineffective. Conversely, an officer who asks for permission to physically interrogate a suspect and is denied by a judge (perhaps one using the 40% calculus used above) will probably be less inclined to interrogate the suspect than if no permission had been asked for in the first place. If an officer has a 40% chance of preventing the explosion of a bomb that will kill 100 people, and we think that saving an expected forty lives is worth the torture of a terrorist, then we want the interrogation to occur, regardless of whether a judge thinks that a 40% chance of success is enough to grant a warrant.

An officer who asks for and is denied authorization to torture a suspect is almost certainly less likely to actually go through with it than an officer who does not ask for permission in the first place. Such an officer knows he will be likely to face severe punishment if he violates a judicial cease-and-desist order. This will be particularly the case if the interrogation ultimately proves futile, as is 60% likely in the hypothetical case detailed above. Even

¹¹⁸ DERSHOWITZ, *supra* note 3, at 158.

if his case goes before a jury, a prosecutor will be able to say, “This blood-thirsty maverick asked for permission to torture a suspect, and an impartial judge said no, and he went ahead and did it anyway, and it turned out to be for nothing!” Such a system forces the torturing officers to bear far too much of the cost of interrogation, and therefore will discourage all but the most ardent officers from defying judicial orders for the sake of the republic.

In contrast, an official considering whether to torture a suspect is in a better position than a judge to weigh the relative benefits and costs because he has a better knowledge of the relevant facts on the ground. If he knows that his act is justified, and is confident that a future trial will vindicate his beliefs, then he should not have to receive *ex ante* judicial permission to go ahead and torture the suspect. If such permission is required, then a false negative—a wrongful denial of a torture warrant—is a possible result. In such a case, the official will now have the even more difficult choice between disobeying a judge’s order and conducting a torture that he believes is justified. Reasons of expediency and improved information¹¹⁹ weigh against requiring officials to obtain judicial warrants to torture suspects in extremely urgent circumstances. And the question whether or not the officer got permission from a judge to perform the interrogation should be irrelevant to after-the-fact determinations of the officer’s criminal culpability.

Conversely, an officer who tortures a suspect based on dubious evidence of likelihood of success should not be able to get absolution from punishment simply because he did get a warrant. It should be the reasoned determination of a trial court based on all the evidence that determines whether the justification defense should be successful in cases of torture—not the spur-of-the-moment decision of a judge asked to review evidence of questionable accuracy in a very short period of time (as would be likely in ticking bomb cases) and under a great deal of stress. Interrogating officers will know that their primary judicial obstacle in making a decision to torture a suspect is not to convince a judge of the rightness of their cause tonight, but to convince a jury or tribunal a year from now that the interrogation was the smart and correct option. Thus, public officials have a far stronger incentive to act properly and honestly in their decisions to torture suspects when they know that justification, rather than a torture warrant, is their primary defense against punishment.

In another book, *Shouting Fire*, Dershowitz criticizes the use of the justification defense as a means of allowing torture because it subjects public officials to unfair risks:

¹¹⁹ See *infra* Part II.B.3.

[Relying on the necessity defense] leaves each individual member of the security services in the position of having to guess how a court would ultimately resolve his case. That is extremely unfair to such investigators Individual interrogators should not have to place their liberty at risk by guessing how a court might ultimately decide a close case. They should be able to get an advance ruling based on the evidence available at the time.¹²⁰

This claim assumes that interrogators will have no knowledge of, or access to, the proper legal standards of justification in cases of torture. However, with a real jurisprudence on the subject, they would have a quite substantial idea of when torture is permitted and how far it may be taken. In reality, they would have access not only to consistent legal standards but also to the same legal advisors who tell government officials in other contexts whether the law permits them to perform certain acts.¹²¹ And because the would-be torturers have a strong incentive to get the best legal advice they can, these legal advisors would make their recommendations based on much more complete and accurate information than would judges who are considering granting a warrant. In addition, these advisors would feel less political pressure to give the interrogators the go-ahead unless torture truly seemed justified.

Furthermore, torture is such an extreme method—and should be such a rare one—that it is desirable for national security agents to know they are taking some risk when they make the decision to torture a suspect. If agents know that they are at no risk of punishment for torturing a subject, there is a significant likelihood that some of the more aggressive agents will see torture warrant applications as a game that, when played well, allows them *carte blanche* to interrogate a subject as much as they can.

The justification defense also poses less of a risk that, as Kreimer puts it, “a ‘torture warrant’ court may not be the most skeptical bench, and they would be subject to public pressure to do everything possible to prevent a recurrence of September 11.”¹²² Kreimer seems to be saying that the danger of a torture warrant court is that it would be effectively “captured” by the law enforcement and national security officials who depend on it for permission to pursue interrogations. Furthermore, if danger is imminent, then members of the court will fear the public outcry that could result if a terrorist attack takes place after the warrant is denied (or the public blames them for the tragedy).

This is the bigger danger of torture warrants, and it occurs because judges will not have the correct calculus in mind in making the decision whether to authorize torture. For these judges, the risk of a false negative is

¹²⁰ ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 477 (2002).

¹²¹ Certainly, it would take a while for a torture-justification jurisprudence to develop. But in the meantime, advisors could quite confidently rely upon the already-voluminous choice-of-evils case law.

¹²² Kreimer, *supra* note 10, at 320.

much greater than the risk of a false positive, because the repercussions they face if they wrongly allow a suspect's torture will be far less severe than those they face if they wrongly *deny* a torture to go forward. A judge who decides to grant a warrant for the torture of a suspect will, at worst, face condemnation for allowing the physical interrogation of someone who is probably a terrorist. This torture may prove fruitless for any number of reasons. But proving that it was actually fruitless may be difficult because the evidence in these situations is typically murky enough that no one can really say definitively that torturing a specific suspect was not reasonably likely to prevent an attack. Thus, it would be virtually impossible to establish after the fact that a torture warrant was improvidently granted, except in the most obvious and egregious of cases.

Even if it could be proven definitively that a torture warrant was improperly granted, the condemnation a judge would face for wrongly granting such a warrant would be miniscule compared to the outcry that would befall a judge who improperly *denied* such a request. A judge who refused to grant a torture warrant to help prevent an attack that later takes place would find himself branded publicly as either an oblivious facilitator or a soft-hearted terrorist appeaser whose unwillingness to be tougher on terrorism led to tragedy.

Courts that evaluate the torture of a suspect after the fact would not face the kind of public pressure that torture warrant courts would. The main reason they would not is because they would not be held directly responsible for the failure to prevent terrorist attacks. Rather, judges only get involved long after the attacks have occurred or been averted, and the public will not hold them responsible for attacks that take place.¹²³

¹²³ It is possible that judges who evaluate claims of justification might be held responsible for *future* terrorist attacks if they set the bar too high and only exonerate public officials who can prove beyond any doubt that they prevented a massive tragedy by torturing a known terrorist and there was no other way to stop it. This reluctance to exonerate any torturers except those that present an absolute clear-cut case that the torture was necessary could have a chilling effect on future interrogators who are not 100% sure that torture is absolutely necessary but know that it is very likely to be helpful, which is a far more common scenario. And judges who do not want to face condemnation from the public or from other branches of the government for not being adequately vigilant in the fight against terrorism might therefore be tempted to go the other way and be overly permissive of torture even in cases where not only did the torture prove ineffective or unnecessary, but also where the interrogators had reason to know this to be the case. This risk, though real, is not as substantial in a trial court as the risk of overly permissive torture warrant courts.

First, the chilling effect caused by overly reluctant torture warrant courts would be far more direct than that caused by non-permissive trial courts. In the former case, law enforcement officials would be personally denied permission to torture a suspect, while in the latter, these officials would say to themselves "according to judicial precedent, we cannot do this." And because the chilling effect would be less direct for trial courts than for torture warrant courts, these courts would feel less afraid of condemnation for causing this effect.

3. Improved Information

Another advantage the justification defense has over torture warrants is improved information. A court evaluating a claim of justification would have access to evidence that is far superior to that offered up by government agents requesting a torture warrant, because it would be more complete—just as the evidence at any trial is more comprehensive and reliable than the evidence put forth in a request for an arrest warrant. In the pretrial discovery process, there would be far more time and resources available to amass the relevant evidence than there would be in the very short-term process of gathering the necessary information to get a warrant. The evidence would also be far more credible and two-sided, since it would be produced not just by the party that performed the torture, but also by a prosecution dedicated to demonstrating that the torture was unjustified.

The fact that judges deciding whether to grant a warrant to torture a suspect may have only incomplete and biased information at their disposal is a real danger, because once a warrant is granted, the requesting officers can essentially act with impunity. Under current law, police officers who have a warrant may act on the warrant and are shielded from later punishment even when the warrant later turns out to have been wrongly granted.¹²⁴ As one court put it, “[i]t is neither fair nor practical to hold such officials to a standard of care exceeding that exercised by a judge.”¹²⁵

Because the information available to torture warrant courts would be so limited and unreliable, there would be a very high probability of decisions turning out to be either false negatives or false positives. As discussed above, the latter type of error is likely to occur more frequently, at least early in a torture warrant regime—government agents who are (quite un-

Second, trial courts will have more information available to them to make a decision on whether torture was permissible, and therefore they can point to more evidence justifying their decision to allow or disallow torture than would torture warrant courts.

Third, there is less immediate urgency in a trial court than in a court deciding whether to grant a warrant, and therefore a court that wrongly decides to deny a warrant to torture a subject will be much more likely to be held culpable for any attacks that are not averted than would be trial courts who evaluate claims of justification long after the threat has been averted (or carried out).

¹²⁴ See, e.g., *Coleman-Johnson v. Chicago, Illinois Police Officers*, 1996 WL 417568, at *5 (N.D. Ill. 1996) (“If the magistrate or judge makes a mistake in determining there is probable cause and the search is later determined to be unlawful, the warrant shields the officer from liability for the illegal search.” (citing *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir.1985)).

¹²⁵ *United States v. Barker*, 546 F.2d 940, 947 (D.C. Cir. 1976) (“[A]lthough the basic policy behind the mistake of law doctrine is that, at their peril, all men should know and obey the law, in certain situations there is an overriding societal interest in having individuals rely on the authoritative pronouncements of officials whose decisions we wish to see respected.” (footnote omitted)).

derstandably) more concerned with preventing an attack than with safeguarding the human rights of a terrorist will only pass the information on to the warrant-issuing court that is most likely to give permission. They will downplay or omit evidence tending to show: (1) that the suspect in custody does not possess useful information; (2) that torture is actually unlikely to get this information out of him; (3) that this information, even if successfully obtained, will be revealed too late to stop the attack; or (4) that there may well be means other than torture to get the information necessary to stop the attack. In fact, officials may even act in a willfully ignorant manner with respect to these questions, in order to maintain a façade of plausible deniability if asked by a warrant-issuing court how likely it is that the torture will be successful and whether there are other possible ways to stop the attack. This informational gap would likely lead to warrants granted in cases where torture is not actually justified.

If enough false positives occur, an overcorrection in the other direction would be a likely result. Eventually, warrant issuers might wise up to the embellishments of torture-happy interrogators and will be more skeptical of all requests for torture warrants. And because truly justified requests are likely so rare, the good requests would likely be thrown out with the bad, because courts could not distinguish between them.¹²⁶

Perhaps an even more useful comparison is not between the information available to warrant-issuing courts and that available to trial courts, but rather between warrant-issuing courts and the actual officers doing the interrogating. A court deciding whether to grant a torture warrant almost inevitably has less information than the government agents who are requesting the chance to torture a suspect since the court will generally only have the information that the agents see fit to hand over. The court in such a case only has the information that the agents have handed over, while the agents not only possess more information, but also a much better handle on the overall situation and mood of the investigation. And with this imbalance, it makes far more sense to place the decision with the party that has the more complete information to determine whether torture is warranted. It is a well established legal and intellectual principle that decision-making responsibility should be placed with the party that has access to the best information. This also gives that party strong incentives to make the correct decision.¹²⁷

¹²⁶ See generally GSS Case, *supra* note 8, at 1476. In that case, the Israeli Supreme Court, evaluating the General Security Services' interrogational methods, confronted a similar argument by some of the petitioners in that case: they argued that because "[t]he very fact that, in most cases, the use of such means is illegal provides sufficient justification for banning their use altogether, even if doing so would inevitably absorb those rare cases in which physical coercion may have been justified." *Id.*

¹²⁷ See, e.g., RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 157 (6th ed. 1995) (arguing that parties with the best information on how to prevent accidents should be held liable for those accidents that do occur) (citing to Guido Calabresi & Douglas Melamed, *Property Rights, Liability Rules*

A court evaluating a claim of justification would also be much better situated to make its determination in a thorough and objective manner than would a court asked to grant a torture warrant. Ex post determinations of fact are nearly always more accurate than ex ante ones. A judge asked for a warrant to torture a suspect to prevent an imminent terrorist attack knows that time is very short, and has to think fast and under enormous pressure. A trial judge or jury, by contrast, has as much time as is needed to make its determination, as there is no particular time pressure to produce an answer. And the trial court would also be under far less mind-clouding stress than a torture warrant court, in part because it knows that its decision is not likely to affect an attempt to stop a terrorist attack.

A trial court would also be under less stress because judges and juries, like most of us, would almost certainly feel that they had less moral agency in validating torture after the fact than they would have if asked to affirma-

and Inalienability: One View of the Cathedral, Harv. L. Rev. 1089, 1096-97 (1972)). There is also the doctrine of *contra proferentum*, which holds that ambiguities in contracts are resolved against the drafter.

A counterargument to the observation that executive officials, rather than judges, should make the decision whether to torture because they have better information is that although government agents may have better knowledge of the factual situation surrounding an attempt to foil a terrorist plot, the judiciary will have better information on the relevant *legal* standards regarding when torture is permissible. There are several answers to this objection.

The first is that legal standards are something that can be learned at leisure, as opposed to the frantic grab for factual information that is necessary in evaluating a request for a warrant. Just as police are taught the relevant case law for searches and seizures, arrests, and Miranda warnings, law enforcement and national security agents can be taught the proper standards for justifiable torture.

Second, even if an official does not know the actual nuances the law relating to torture and justification, these notions are, to some extent, rather intuitive. Justifiability, if not quite an instinctive response to a difficult moral decision, is certainly one that pervades our cultural and moral landscape, right down to the clichéd idea that it is sometimes necessary to choose the lesser of two evils. *Cf.* Ralph Nader, referring to the choice between Al Gore and George W. Bush “the evil of two lessers”, at <http://thewitness.org/archive/nov2000/naderinterview.html>. Simply telling a law enforcement official that an extreme method of interrogation is justified if it is the lesser of evils will likely lead to the legally correct behavior the vast majority of the time.

A third reply is that using justification, rather than warrants, to sanction torture encourages agents to be more *honest* with courts, at least before the fact. Instead of presenting only the evidence that most weights in favor of torture, as would occur in requests for torture warrants, government agents who are contemplating torture who know that they might later have to prove at trial that the torture was justified will have a strong incentive to give good and complete information to judiciary officials (or, more likely, the legal experts in the relevant agency) to get their *advisory* opinion on whether torture is justified. Instead of asking actual permission to perform the torture, government agents can ask their staff legal experts whether, in this situation, they are likely to win acquittal through justification if they torture a suspect. In getting this opinion, they have every incentive to give as honest and complete an assessment of the situation as they can, knowing that this information is also likely to come out later at trial.

tively allow it to go forward, with the knowledge that it would not happen unless they gave permission. This is the flip side of Kreimer's critique of torture warrants on the ground that they would remove some of the moral culpability that government agents would feel for their own actions, because they can always say that they tortured a suspect only because a judicial officer gave them permission.¹²⁸ In fact, it is the more important side, because to whatever extent the moral culpability is taken away from the interrogators, it is transferred to the courts. The intense stress and pangs of conscience that come with the excruciating decision whether to allow the torture of a suspect would cloud the judgment of whoever has to make such a decision. And because such a decision is likely to be mind-bending to anyone, it would be best to at least give it to the person who possesses the best information on whether it would be truly justified.

Levinson suggests that the real danger to having judges evaluate torture *ex ante* is that it might later prove dangerous *for the judges*:

[W]hether or not the judge actually puts the hood over the head or engages in whatever otherwise prohibited practices are thought to be most efficacious, he should have no doubt that he is in fact collaborating in what even the Argentinean torturers recognized is presumptively evil activity. He should know that he is, therefore, potentially at risk if a later court finds the grant of the warrant to be unreasonable.¹²⁹

Levinson does not take this caution against torture warrants to its logical conclusion—courts' fear that they might later be held accountable for sanctioning torture may well result in torture requests *wrongly* denied. Ironically, while the public pressure on judges may lead to false positives (torture warrants wrongly granted), the equally potent pressure judges may feel from future *legal* accountability could lead to false negatives. Thus, this is another reason why a system of *ex post* justification for torturing suspects would be superior to a system of warrants.

4. The Proper Justification Standard

When a torture case goes to trial, a defendant pleading justification should ideally meet a standard of justification that is best described as a "subjective-plus" standard. Because the stakes are so high and a mistake would be so damaging, the defendant should not only have to prove that his belief was reasonable under the circumstances, but also that he made every good faith effort to obtain the information necessary to make an informed choice. As an affirmative defense, the defendant would have the burden of

¹²⁸ See Kreimer, *supra* note 10, at 323-24.

¹²⁹ Levinson, *supra* note 16, at 2049.

proving by a preponderance of the evidence that he has a reasonable and good faith belief that torturing the suspect was necessary to prevent a terrorist harm worse than the torture itself.

The calculus in determining whether torture in a certain case was justified may well be both too subjective and too complex to be left to a jury. Allowing juries to make decisions about justification would have the disadvantage of inconsistency. Two different juries, judging the same torture case, might well come to differing conclusions about whether torture was warranted in that particular circumstance. They might come to this conclusion not because they come to different conclusions with respect to the facts, but rather because they have different views about whether a certain act was truly justified. Some jurors might think that torture is never justified, or is justified only when it is necessary to stop a nuclear scale attack. Other jurors might be willing to see a suspect tortured even to save one life, or perhaps even an unoccupied building if the suspect is unsympathetic enough. Jurors might also have highly variant views about which methods of torture are worse than others, and therefore are less permissible except in the most extreme circumstances. Some jurors might be swayed by horror at the fact that a government agent used his authority to inflict extreme pain on a captive, while others might be more concerned with the innocent life that agent was trying to save.

This is not to say that those concerns are not legitimate—on the contrary, weighing such factors as the extremity of the torture and the number of lives saved are absolutely indispensable to any fair determination of justification. But there is much to be said for the use of precedent in ensuring consistency of results. The decision whether to torture a suspect is difficult enough, both morally and pragmatically, without the uncertainty that would arise from contradictory jury verdicts on the permissibility of torture. Public officials—and the lawyers advising them—need as clear a picture as possible of which circumstances will allow torture to occur, and which will not.

This need for a consistent jurisprudence to ensure that torture occurs only when it is truly necessary and justified is not only an advantage that allowing torture has over a blanket prohibition, but is also a clear advantage that *ex post* justification has over *ex ante* warrants. As has already been discussed, judges who are asked to authorize a warrant to torture a suspect will be under tremendous pressure. A judge may be pushed in one direction by knowing that her decision could make the difference in preventing a terrorist attack, and in the other direction by the pressure to decide whether to allow torture—one of the most forbidden acts to anyone who believes in human rights. Such circumstances do not lead to the most reasoned decisions, particularly when the information available to the judge is not en-

tirely accurate. Inconsistency in decision-making is quite likely under such circumstances, as judges of differing temperaments and ideological views and under different balances of pressure could come to widely variant standards on when a torture warrant is warranted. But when the relevant legal barrier to the would-be torturer is not a warrant, but rather the possibility of a trial some time in the future, consistency is far more likely, for two reasons.

First, judicial decisions on justifiability would have numerous safeguards in place to assure that results are consistent. As discussed above, they would have far more time and accurate information to make a reasoned decision. In addition, a court's decision whether torture was justified can be appealed. Higher courts can review the decisions of trial courts and determine whether they were correct based on precedent, and can resolve any splits among the lower courts. With the development of this jurisprudence, public officials could have a reasonably reliable gauge of when torture is justified and when it is not.¹³⁰

Second, the legal advisors who tell public officials whether torture is permissible in this case would be under less pressure than would warrant-issuing judges, because their function is merely advisory rather than one of actual decision-making power. Their jobs will depend not on making the popular call, but rather on making the right call, based on the existing legal standard. If they tell the officials that torturing a certain suspect is justified when it is not, then they will be held accountable when the officials are found guilty of unjustified torture. As such, they would have an extremely powerful incentive to make the right call, and far less pressure than torture warrant courts would have to make the wrong one. Instead of trying to outwit judges by providing them only with the information that puts their request to torture a suspect in the most favorable light, an official who will depend on the necessity defense to avoid punishment for torturing a suspect will want to get the best possible advice from their legal advisors.

Another pertinent issue is the division of labor between judges and juries: which issues are best handled by the former, and which are best (and perhaps constitutionally required to be) handled by the latter. In torture

¹³⁰ A corollary of this observation is that public officials seeking approval of torturing a suspect would have less of a chance to forum shop under a justification regime than under a warrant scheme. Defendants cannot normally pick their judges, while police officers requesting warrants can shop around for magistrates who hold to lenient standards. *See, e.g.,* Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 60-61 (2002) (arguing that "in a warrant proceeding, the government could forum-shop by seeking out the most pro-government magistrate to issue the warrant"); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 589 n.106 (1990) (noting the "ability of police to 'magistrate shop' and seek warrants from those judicial officers least likely to question the application"); L. TIFFANY ET AL., DETECTION OF CRIME 120, 204 (1967).

trials, the most accurate way to reach a result would likely be to have juries make the findings of fact with respect to whether the official who did the torturing did so only after a good faith effort to get the necessary information to determine whether torture was necessary: (1) how agonizing the torture was; (2) whether less extreme methods were available and were likely to have worked equally well; and (3) how many lives, if any, were saved by torturing the suspect.¹³¹ After the jury makes these findings of fact, the bench could determine whether, given the jury's findings, the torture was reasonably justified.

To enable courts to exist that take the defense of justification seriously in torture cases, it would be necessary to do exactly the opposite of what Oren Gross recommends: rather than allowing prosecutions to be swayed by public opinion, courts and prosecutors would have to be essentially immune from public pressure. Granted that no one in government can be entirely immune from politics, an independent prosecutor with either a lifetime or extended term might be the best procedural mechanism. It must be someone who would not be dissuaded from pursuing a prosecution even in cases of torture that the public lauds as well as someone insulated from executive branch pressures to let public officials off the hook. The courts that evaluate these cases would also have to be isolated from the vagaries of public opinion and executive pressure, but the lifetime appointments given to federal judges would probably be enough to insulate them from these kinds of coercion.¹³²

CONCLUSION

The monstrous lengths to which ordinary people will go if prodded by authority was well documented by, among others, Hanna Arendt in her

¹³¹ If past experience is to be any guide, in these cases there is also likely to be a substantial question of fact about just what the interrogator did to the suspect. This might be the hardest to get a credible answer on, because the defendant would have every incentive to downplay the extremity of his methods, and would likely be backed up by his colleagues. By contrast, the alleged victim of the torture is likely either (1) dead or (2) as unsympathetic a victim as will ever come before a jury. This is all the more reason for the government to come clean publicly about its interrogation methods, so jurors will have a good idea about the methods commonly used, rather than being in the dark and therefore likely to suspect the worst. It is also a reason to make sure that prosecutors in such cases are given adequate resources to make a case based on evidence other than the accusation of a terrorist.

¹³² Another real key concern in ensuring that the justification defense works properly in a jury trial system would be to safeguard against a kind of prosecutorial nullification—essentially, a prosecutor's decision not to charge an official who has tortured a suspect. Politically driven prosecutors could well decline to prosecute officials who torture members of unpopular political or ethnic groups, even when there is clear evidence that the torture may not have been justified. In such cases, it is important that the relevant prosecutors be insulated from short-term political pressures, just as judges are.

study of Holocaust Germany.¹³³ Whether this willingness to hurt others was actually created by the perceived sanction of an authority figure or was an already-existing impulse waiting for the chance to rear its head need not concern us as the result was the same in either case.

What does concern us is whether the human willingness to act violently when given permission to do so can be harnessed in a *positive* manner in the context of torturing suspects. Sometimes, when the stakes are high enough and there are no other alternatives, we *want* suspects to face physical interrogation. If there are officers out there who, as Kreimer puts it, will categorically protest “we are not Nazis” whenever the possible need to torture a suspect arises, they should be *removed* from their decision-making capacity in favor of someone who is willing to dirty his hands and choose the lesser of evils.¹³⁴ Government officials trying to prevent the most extreme tragedies *should* feel safe to pursue even the most distasteful means, if necessary. A decision to torture a suspect for revenge or fun or even to set an example may be reminiscent of the methods of the SS, but the physical interrogation of a terrorist for the purpose of finding a car parked near the Empire State Building with an atomic device in the trunk is not.

“We are not Nazis” should be the beginning of a debate whether torture is permissible in certain cases, not the end of it. Notwithstanding Der-showitz’s suggestion that torture, if completely prohibited, will simply be driven underground, there is little question that potential torturers who feel as if they have official permission to torture suspects will be far more likely to do so than those who know that any torture they commit will result in their punishment. History and psychology have proven that the imprimatur of a sanctioning authority can evoke the most horrific behavior out of seemingly normal people. As psychologist Stanley Milgram wrote after observing the effects of his famed experiments:

With numbing regularity good people were seen to knuckle under the demands of authority and perform actions that were callous and severe. Men who are in everyday life responsible and decent were seduced by the trappings of authority, by the control of their perceptions, and by the uncritical acceptance of the experimenter's definition of the situation, into performing harsh acts A substantial proportion of people do what they are told to do, irre-

¹³³ See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (revised and enlarged ed., Penguin Books 1994) (1963).

¹³⁴ See OSIEL, *supra* note 22, at 225 n.183 (“[T]orture is morally defensible when clearly necessary to prevent a much greater evil.”); Posner, *supra* note 3, at 30; *cf.* Antonin Scalia, *God's Justice and Ours*, 123 *FIRST THINGS*, 17, 18 (2002) (arguing that judges are complicit enough in capital punishment that those who are morally opposed to the death penalty should recuse themselves from capital cases).

spective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.¹³⁵

When people are given the imprimatur of government authority to perform the most extreme acts of physical violence, the best way to induce the correct decisions by these officials is by setting up a system in which they know that their behavior will be permitted only when it is justified. They also must know that determinations of whether their acts are justified will take place not under the extreme pressure and limited information inevitable in warrant-request situations, but rather in the two-sided and drawn-out process of a full-blown public trial.

The abuses in the Abu Ghraib prison scandal fail every standard offered in this Article. They were conducted in secret, and could easily have remained so if not for some small number of whistle-blowers. In addition, there appears to be little if any evidence that any of the abuses were (or were reasonably believed to be) connected with any efforts to stop imminent terrorist attacks. Likewise, the infamous memoranda of the law on torture, prepared by Justice Department attorneys for Defense Department General Counsel William Haynes II, were aimed at shielding interrogators from even *potential* legal repercussions by arguing that Al Qaeda and Taliban detainees captured in Afghanistan were not covered by the Geneva Convention.¹³⁶ They also invoked hair-splitting definitions of “torture” to argue that for mental pain to qualify as torture, it had to involve

threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality; or threatening to do any of these things to a third party.¹³⁷

Even more absurdly, they argued that torture only occurs when the interrogator’s *purpose* is to inflict pain rather than to extract information. Thus, only a pure sadist with no desire to get information can be guilty of torture.¹³⁸ What our government has repeatedly failed to do—in these

¹³⁵ Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 74-75 (1965).

¹³⁶ See Amanda Ripley, *Redefining Torture; Did the U.S. go too far in changing the rules, or did it apply the new rules to the wrong people?*, TIME, June 24, 2004, at 49 (“Contradicting 50 years of policy governing the treatment of detainees captured during conflict, the memos meticulously list all the laws against torture—then offer methods of evading them.”).

¹³⁷ David Johnston & James Risen, *Aides Say Memo Backed Coercion Already in Use*, N.Y. TIMES, June 27, 2004, at 1.

¹³⁸ See *Shameful revelations will haunt Bush*, ECONOMIST.COM, June 18, 2004, at http://www.economist.com/agenda/displayStory.cfm?story_id=2771643.

memos and everywhere else—is set forth a proper legal mechanism for systematically and accurately determining which extreme interrogations are justified and advisable and which are not.

Cicero anticipated the dilemma facing democracies trying to respond to the threat of terrorism when he wrote “*inter arma silent leges*”¹³⁹—in battle, the laws are silent. Government officers facing the morally wrenching decision whether to torture a terrorism suspect—or, even worse, an innocent whose torture might induce a suspect to talk—must be subject to the judgment of the law rather than be held hostage to the fickleness of public opinion or the legislative process. Requiring officers to get judicial permission to torture subjects, however, would likely produce both false negatives, due to the tough standards of permission judges would be likely to apply, and false positives, due to the incomplete and biased information upon which judges would have to rely. Government agents should not base their decisions to torture on whether a judge agrees with their proposed actions before the fact, but on whether these actions are likely to hold up to judicial scrutiny *after* they are completed and heard in an adversarial court process with information presented from both sides. The defense of justification is designed to apply some utilitarian calculus to the criminal law, and, however imperfect and cold it may seem at times, it may be the best legal option for dealing with the most extreme circumstances.

139 CICERO, PRO MILONE 16 (N.H. Watts trans., Harv. Univ. Press, 5th ed. 1972).