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

Seth F. Kreimer*

INTRODUCTION

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

Torture has never been a favorite of American law. Whatever the transgressions of street-level bureaucrats,¹ it has not been a traditionally avowed instrument of American policy.² However, as the current trope goes, everything has changed after September 11.

In the immediate aftermath of that tragedy, law enforcement officials confronted with recalcitrant suspected terrorists let it be known that they were seriously considering resorting to chemical interventions and outright physical abuse to obtain information that could aid them in preventing a recurrence.³ According to the Department of Justice's Inspector General, physical abuse has in fact occurred.⁴ As the United States began its military response, reports of harsh treatment of captives who might have information began to filter back to

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¹ See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 470 (1997) [hereinafter Kreimer, *Dark Matter*] (describing the prevalence of constitutional claims against street-level bureaucrats for abuse of force).

² Justice Joseph Story believed that the Eighth Amendment "would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 710 (Carolina Academic Press 1987) (1833).

³ E.g., Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma for FBI*, WASH. POST, Oct. 21, 2001, at A6 (reporting proposals of truth drugs and "pressure tactics"); Jon Riley, *The War on Terror; Probe Stymied by Silence, Weighing How to Get Suspects to Cooperate*, NEWSDAY, Nov. 4, 2001, at A39 (reporting former State Department official's advocacy of "human rights violations").

⁴ OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 142 (2003), available at <http://www.usdoj.gov/oig/igspeccr1.htm>. See *id.* at 142–50, for a more specific account of the "pattern of physical and verbal abuse against some September 11 detainees" at the Metropolitan Detention Center in Brooklyn, New York.

the United States.⁵ Most recently, America's war with and subsequent occupation of Iraq has spawned accounts of physical abuse and torture.

In response to these reports, the current administration issued a statement that has been read as disavowing torture as a tool.⁷ Parsed carefully, however, the statement may forswear less than it appears to. The statement accurately recounts that the United States has ratified the Convention Against Torture,⁸ then goes on to state that the current administration fully intends to abide by the Convention as ratified. The statement does not, however, highlight the fact that the United States interprets the Convention as distinguishing between "torture"—defined as an act that inflicts "severe pain or suffering" for prohibited purposes—and other "cruel, inhuman or degrading practices" which are subject to lower levels of condemnation.⁹ Nor does it

⁵ See, e.g., 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 (providing accounts of interrogation techniques in American detention facilities, including "stress and duress" methods, and the criminal investigation into the death of two prisoners at a U.S.-occupied air base); Philip Shenon, *Officials Say Qaeda Suspect Has Given Useful Information*, N.Y. TIMES, Apr. 26, 2002, at A12 ("[S]uspects will not be subjected to any form of torture. But officials said other, nonviolent forms of coercion were being used, including sleep deprivation and a variety of psychological techniques that are meant to inspire fear.").

⁶ See, e.g., Owen Bowcott, *Troops Accused of Torture*, GUARDIAN (London), July 24, 2003, at 4 (containing account of interrogation technique of occupation forces); Jim Krane, *U.S. Interrogations Draw Fire*, DESERET MORNING NEWS (Salt Lake City), July 1, 2003, at A4 (same). There have been repeated reports of threats to "render" suspects to countries where torture is practiced. See, e.g., Priest & Gellman, *supra* note 5, at A1 ("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."). Such practices violate American treaty obligations. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, art. 3, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, 114 [hereinafter Convention Against Torture] (prohibiting the use of torture by any State party in any territory under its jurisdiction and proscribing the expulsion of any person to another State "where there are substantial grounds for believing that he would be in danger of being subjected to terror"). However, such issues of territoriality lie beyond the specific constitutional obligations explored in this Article.

⁷ Letter from William J. Haynes II, General Counsel, U.S. Department of Defense, to Senator Patrick Leahy (June 25, 2003), available at <http://www.hrw.org/press/2003/06/>; see also Press Release, The White House, Statement by the President, United Nations International Day in Support of Victims of Torture (June 26, 2003), available at <http://www.whitehouse.gov/news/releases/2003/06/> ("Torture anywhere is an affront to human dignity everywhere."). For commentary reading the statement as disavowing torture, see *The Pledge*, ECONOMIST, July 5, 2003, at 29, and Peter Slevin, *U.S. Pledges to Avoid Torture: Pledge on Terror Suspects Comes amid Probes of Two Deaths*, WASH. POST, June 27, 2003, at A11.

⁸ Convention Against Torture, *supra* note 6.

⁹ The Convention Against Torture itself forbids "torture," which it defines as acts that inflict "severe pain or suffering" for prohibited purposes. *Id.* at 113–14 (art. 1). It imposes as well an obligation to "undertake to prevent . . . other acts of cruel, inhuman or degrading treatment . . . which do not amount to torture." *Id.* at 116 (art. 16). Article 16 does not carry with it the entire series of enforcement obligations applicable to "torture" or the explicit disavowal of an "exceptional circumstances" justification. *Id.* at 114 (art. 2). The statutory prohibitions on

reveal that this distinction has been advanced as a basis for permitting a variety of physical abuses as techniques of interrogation.¹⁰ The administration's statement does observe that the Senate's ratification of the Convention was accompanied by reservations, among which is the

torture invoked by the Haynes letter incorporate a similar definition. See 18 U.S.C. § 2340 (2000) (providing a statutory definition of "torture").

The United States insisted in negotiations on the position that "torture" is limited to extreme forms of cruel treatment, and regulations adopted by the United States to implement the Convention explicitly provide that "[t]orture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 208.18(a)(2) (2002). See *Zubeda v. Ashcroft*, 333 F.3d 463, 472 (3d Cir. 2003) ("The Convention 'draws a clear distinction between torturous acts as defined in Article 1 and acts [of cruelty] not involving torture referenced in Article 16. The severity of the pain and suffering inflicted is a distinguishing characteristic of torture.'" (quoting *In re J-E*, 23 I. & N. Dec. 291, 295 (B.I.A. Mar. 22, 2002))). See also *In re J-E*, 23 I. & N. Dec. at 294-95 (detailing the United States's negotiating position). In *J-E*, a majority of the United States Board of Immigration Appeals invoked this distinction to return a Haitian refugee to Haiti, where he would likely face police mistreatment and indefinite imprisonment, reasoning that "[i]nstances of police brutality do not necessarily rise to the level of torture." *Id.* at 302.

¹⁰ In the 1970s in Northern Ireland, the British Army used a combination of five "techniques" (hooding, extended wall standing in painful postures, loud noises, sleep deprivation, and deprivation of food and drink) to interrogate suspects in an effort to obtain information to use against IRA terrorists. The European Commission of Human Rights found these actions, in combination, to be "torture" within the meaning of the European Convention on Human Rights. *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on H.R. 512, 792-94 (Eur. Comm'n of H.R.). The European Court for Human Rights reversed, determining that the combination of these techniques constituted "inhuman and degrading treatment" prohibited under the Convention, but not "torture." *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978).

One official inquiry by the state of Israel relied on the *Ireland* case to maintain that "moderate physical pressure" deployed against suspected Palestinian terrorists was consistent with international prohibitions against "torture." See REPORT OF THE COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), excerpted in 23 ISR. L. REV. 146, 179-80 (1989). The Israeli Supreme Court ultimately prohibited these techniques, which were similar to the British techniques, as unauthorized by law. See H.C. 5100/94, Pub. Comm. Against Torture in Israel v. Israel, 53(4) P.D. 817 (1999), reprinted in Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, Sept. 6, 1999, 38 I.L.M. 1471, 1478, 1480-85. See generally, John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237 (2003) (comparing U.S. conduct with that of British forces in Northern Ireland and Israeli forces fighting terrorism).

The United States may be invoking similar distinctions in its deployment of the "stress and duress" techniques, referred to as "torture lite." See, e.g., Jess Bravin, *Interrogation School Tells Army Recruits How Grilling Works*, WALL ST. J., Apr. 26, 2002, at A1 (describing some of the thirty techniques taught to soldiers at interrogation school where instructors claim that the techniques do not constitute human rights violations); Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9 ("Ruth Wedgwood, a professor of law at Yale University who has advised the administration, said it is debatable whether the CIA techniques constitute torture under the U.N.'s definition, which is the intentional infliction of 'severe pain or suffering' to obtain information."); Paul Valley, *The Invisible*, INDEPENDENT (London), June 26, 2003, at 2 (describing "stress and duress" techniques).

proposition that the United States understands the convention's prohibition of "cruel, inhuman or degrading" practices to constrain only those practices that violate the Fifth, Eighth, or Fourteenth Amendments.¹¹

If one reads the Haynes statement with the technicality that has been invoked in other public pronouncements by the current administration, physical or mental pressure to force answers from unwilling subjects that does not meet the technical definition of "torture" is not wholly disavowed. It is renounced only so far as the pressure would violate the Constitution. This reservation might be immaterial if it were clear that American constitutional law prohibited torture. However, in the wake of 9/11, at least one very public commentator, Professor Alan Dershowitz, has advanced arguments that under limited circumstances torture is a constitutional option.¹² It is to those arguments that this Article is addressed.

¹¹ See 136 CONG. REC. S17904 (daily ed. Oct. 27, 1990) (proposed amendments of Senator Pell on "U.S. Reservations, Declarations, and Understandings" of the Convention Against Torture). Professor Dershowitz seems to miss the distinction between "inhuman and degrading" practices that fall within the reservation and torture which does not, and he curiously omits reference to the Due Process Clause of the Fifth and Fourteenth Amendments in his discussion in ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 136 (2002) [hereinafter *WHY TERRORISM WORKS*] (maintaining that the United States is bound by the Convention Against Torture only to the extent that it is consistent with the Eighth Amendment of the Constitution and referring to it as the "Geneva Convention Against Torture").

¹² See, e.g., ALAN DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 470–77 (2002) (arguing that there may be some circumstances where extraordinary means, including physical torture, may be authorized in the interrogation of terrorists); *WHY TERRORISM WORKS*, *supra* note 11, at 131–63 (arguing that inflicting nonlethal pain on a guilty terrorist who illegally withholds information regarding an act of terrorism may be justified by preventing the loss of a large number of lives); Alan M. Dershowitz, *Is There a Torturous Road to Justice?*, L.A. TIMES, Nov. 8, 2001, at B19 (proposing that torture should only be conducted where authorized by law); Alan M. Dershowitz, *Painful Moral Questions; German Issue Is One for U.S. Too: Can Torture, or the Threat of It, Be Right?*, L.A. TIMES, Apr. 17, 2003, at B15 ("[L]et's start the public debate about torture, the threat of torture and other unpleasant options and tragic choices."); *60 Minutes: Torture?: Using Torture as a Means to Get Terrorists and Other Criminals to Talk* (CBS television broadcast, Jan. 20, 2002) (presenting Dershowitz as willing to accept torture as an interrogation tool so long as "we bring it into the legal system so that we can control it"); *Hardball* (MSNBC television broadcast, Jan. 29, 2002) ("[W]e should bring it within the law"). Professor Dershowitz builds on arguments he made initially in advising the state of Israel on how to meet its terrorist threats. See generally Alan Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—And to Lie About It?*, 23 ISR. L. REV. 193 (1989) (presenting circumstances where torture could be authorized against terrorists).

The Dershowitz argument has been advanced to courts, see *infra* text accompanying note 44 discussing the recent Supreme Court case *Chavez v. Martinez*, 123 S. Ct. 1994 (2003), invoked in public discussion, and seems to be taken seriously by military commentators, whose opinions matter a bit more than do those of law professors. See, e.g., Major Susan J. Burger, Book Review, 174 MIL. L. REV. 189, 193–94 (2002) (reviewing *WHY TERRORISM WORKS*, *supra* note 11) (arguing that "the book's significance is that it demands that the American public and its government confront . . . dilemmas in arriving at a terrorism policy").

I. THE DERSHOWITZ POSITION

Professor Dershowitz does not advocate a promiscuous return to the regime of the rack and the thumbscrew. Like most moderns, he views torture with repugnance. But in a situation where the only means of avoiding catastrophic loss of life lies in the knowledge of a recalcitrant prisoner, he argues, the course of least evil may be to temporarily sacrifice the physical integrity of a single wrongdoer as a way of saving the lives of a multitude of innocents. It is a “tragic choice,” but under circumstances where it is the only sure way to avert looming disaster, “a sterilized needle under the fingernails” may be the option that a government should adopt.¹³ Professor Dershowitz further argues it is not an option that is constitutionally barred.

Professor Dershowitz begins by taking the position that as long as the information obtained is not used in a criminal prosecution, the protections of the Fifth Amendment’s prohibition on compelled self-incrimination are not transgressed. Further, he argues, in addressing the constraints on deployment of force in pursuit of prevention—as opposed to retribution—the Eighth Amendment’s constraints on cruel and unusual punishment are inapplicable. The only relevant constitutional limitations, in his view, are the unreasonable searches and seizures and the general commands of the due process clause. As the relevant Fourth Amendment norm is one of “reasonableness,” the same principles that allow the involuntary insertion of a needle to obtain blood-alcohol tests in order to prosecute drunk drivers, would approve the insertion of a needle bearing “truth serums” to prevent terrorism. This would allow proportionately more serious intrusions to prevent more serious breaches of public order, culminating in torture where absolutely essential to preserve life. So, too, he argues, the due process clauses are “sufficiently flexible to permit an argument that the only process ‘due’ . . . is the requirement of probable cause and [at least] some degree of judicial supervision.”¹⁴

The proposal has evoked comment as well in the academy. Compare Sanford Levinson, *Sanford Levinson Replies*, DISSENT, Summer 2003, at 93–94 [hereinafter Levinson, *Sanford Levinson Replies*] (treating Dershowitz’s arguments seriously), and Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2048 (2003) [hereinafter Levinson, *Precommitment*] (suggesting that Dershowitz’s approach seeking to limit torture from an ex ante rather than ex post perspective be taken seriously), with William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2190 (2002) (arguing that torture should not be deployed even in pursuit of terrorists), and John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 747–48 (2002) (arguing that torture should not be a legally recognized option). This initial debate antedates *Chavez v. Martinez*, discussed *infra* Part II.A.2.b, and none of it comes to grips with the full range of constitutional precedent.

¹³ WHY TERRORISM WORKS, *supra* note 11, at 144.

¹⁴ *Id.* at 135.

II. THE LAW

A. *Self-Incrimination and Cruel Punishment—And Common Decency*

1. *The Limitations of the Clauses*

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

If anything is clear in constitutional law, it seems to be that the Eighth Amendment's prohibition against "cruel and unusual punishments" bars "torture." The original impetus for the Eighth Amendment came from the Framers' repugnance towards the use of torture, which was regarded as incompatible with the liberties of Englishmen.¹⁵ Even for those sentenced to death, the Court has held for more than a century that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden."¹⁶ "Wanton infliction of physical pain" has been univer-

¹⁵ See, e.g., *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) ("[P]roscribing torture and barbarous punishment was 'the primary concern of the drafters' of the Eighth Amendment . . ." (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976))); *id.* at 13-14 (Blackmun, J., concurring in the judgment) ("Indeed, were we to hold to the contrary, we might place various kinds of state-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a tell-tale 'significant injury'—entirely beyond the pale of the Constitution."); *cf. id.* at 26 (Thomas, J., dissenting) ("Many things—beating with a rubber truncheon, water torture, electric shock, incessant noise . . .—may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks." (quoting *Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988))); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (tracing "cruel and unusual" punishment ban to English Bill of Rights of 1689, which prohibited punishments "unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved"). For a discussion of the historical background of the American rejection of torture, see *infra* Part II.B.3.

¹⁶ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879). The Court has regularly proclaimed that torture, the infliction of lingering and excruciating pain, is out of bounds, even where capital punishment is warranted. See *In re Kemmler*, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death . . ."); see also *Estelle*, 429 U.S. at 102 (referencing *Kemmler*, 136 U.S. at 447); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("Prohibition against the wanton infliction of pain has come into our law from the [English] Bill of Rights of 1688 [sic]."); *Weems v. United States*, 217 U.S. 349, 370 (1910) (quoting *Kemmler*, 136 U.S. at 447).

As applied to capital cases, the boundaries of the prohibition on torture have allowed substantial pain to accompany execution, but nothing approaching the impositions proposed by Professor Dershowitz. Compare *Gray v. Lucas*, 463 U.S. 1237, 1239-40 (1983) (Burger, C.J., concurring in denial of certiorari) (agreeing with the decision of the court of appeals that death by cyanide is not so different from other methods of constitutional execution), with *id.* at 1240-42 (Marshall, J., dissenting from denial of certiorari) (describing gruesome and painful death by cyanide gas that can extend over several minutes). See generally *Gomez v. United States Dist. Ct.*, 503 U.S. 653, 655-56 (1992) (Stevens, J., dissenting from vacation of stay) (describing painful death from cyanide gas, which extended over ten minutes); *Glass v. Louisiana*, 471 U.S.

sally conceded to be outside the scope of legitimate punishment, even for the most heinous of crimes.¹⁷

Professor Dershowitz, however, citing *Ingraham v. Wright*,¹⁸ takes the position that this prohibition applies only to “punishment,” and that the effort to extract information where no judicially imposed punishment is contemplated lies outside of the prohibition.¹⁹ *Ingraham* involved a challenge to the imposition of corporal punishment on students in the Dade County, Florida, school system. The punishment was referred to as “padding,” but included assaults comprising twenty to fifty blows with a wooden slat which on occasion left the

1080, 1087–89 (1985) (Brennan, J., dissenting from denial of certiorari) (describing electrocution as a painful experience lasting several minutes).

Professor Dershowitz asks rhetorically, “What moral principle could justify the death penalty for past individual murders and at the same time condemn nonlethal torture to prevent future mass murders?” WHY TERRORISM WORKS, *supra* note 11, at 148. The answer, one supposes, is the moral principle embedded in the Eighth Amendment.

¹⁷ See *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (holding that shackling in a painful position at a “hitching post” for extended time is unconstitutional because “[t]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment” (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986))); *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that conditions of prison confinement that are likely to cause serious illness and needless suffering violate the Eighth Amendment); *Hudson v. McMillian*, 503 U.S. 1, 8–9 (1992) (reaffirming, in a case involving beating by prison guards, the “general requirement” that the Eighth Amendment proscribes “unnecessary and wanton infliction of pain” or torture, even when no serious physical injury eventuates); *Estelle*, 429 U.S. at 104 (1976) (holding that the denial of medical care for “serious medical needs” likely to result in substantial pain or suffering violates the Eighth Amendment because “unnecessary and wanton infliction of pain” is inconsistent with contemporary standards of decency (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))); *cf. Hudson*, 503 U.S. at 26 (Thomas, J., dissenting) (explaining that the state cannot inflict serious agony, whether physical or not, without cause); *Weems*, 217 U.S. at 372–73 (holding that sentencing defendant to labor under painful conditions violated Eighth Amendment, which was motivated by Framers’ suspicion that “power might be tempted to cruelty”); *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (“That [cruel and unusual] designation . . . is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering.”).

To violate the Eighth Amendment, the imposition in question must be the result of either intent or deliberate indifference. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (applying “deliberate indifference” requirement to the conduct of prison officials accused of failing to protect inmate from assaults by other inmates). Infliction of pain is, of course, entirely intended in the situations of which Professor Dershowitz writes.

¹⁸ 430 U.S. 651 (1977).

¹⁹ Professor Dershowitz’s approach thus has echoes of the *torture préalable*, established by the French legal system during the Ancien Régime, in which torture was applied after criminal conviction to gain the names of accomplices. See JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 16–17 (1977); EDWARD PETERS, TORTURE 66 (1985). The *torture préalable* was retained even after abolition of the *torture préparatoire*, which sought to obtain confessions. See *id.* at 73; see also LANGBEIN, *supra* at 16–17 (“In the French sources ordinary judicial torture is known as *torture préparatoire*, as opposed to this torture of a convict, so-called *torture préalable*, literally ‘preliminary torture’ in the sense of being preliminary to the execution of a capital sentence.”).

recipients incapacitated and in need of medical treatment.²⁰ Nonetheless, a five-member majority of the Court found the punishments in question to be outside of the ambit of the Eighth Amendment, construing the ban on “cruel and unusual punishment” to apply only to punishment imposed as part of the criminal process.²¹

So, too, the most recent Supreme Court pronouncements lend support to Professor Dershowitz’s claim that the protection against self-incrimination bars the use of coerced disclosures at trial, rather than the coercion itself. While earlier language in the Supreme Court seemed to establish a right against coercive interrogations rooted in the Fifth Amendment’s self-incrimination clause, a majority of the Court in *Chavez v. Martinez*²² refused to entertain an action for damages based on a violation of the self-incrimination right on behalf of a plaintiff who had been interrogated for forty-five minutes while screaming in pain and awaiting medical treatment after being shot in the face by the police. Justice Thomas’s opinion, joined on this point by Chief Justice Rehnquist and Justices Scalia and O’Connor, found no violation of the self-incrimination right because the plaintiff was never brought to trial on any criminal charge. According to Justice Thomas’s opinion:

Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs. The text of the Self-Incrimination Clause simply cannot support the . . . view that the mere use of compulsive questioning, without more, violates the Constitution.²³

Notwithstanding a vigorous dissent by Justice Kennedy, joined by Justices Stevens and Ginsburg, the case lends support to Professor Dershowitz’s position on self-incrimination.²⁴

²⁰ See *Ingraham*, 430 U.S. at 656–57 (noting that one of the plaintiffs received more than twenty blows, required medical care, and could not return to school for several days; a second plaintiff could not use one of his arms for a week); *id.* at 688 (White, J., dissenting) (noting that another student received fifty blows).

²¹ In this respect *Ingraham* is probably good law. See *Graham v. Connor*, 490 U.S. 386, 393 n.6 (1989) (citing *Ingraham* for the proposition that the Eighth Amendment standard applies “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions”); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199 n.6 (1989) (same); *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (same); *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (same); *Bell v. Wolfish*, 441 U.S. 520, 535, n.16 (1979) (citing *Ingraham* and *United States v. Lovett*, 328 U.S. 303, 317–18 (1946), for the same proposition). *But cf.* *Austin v. United States*, 509 U.S. 602 (1993) (applying Eighth Amendment to *in rem* civil forfeiture proceeding and therefore to “remedial goals” beyond the criminal context).

²² 123 S. Ct. 1994 (2003).

²³ *Id.* at 2001 (citations omitted).

²⁴ Justice Souter concurred in the judgment on the self-incrimination claim, joined by Justice Breyer, to provide a majority. His opinion began by stating, in his view:

Professor Dershowitz concludes that the only protections the Constitution imposes on nonpunitive government cruelty in and of itself are procedural, and may be met by issuance of a “torture warrant” on a proper showing of probable cause. If his reading of the Fifth and Eighth Amendments exhausts constitutional constraints, a gaping hole opens in constitutional protections against tyranny: a government seeking to cow the citizenry need only dispense with prosecution entirely and administer physical sanctions directly to disfavored individuals on “probable cause.”

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

2. *The Limitations of the Dershowitz Analysis*

a. *The Eighth Amendment, Ingraham v. Wright, and Bodily Integrity*

While, as Professor Dershowitz notes, *Ingraham v. Wright* found the Eighth Amendment inapplicable to assaults on students, the case also adopted the proposition that bodily integrity is a liberty interest protected by the Due Process Clause. Justice Powell’s further discussion focused on the procedures required for the imposition of paddling, because the grant of certiorari had excluded the plaintiffs’ substantive due process claim.²⁵ The procedural due process analysis that fol-

[T]he text of the Fifth Amendment (applied here under the doctrine of Fourteenth Amendment incorporation) focuses on courtroom use of a criminal defendant’s compelled, self-incriminating testimony Martinez has offered no reason to believe that the guarantee has been ineffective in all or many of those circumstances in which its vindication has depended on excluding testimonial admissions or barring penalties.

Id. at 2006–07 (Souter, J., concurring in the judgment). Souter did not indicate whether an injunctive action might be proper, or what result would be obtained if a showing were made.

²⁵ The Court specifically refused to address the contention that substantive due process barred punishments as to students that would be unconstitutional as to convicted criminals. See *Ingraham*, 430 U.S. at 659 n.12. Perhaps this was an effort to avoid the furor that accompanied the substantive due process discussion of abortion, which was raging at the time. Current law, however, seems to have accepted *Roe v. Wade*, 410 U.S. 113 (1973), as part of the constitutional canon. See Seth F. Kreimer, *The Second Time as Tragedy: The Assisted Suicide Cases and the Heritage of Roe v. Wade*, 24 HASTINGS CONST. L.Q. 863, 867 (1997) (observing that all members of the Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997), accepted the vitality of the abortion right). The recent majority in *Lawrence v. Texas* was remarkably aggressive in its citation of the abortion cases as binding precedent. 123 S. Ct. 2472, 2481 (2003) (describing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as having affirmed “the substantive force of the liberty protected by the Due Process Clause”); *id.* at 2480, 2483 (providing other citations to *Casey*).

Likewise, notwithstanding the periodic rumblings of dissatisfaction by Justices Thomas and Scalia, there is also unanimity that the Due Process Clause bears a substantive content, however contested its precise boundaries may be. See, e.g., *Lawrence*, 123 S. Ct. at 2481; *Chavez*, 123 S. Ct. 1994; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (“Despite the

lowed was not a blanket grant of deference to executive decisions to deploy physical force, but rather a tightly focused (not to say idiosyncratic) set of reasoning. It was predicated on both the teacher's common law privilege of "moderate correction" and on a concern for the local educational autonomy. Justice White's dissent for himself and Justices Brennan, Marshall, and Blackmun, in addition to disagreeing with Justice Powell's analysis of the Eighth Amendment issues suggested—without contradiction—that given the recognition of a liberty interest in bodily autonomy, review of physical assaults by school officials and other executive officers could take place under the rubric of substantive due process.²⁶ Such, indeed, has been the subsequent development over the last generation.

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

broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion." (quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001)); *Glucksberg*, 521 U.S. 702.

²⁶ *Ingraham*, 430 U.S. at 669 n.5 (White, J., dissenting).

²⁷ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992) (quoting *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 196 (1989) (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)))).

²⁸ *Tennessee v. Garner*, 471 U.S. 1 (1985); see also *Graham v. Connor*, 490 U.S. 386, 395 (1989) (setting forth objective reasonableness test for measuring excessive force); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (subjecting police roadblock to Fourth Amendment requirements because intentional restraint on citizen's freedom of movement constituted seizure).

²⁹ *Winston v. Lee*, 470 U.S. 753 (1985).

³⁰ See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (classifying punishment by use of a hitching post as cruel and unusual); *Farmer v. Brennan*, 511 U.S. 825, 832–34 (1994) (condemning failure to protect against inmate beatings); *Helling v. McKinney*, 509 U.S. 25 (1993) (holding that a prisoner claiming to have suffered cruel and unusual punishment by being exposed to environmental tobacco smoke had stated an Eighth Amendment claim); *Hudson v. McMillian*, 503 U.S. 1, 10–11 (1992) (reaffirming earlier holdings that malicious and excessive force is cruel and unusual punishment); *Whitley v. Albers*, 475 U.S. 312 (1986) (holding that shooting of an inmate during a prison riot did not violate Eighth Amendment because it was part of a good

todial settings, the Constitution similarly bars officials from physical assault and the denial of minimal standards of decent treatment.³¹ Indeed, actions against officials to enforce standards of minimum decency came to represent the largest part of the civil constitutional caseload of lower federal courts during the 1990s.³²

In the last decade, the Court has also come to enunciate a more general protection: if not covered by a specific constitutional constraint, the Court has held that due process substantively protects against physical abuses that "shock the conscience of the Court." This line of cases originates in *Rochin v. California*, which began when Los Angeles deputy sheriffs pursued a tip that Antonio Rochin had been dealing narcotics. They burst into his apartment and observed two suspicious capsules on the nightstand beside the bed, on which Rochin lay partly undressed. When Rochin swallowed the capsules, the deputies handcuffed him and conveyed him to a hospital where "[a]t the direction of one of the officers a doctor forced an emetic solution through a tube into Rochin's stomach against his will."³³ Rochin vomited, revealing the suspect capsules; over Rochin's objection, the capsules and the morphine they contained were introduced into evidence at his subsequent trial.

Justice Frankfurter, writing for six members of the Court, found this course of conduct violated the demands of due process, which guarantee "respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . or are implicit in the concept of ordered liberty.'"³⁴ Observing that due process requires the state to "respect cer-

faith effort to restore security); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (finding denial of medical care unconstitutional).

³¹ As the Court summarized these cases in *Collins*:

We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, *cf. Hutto v. Finney*, 437 U.S. 678 (1978), the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, *see Bell v. Wolfish*, 441 U.S. 520, 535, n.16, 545 (1979), for persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315-316 (1982), for convicted felons, *Turner v. Safley*, 482 U.S. 78, 94-99 (1987), and for persons under arrest, *see Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-245 (1983).

503 U.S. at 127. See also *West v. Atkins*, where Justice Scalia explains:

[A] physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment's protection against the deprivation of liberty without due process.

487 U.S. 42, 58 (1988) (Scalia, J., concurring in part and concurring in the judgment).

³² See Kreimer, *Dark Matter*, *supra* note 1, at 470-71 (providing detailed statistical breakdown of the bases for constitutional claims).

³³ *Rochin v. California*, 342 U.S. 165, 166 (1952).

³⁴ *Id.* at 169 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

tain decencies of civilized conduct,” the opinion declared of Mr. Rochin’s treatment at the hands of the deputies:

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.³⁵

While the issue before the Court in *Rochin* was the use of evidence in a criminal prosecution, it rapidly became clear that the shock to the Court’s conscience arose from the “coercion, violence or brutality to the person” involved.³⁶ When Justice Powell canvassed the scope of constitutional protection from physical assault in *Ingraham v. Wright*, he included *Rochin* as support for the historic pedigree of that right.³⁷ There followed a quarter-century-long struggle over the legitimacy of substantive due process as a rubric for judicial review, swirling in large measure around the debate over the constitutional status of abortion. Throughout this period, opinions continued to cite *Rochin* for the proposition that deliberate use of force that “shocks the conscience” violates constitutional constraints.³⁸ By the end of the century, as the abortion debate stabilized, *Rochin* was being cited as a keystone in the constitutional protection of bodily integrity against arbitrary invasion.³⁹

³⁵ *Id.* at 172. *See id.* at 173 (“It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.”).

³⁶ *Irvine v. California*, 347 U.S. 128, 133 (1954); *see also* *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (deciding that an involuntary blood test was not sufficiently “brutal” or “offensive” to invoke *Rochin*); *Schmerber v. California*, 384 U.S. 757 (1966) (holding that an involuntary blood test to measure blood-alcohol level is reasonable).

³⁷ *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977).

³⁸ *See, e.g., Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”); *West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring in part and concurring in the judgment) (construing prisoner’s claim as one premised on substantive due process); *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (stating that in the context of forceful prison security measures, conduct that violates the Fourteenth Amendment also violates the Eighth Amendment). *See also* *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (“*Rochin* . . . must stand for the proposition that, quite apart from any ‘specific’ of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law.”).

³⁹ *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing “bodily integrity” as included in liberty “specially protected” by due process); *id.* at 777 (Souter, J., concurring in the judgment) (same); *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (citing *Rochin* to argue that the Constitution places limits on a state’s right to interfere with bodily integrity); *id.* at 915 (Stevens, J., concurring in part and dissenting in part) (same); *id.* at 927 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (same).

In *County of Sacramento v. Lewis*, the Court announced a general approach to the problem of executive abuse of force. Relying on *Rochin*, the Court held that in circumstances covered by neither the Fourth Amendment nor the Eighth Amendment, the Due Process Clause bars executive officials “from abusing [their] power or employing it as an instrument of oppression” in a fashion that “shocks the conscience of the court.”⁴⁰ Thus today, notwithstanding the fact that the Eighth Amendment does not constrain school teachers, a student like the plaintiff in *Ingraham v. Wright*, having sustained incapacitating injury caused by subjection to twenty “licks” with a wooden paddle at the hands of a public school teacher, would have a good cause of action against his assailant under substantive due process theory.⁴¹

b. *Coercive Interrogation*

Rochin, it will be recalled, grounded its analysis in an analogy to the values of the Self-Incrimination Clause: the state’s assault was “too close to the rack and the screw to permit of constitutional differentiation.”⁴² In *Chavez v. Martinez*,⁴³ while a majority of the Court denied

⁴⁰ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citations omitted). In the context of a high-speed police chase, the Court held that conduct short of an “intent to harm suspects physically” would not “shock the conscience,” though it left open the scope of “conscience-shocking” conduct in other circumstances. *Id.* at 854. See also *United States v. Lanier*, 520 U.S. 259, 262 (1997) (reversing dismissal of civil rights prosecution of a state judge who sexually assaulted and orally raped litigants and employees, where trial court correctly charged that physical assault would violate Constitution if the conduct involved “physical force, mental coercion, bodily injury or emotional damage which is shocking to one’s consci[ence]”).

⁴¹ *Ingraham*, 430 U.S. at 657, 674. See, e.g., *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251–52 (2d Cir. 2001) (concluding that gym teacher’s disciplinary response of dragging student across the floor by neck and slamming student’s head against bleachers stated a substantive due process claim); *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1071 (11th Cir. 2000) (holding that corporal punishment by football coach that resulted in destruction of a student’s eye stated a substantive due process claim); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996) (holding that school principal’s conduct in hitting one student in the mouth, grabbing and squeezing the student’s neck, punching a second student in the chest, and throwing a third student headfirst into lockers was corporal punishment actionable as a substantive due process claim); *Metzger v. Osbeck*, 841 F.2d 518, 519–20 (3d Cir. 1988) (concluding that “discipline” resulting in lacerations to a student’s lower lip, a broken nose, fractured teeth and other injuries requiring hospitalization stated violation of substantive due process); *Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir. 1987) (finding principal’s motion for summary judgment on substantive due process inappropriate where nine-year-old student was left with deep bruises, bleeding, and permanent scar after paddling); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (upholding injunction against school’s use of a disciplinary action nicknamed the “hair dance” in which a school employee would “grab one of the student’s arms and clutch the boy’s hair with his other hand”); *Hall v. Tawney*, 621 F.2d 607, 615 (4th Cir. 1980) (reversing dismissal of claim brought by a student who spent ten days hospitalized with tissue damage from spanking with rubber paddle).

⁴² 342 U.S. 165, 172 (1952).

⁴³ 123 S. Ct. 1994 (2003).

the application of the Fifth Amendment's Self-Incrimination Clause to coercive interrogation simpliciter, the opinions in that case simultaneously made clear that the powers of the government to inflict injury in the search for information are constrained by substantive due process.

Chavez was argued a little over a year after the September 11 attacks, against the backdrop of the ongoing "war on terror." The brief for the petitioner, seeking to exonerate the police officer who persisted in questioning the wounded and screaming suspect, invoked the image of an official questioning a "suspect [who] has been arrested for kidnaping [sic] a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out on his life," and invited the Court to refer to Professor Dershowitz's analysis.⁴⁴ One amicus brief invited the Court to consider issues of "national security" in limiting the rights of those subject to interrogation.⁴⁵ The Solicitor General, on behalf of the United States as amicus curiae, argued for "breathing space" needed "for law enforcement to confront imminent threats," putting before the Court the picture of police seeking "life-saving information" from a suspect regarding a "bomb . . . about to explode," and inviting the Court to approve such measures as "grabbing of the throat," pointing a gun at the suspect's temple, and threatening to "knock [the suspect's] remaining teeth out of his mouth if he remained silent."⁴⁶

The Court pointedly declined these invitations. Five of the six opinions in the case renounced the position that torture to obtain relevant information is a constitutionally acceptable law enforcement technique if the information is not introduced at trial.⁴⁷ In deciding

⁴⁴ Brief for the Petitioner at 27 n.8, *Chavez v. Martinez*, 123 S. Ct. 1994 (2003) (No. 01-1444) (citing *WHY TERRORISM WORKS*, *supra* note 11, at 135, 247 n.3) (encouraging Court to interpret *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984), as did Dershowitz, to admit statements made sufficiently subsequent to an incident of torture).

⁴⁵ Brief of Amici Curiae 50 California Cities in Favor of Petitioner and Reversal at 28, *Chavez* (No. 01-1444).

⁴⁶ Brief for the United States as Amicus Curiae Supporting Petitioner at 24–25, 21, 29, *Chavez* (No. 01-1444). See Reply Brief for the Petitioner at 7, *Chavez*, (No. 01-1444) (invoking the "bomb is about to explode"). See also Transcript of Oral Argument at 34, *Chavez*, (No. 01-1444), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/ ("QUESTION: [L]et's assume . . . you think he's going to blow up the World Trade Center. I suppose if . . . we have . . . this necessity exception . . . you could beat him with a rubber hose.")

Both the United States and the Petitioner cited Justice Marshall's dissent in *New York v. Quarles*, 467 U.S. 649, 686 (1984), for the proposition that, "[i]f a bomb is about to explode . . . the police are free to interrogate suspects without advising them of their constitutional rights." Of course, the United States and the Petitioner argued that the police were free to do much more.

⁴⁷ *Chavez*, 123 S. Ct. at 2004 (Thomas, J., holding unclear) ("Our views on the proper scope of the Fifth Amendment's Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial . . ."); *id.* at 2010 (Stevens, J., concurring in part and dissenting in part)

this, they followed established law. Many cases condemning physical abuse in the search for evidence as unconstitutional involved the invalidation of convictions obtained on the basis of extorted confessions.⁴⁸ But there is sound precedent, as well, for the proposition that such physical abuse, in and of itself, violates the mandates of the Due Process Clause. Almost half a century ago, the Supreme Court upheld the criminal conviction of special police who physically abused a series of suspects in the effort to obtain both confessions and evidence against alleged accomplices. The Court held that the physical

(concluding that the law is clear that “an attempt to obtain an involuntary confession from a prisoner by torturous methods . . . [is the] type of brutal police conduct [that] constitutes an immediate deprivation of the prisoner’s constitutionally protected interest in liberty”); *id.* at 2016 (Kennedy, J., concurring in part and dissenting in part) (“[U]se of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”); *id.* at 2019 (Ginsburg, J., concurring in part and dissenting in part) (quoting Stevens on “torturous methods” and characterizing the type of procedure to be avoided by quoting 4 J. WIGMORE, EVIDENCE § 2251, 827 (1923), that “[i]t is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence”). Justice Souter, joined by Justice Breyer, was more measured in his comments, concluding that Justice Stevens had shown that Martinez had set forth a “serious argument” that the police conduct was unconstitutionally “outrageous.” *Id.* at 2007–08 (Souter, J., concurring in the judgment). Justice Scalia, who joined Justice Thomas’s opinion, filed a separate opinion focusing on a procedural objection to the outcome of the case. *Id.* at 2008 (Scalia, J., concurring in part in the judgment). *Cf.* *McKune v. Lile*, 536 U.S. 24, 41 (2002) (distinguishing “the physical torture against which the Constitution clearly protects” from “*de minimus* harms against which it does not”).

⁴⁸ The first in this line was *Brown v. Mississippi*, 297 U.S. 278, 281–82 (1936), which involved convictions based on confessions resulting from investigations in which one defendant was “tied to a tree and whipped” and two others were “made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it.” *See, e.g.,* *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (recounting police chief’s threat to suspect, “If you don’t tell the truth I am going to kill you,” and officer’s subsequent firing of rifle next to suspect’s ear); *Clewis v. Texas*, 386 U.S. 707, 709–10 (1967) (describing suspect’s arrest without probable cause and interrogation for nine days with little food or sleep); *Reck v. Pate*, 367 U.S. 433, 435, 439–40 n.3 (1961) (giving account of mentally retarded youth interrogated incommunicado for a week “during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher”); *Leyra v. Denno*, 347 U.S. 556, 558–61 (1954) (invalidating conviction where sleep-deprived suspect confessed after being questioned by state psychiatrist who offered to treat suspect’s “acutely painful attack of sinus”); *Malinski v. New York*, 324 U.S. 401, 403 (1945) (noting that defendant was held naked for three hours and questioned in hotel room for ten hours); *Ashcraft v. Tennessee*, 322 U.S. 143, 150–51 (1944) (noting that defendant was questioned for thirty-six straight hours without sleep); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (explaining that defendant was moved “by night and day to strange towns, [told] of threats of mob violence, and question[ed] continuously” before giving confession); *Lisenba v. California*, 314 U.S. 219, 230 (1941) (noting that defendant was held incommunicado, slapped and allegedly beaten, leaving both ears swollen); *White v. Texas*, 310 U.S. 530, 532–33 (1940) (explaining that armed Texas Rangers took defendant out of jail and into the woods for interrogation where they allegedly whipped him); *Chambers v. Florida*, 309 U.S. 227, 238–39 (1940) (describing arrest of defendants, black tenant farmers, without warrants and their interrogations “under circumstances calculated to break the strongest nerves and the stoutest resistance”).

abuse itself constituted a deprivation of constitutional rights under color of law.⁴⁹

All of the Justices in *Chavez* accepted the proposition, based in *Rochin* and *County of Sacramento v. Lewis*, that egregious physical abuse in police questioning that “shocks the conscience” of the court would violate the substantive requirements of the Due Process Clause.⁵⁰ The Justices splintered, however, on whether the actions of Officer Chavez rose (or sank) to that level of egregiousness. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have relied on an absence of evidence that Officer Chavez “acted with a purpose to harm Martinez,” interfered with his treatment, or “exacerbated [his] injuries or prolonged his stay in the hospital” along with the legitimate “need to investigate” the circumstances of the shooting to conclude that no substantive due process violation had been alleged.⁵¹ Justice Kennedy, joined by Justices Stevens and Ginsburg, thought it equally plain that because “the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions,” there was a clear constitutional violation; “no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement.”⁵² Justice Souter, joined by Justice Breyer, filed a brief and cryptic opinion for the Court stating that there was a “serious argument” in support of that claim, but that whether the actions were indeed conscience-shocking should be resolved on remand.⁵³

⁴⁹ *Williams v. United States*, 341 U.S. 97, 101 (1951) (“[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution.”). See *United States v. Price*, 383 U.S. 787, 793 & n.6 (1966) (holding that police officers who assaulted, shot, and killed civil rights workers violated due process rights, and quoting *Williams* on “beat[ing] and pound[ing] until they confess”); *Rochin v. California*, 342 U.S. 165 (1952) (holding that forcing a suspect to vomit evidence is unconstitutional). As the Court set forth the facts in *Williams*:

A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed.

341 U.S. at 98–99.

⁵⁰ *Chavez*, 123 S. Ct. at 2005 (Thomas, J., joined by Rehnquist, C.J., O’Connor and Scalia, JJ.); *id.* at 2008 (Souter, J., joined by Breyer, J.); *id.* at 2011 (Stevens, J.); *id.* at 2016 (Kennedy, J., joined by Stevens and Ginsburg, JJ.) (Under the Due Process Clause of the Fourteenth Amendment, “use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.” (citing *Rochin*, 342 U.S. at 165)).

⁵¹ *Id.* at 2005 (Thomas, J., holding unclear).

⁵² *Id.* at 2017–18 (Kennedy, J., concurring in part and dissenting in part).

⁵³ *Id.* at 2008 (Souter, J., opinion of the court on this point). Justice O’Connor’s position on this issue does not seem to be recorded.

In light of this evolution, how should we approach the question of “torture warrants”? Whatever else may be true, it appears that Professor Dershowitz’s proceduralist position is no longer tenable. Although neither the Self-Incrimination Clause nor the Eighth Amendment apply by their own force to investigatory torture, brutal inquisition violates the Constitution as a substantive matter if its brutality “shocks the conscience of the court.”⁵⁴ This conclusion, however, simply sets the terms of further discussion, for it does not answer the question of exactly what level or type of brutality will shock the judicial conscience. Professor Dershowitz’s proposed torture is brutal, and would be undertaken with a “purpose to harm”—the absence of which underpinned the Thomas opinion’s exoneration of Officer Chavez. But will a claim of sufficiently compelling circumstances assuage brutality’s shock? Conversely, the recurrent accounts of “stress and duress” techniques deployed by United States interrogators in the “war on terror” fall short of Dershowitz’s proposed needle under the fingernails, and only two Justices fully joined Justice Kennedy’s position in *Chavez* that “no reasonable police officer would [have] believe[d] that the law permitted him to prolong or increase pain to obtain a statement.”⁵⁵ Would what is referred to by some former American officials as “torture lite”⁵⁶ shock the judicial conscience? An answer to these questions requires further investigation into the contours of the judicial conscience.

III. THE CONSCIENCE OF THE COURT

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

In sounding the depths of the judicial conscience that finds “the rack and the screw” repugnant, it is worth beginning with the basis for that repugnance. Torture is alien to our Constitution both be-

In the event on remand, the Ninth Circuit was equally abrupt, but more emphatic, in *Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003), holding tersely that the plaintiff’s claim was viable because “[a] clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation.”

⁵⁴ Professor Dershowitz acknowledges the “shocks the conscience” constraint of *Rochin*, WHY TERRORISM WORKS, *supra* note 11, at 135, 247–49, but concludes that only procedural protections are required in the case of “a terrorist suspected of refusing to disclose information necessary to prevent a terrorist attack.” His citation for this proposition, *Leon v. Wainwright*, 734 F.2d 770 (11th Cir. 1984), is an odd one, since *Leon* appears to acknowledge that a constitutional violation occurred when police choked a kidnapper to determine the location of the kidnap victim, but determined that the violation had been dissipated by the passage of time and advice of his rights between the abuse and a subsequent confession.

⁵⁵ *Chavez*, 123 S. Ct. at 2017–18 (Kennedy, J., concurring in part and dissenting in part, joined by Stevens and Ginsburg, JJ.).

⁵⁶ See, e.g., Duncan Campbell, *US Interrogators Turn to “Torture Lite,”* GUARDIAN (London), Jan. 25, 2003, at 17 (quoting former U.S. Navy intelligence officer).

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

1. *Bodily Integrity*

Torture in the form that Professor Dershowitz contemplates involves an assault on the body.⁵⁷ Yet from the early days of the Republic, physical security against government has been a defining characteristic of the American constitutional system; protection against physical assault by their rulers is one of the hallmarks of free people. The Fourth Amendment protects the "person" against unreasonable searches and seizures; the protection of "liberty" against deprivation without due process builds on Blackstone's definition of liberty as including personal security.⁵⁸

This concern for bodily integrity draws force as well from the background of the Thirteenth Amendment's ban on slavery. In American law before the Civil War, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master's "uncontrolled authority"; physical assault could yield no legal redress.⁵⁹ Indeed, the standard

⁵⁷ Note that some forms of "stress and duress" involve sensory deprivation, rather than sensory assaults.

⁵⁸ *Ingraham v. Wright*, 430 U.S. 651, 661, 673 n.41 (1977) ("Blackstone catalogued among the 'absolute rights of individuals' the right 'to security from the corporal insults of menaces, assaults, beating, and wounding . . .'" (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *134)).

⁵⁹ See, e.g., *State v. Mann*, 13 N.C. (2 Dev.) 263, 266, 268 (1829) (recognizing "absolute" authority of master over the slave's body); *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827) (sustaining master's demurrer to indictment on charge of beating his slave); ANDREW FEDE, PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH 3, 10–11 (Harold M. Hyman ed., 1992) ("[T]he logic of slave law was the logic of absolute legal oppression of one person over another.").

The master's authority did not extend to killing the slave. See, e.g., *State v. Will*, 18 N.C. (1 Dev. & Bat.) 121, 126–31, 134, 172 (1834) (holding that slave's death at master's hand, absent malice, was not murder but was a "felonious" homicide); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1032–35 (1992) (providing examples of prosecutions and convictions for the killing of slaves by masters or overseers). Some states by statute prohibited "cruel and unusual" punishments of slaves. See, e.g., *Wilson v. State*, 29 Tex. 240, 245–46 (1867) (citing Texas statute under which "abuse or cruel treatment" of slave leading to death was murder); *Kelly v. State*, 11 Miss. (3 S. & M.) 518, 526 (1844) ("[T]he master or any other person entitled to the service of the slave shall not inflict upon such slave cruel or unusual punishment, under the penalty, upon conviction thereof, of a fine of five hundred dollars."); *Turnipseed v. State*, 6 Ala. 664, 665 (1844) (citing Alabama penal code section providing that "[n]o cruel or unusual punishment shall be inflicted on any slave"). Whipping, however, was the normal mode of punishment on plantations, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 85–87 (1993), and for antebellum antislavery forces, "whipping symbolically condensed the evils of tyranny and barbarism." MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835, at 296 (1996).

form of a legal suit for freedom was an action for battery against the purported master.⁶⁰ A constitutional prohibition of slavery brings with it a presumption that the bodies of citizens are subject to neither the “uncontrolled authority” of the state nor that of any private party. As Justice O’Connor has observed, “Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”⁶¹

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

Torture, of course, is not a mere infringement on bodily integrity. It is an infringement designed to produce excruciating pain. Both the Eighth Amendment’s strictures against cruel punishment and the antitorture background of the Self-Incrimination Clause bespeak hostility toward such practices. Justice Kennedy in *Chavez* took the position that “no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement.”⁶² So, too, in *Glucksberg*, Justice Stevens would have held that “[a]voiding

⁶⁰ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (dismissing, for want of diversity jurisdiction, slave’s suit for battery committed by master).

⁶¹ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring). See also *Sell v. United States* 123 S. Ct. 2174, 2182 (2003) (reiterating that “involuntary medical treatment raises questions of clear constitutional importance” under the Due Process Clause); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[L]iberty’ specially protected by the Due Process Clause includes the right[] to . . . bodily integrity . . .”); *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (“It is settled now . . . that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about . . . bodily integrity.”); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (holding Due Process prevents a person detained for trial from being forced to take antipsychotic drugs “absent a finding of overriding justification and a determination of medical appropriateness”); *Cruzan*, 497 U.S. at 278–79 (inferring “liberty interest” to refuse “unwanted” medical care from prior cases under the Due Process Clause); *Washington v. Harper*, 494 U.S. 210, 221–23 (1990) (establishing prisoner’s due process right to be free from forced antipsychotic drug therapy absent justification); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O’Connor, J., concurring in part and dissenting in part) (“[O]ur Constitution’s promise of due process of law guarantees” at least compensation for violations of the principle stated by the Nuremberg Military Tribunals “that the ‘voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts.’” (citation omitted)); *Winston v. Lee*, 470 U.S. 753 (1985) (forbidding brutally invasive surgical search authorized by warrant); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (recognizing Due Process Clause protects “right to freedom from bodily restraint” that survives involuntary commitment to state institution for the mentally retarded); *Schmerber v. California*, 384 U.S. 757, 772 (1966) (“The integrity of an individual’s person is a cherished value of our society.”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (refusing court-compelled medical examination of plaintiff upon pretrial application by defendant).

⁶² *Chavez v. Martinez*, 123 S. Ct. 1994, 2018 (2003) (Kennedy, J., concurring in part and dissenting in part).

intolerable pain” was a virtually infeasible individual right,⁶³ and Justices O’Connor, Ginsberg, and Breyer approved the prohibition on assisted suicide at issue only because state law permitted palliative interventions sufficient to avoid agony.⁶⁴

This perception is not a new one. Even before the Court applied the Fifth Amendment’s protections against self-incrimination to the states, torture to obtain criminal convictions was outside of the moral universe delineated by the Constitution under the fundamentals of “ordered liberty”; “[t]he rack and torture chamber may not be substituted for the witness stand.”⁶⁵ Likewise, it has been clear for over a century that one of the core elements of the Eighth Amendment’s prohibition against cruel and unusual punishment is its bar of the imposition of torture or lingering death.⁶⁶ Almost three decades ago, in *Estelle v. Gamble*, the Court concluded that “deliberate indifference to serious medical needs of prisoners” can impose constitutionally impermissible “unnecessary and wanton infliction of pain.”⁶⁷ One of the examples cited by the Court in *Estelle* as “cruel and unusual punishment” was the refusal to administer a prescribed pain killer to prisoners after surgery.⁶⁸ If there are physical sensations that cannot legitimately be inflicted on prisoners in retaliation for even the most heinous of crimes, presumably the state may not inflict these sensations on individuals whom it has not even prosecuted.⁶⁹ Although the

⁶³ *Glucksberg*, 521 U.S. at 745 (Stevens, J., concurring in the judgment) (referring to the right to assisted suicide when in intolerable pain).

⁶⁴ *Id.* at 737 (O’Connor, J., concurring, joined in part by Ginsburg and Breyer, JJ.) (noting that a patient “experiencing great pain” is not barred from receiving painkilling medicines that might hasten death); *id.* at 791 (Breyer, J., concurring in the judgment) (observing that laws under review did not block patient from “avoidance of severe physical pain”).

⁶⁵ *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

⁶⁶ See *In re Kemmler*, 136 U.S. 436, 446 (1890) (reasoning that the Eighth Amendment prohibits Congress from allowing such punishments as “burning at the stake, crucifixion, breaking on the wheel, or the like”); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (“[P]unishments of torture . . . are forbidden by that [A]mendment . . .”).

⁶⁷ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); cf. *West v. Atkins*, 487 U.S. 42, 58 (1988) (Scalia, J., concurring in part and concurring in the judgment) (construing allegations of prisoner subjected to pain by doctor’s refusal to perform surgery as raising a Due Process claim rather than an Eighth Amendment claim).

⁶⁸ *Estelle*, 429 U.S. at 104 n.10.

⁶⁹ See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that a person “injured while being apprehended by police” has due process rights “at least as great” as the Eighth Amendment rights of a convicted prisoner (citation omitted)); *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (“Persons who have been involuntarily committed are entitled to more considerate treatment . . . than criminals whose conditions of confinement are designed to punish.”); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (distinguishing due process rights of pretrial detainee from Eighth Amendment rights of sentenced inmate).

Indeed, in his concurrence in *Louisiana ex rel. Francis v. Resweber*, Justice Frankfurter viewed this prohibition of willful infliction of great physical cruelty as part of the due process protection of “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” 329 U.S. 459, 469–70 (1947) (Frankfurter, J., concurring) (quoting

Court may properly hesitate in imposing controversial value choices under the rubric of due process, the proposition that the government is constitutionally constrained from intentionally imposing agony on its subjects does not appear to raise contentious normative issues.⁷⁰

Even in a regime of negative constitutional rights, the Court has recognized that when the government takes custody of an individual and renders her helpless, it has a duty to ensure her physical safety and minimal human needs.⁷¹ Torture flouts this duty. It inflicts agony on the helpless; it is at odds with the constitutionally legitimate role of the state. One of Orwell's final comments in 1984—"If you want a picture of the future, imagine a boot stamping on a human face—forever"⁷²—repels us precisely because it is the antithesis of the legitimate relation between the state and those subject to its power.

The pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy. Justice Kennedy recently set forth the constitutional importance of the "autonomy of self" in *Lawrence v. Texas*.⁷³ Torture seeks to shatter that autonomy. Torture's evil

Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *Cf. West*, 487 U.S. at 58 (Scalia, J., concurring in part and concurring in the judgment) (noting that a physician who causes physical harm to a person involuntarily in state custody violates the Fourteenth Amendment).

⁷⁰ In a parallel discussion in recent political philosophy, Professor Barry has suggested that avoiding physical harm is a good candidate for a consensus value because such harm is "deleterious from the point of view of a very wide range of conceptions of the good. . . . [V]irtually any conception of the good life goes better in the absence of physical injury." BRIAN BARRY, *JUSTICE AS IMPARTIALITY* 87–88 (1995) (citations omitted). *See id.* at 25 (noting consensus on "badness of harm"). *See also* SISSELA BOK, *COMMON VALUES* 15–16, 18–19, 30, 57 (1995) (citing duties to refrain from coercion and violence as minimal values common across cultures); STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 90 (1989) (discussing "the great evils of human experience, re-affirmed in every age . . . murder and the destruction of life, imprisonment, enslavement . . . physical pain and torture"). *Cf. ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 52 (1985) ("[T]he most essential, aspect of pain is its sheer aversiveness. While other sensations have content that may be positive, neutral, or negative, the very content of pain is itself negation."); MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 10 (1994) (arguing for universal applicability of "negative injunctions . . . against murder, deceit, torture, oppression, and tyranny" that "respond to other people's pain and oppression"); Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 305 (1999) (invoking the "standard, predictable abhorrence of torture in every culture and every society").

⁷¹ For such a recognition, see, for example, *DeShaney v. Winnebago County Department of Social Services*, which notes:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action

489 U.S. 189, 200 (1989), *quoted in* *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998).

⁷² GEORGE ORWELL, 1984, at 220 (The Penguin Group 1981) (1949).

⁷³ 123 S. Ct. 2472, 2475 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of

extends beyond the physical; extreme pain totally occupies the psychic world; the agony of torture is designed to make choice impossible.⁷⁴ Effective torture is intended to induce the subject to abandon her own volition and become the instrument of the torturer by revealing information. Such government occupation of the self is at odds with constitutional mandate.⁷⁵

B. "Justifiable Violations"?

Not every governmental action that results in pain or impinges on bodily integrity is barred by the Constitution. A state may uncontroversially require smallpox vaccinations in the midst of a threatened epidemic;⁷⁶ a prison guard may concededly use firearms to quell a prison riot;⁷⁷ a police officer may unquestionably use appropriate force to subdue a resistant suspect.⁷⁸ Can the principles that justify such actions similarly come to constitutionally justify torture in sufficiently desperate circumstances?

To begin with, it is worth clarifying the precise issue under discussion. It is not the question of whether it is moral for an individual to

thought."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

⁷⁴ See SCARRY, *supra* note 70, at 33 ("[I]n serious pain the claims of the body utterly nullify the claims of the world.").

⁷⁵ The cases in which the Court has acceded to the state's request to literally override the will of the subject by involuntary administration of psychotropic medication in order to have them competent to stand trial have been predicated on a finding that the intervention is both "essential for the sake of [the prisoner's] own safety or the safety of others" and in the medical interest of the patient. See *Sell v. United States*, 123 S. Ct. 2174, 2183, 2185 (2003) (quoting *Riggins v. Nevada*, 504 U.S. 127, 135 (1992)). See also *id.* at 2185 (requiring that the reviewing court conclude, *inter alia*, that the drug treatment is in the "patient's best medical interest"); *Riggins*, 504 U.S. at 135 (observing in dictum that the treatment must be "in the inmate's medical interest") (quoting *Washington v. Harper*, 494 U.S. 210, 227 (1990)); *Harper*, 494 U.S. at 222 n.8 (mandating determination by treating physician that "medication is appropriate").

One must be tremendously careful with such rationales: the Inquisition also sought to "benefit" its subjects by saving their immortal souls, and doctors have not infrequently convinced themselves that medical benefits coincide with their research agendas or other interests. Cf. *United States v. Stanley*, 483 U.S. 669, 686 (1987) (Brennan, J., dissenting) ("In experiments designed to test the effects of lysergic acid diethylamide (LSD), the Government of the United States treated thousands of its citizens as though they were laboratory animals, dosing them with this dangerous drug without their consent."); GORDON THOMAS, *JOURNEY INTO MADNESS: THE TRUE STORY OF SECRET CIA MIND CONTROL AND MEDICAL ABUSE* (1989) (covering stories of patients in CIA-funded mind-control research programs). They are, in any event, inapplicable to the case at hand; no one claims that the torture contemplated by Professor Dershowitz is in the subjects' best interests.

⁷⁶ See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state's mandatory vaccinations as valid exercise of police power).

⁷⁷ See *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (holding that the shooting of a prisoner in the course of quelling a riot did not violate the Eighth Amendment).

⁷⁸ See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (reasoning that "apprehension by the use of deadly force" is seizure constrained by the Fourth Amendment).

engage in a particular sort of assault or physical imposition, but whether the Constitution allows the state to do so. Individuals may be morally free to engage in a variety of actions—from peremptory dismissal from employment for political views, to refusal to accord benefits because of sexual preference, to prayer—that are nonetheless barred by the government under our constitutional scheme. The question, therefore, is not a single abstract moral choice but one of constitutional law, national identity, and institutional structure.

1. *Purposeless Restraints?*

One formulation of the demands of substantive due process suggests that it bars “arbitrary impositions and purposeless restraints” on liberty.⁷⁹ So, too, there is language in Eighth Amendment precedents that the Cruel and Unusual Punishment Clause bars “unnecessary and wanton” infliction of pain.⁸⁰ Some of the abuses held to violate the constitutional protections against official abuse have been entirely without public justification.⁸¹

Judged by this standard, some torture would certainly be unconstitutional. American actions replicating the policies of the former regimes of Greece, Iraq, Uruguay, Uganda, or Argentina would be impermissible.⁸² If an American official were to subject a person to

⁷⁹ *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), *quoted in* *Washington v. Glucksberg*, 521 U.S. 702, 752 (1997) (Souter, J., concurring); *Planned Parenthood v. Casey*, 505 U.S. 833, 848–49 (1992) (plurality opinion).

⁸⁰ *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“The unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.” (quoting *Whitley*, 475 U.S. at 319)). This standard of “unnecessary and wanton infliction of pain” has been used repeatedly by the Supreme Court. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) (“[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (“Unnecessary and wanton infliction of pain implicates the Eighth Amendment.”); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (Pain “totally without penological justification” is among that pain which is “unnecessary and wanton”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (finding no cruelty where there was “no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution”).

⁸¹ *See, e.g.*, *Hope*, 536 U.S. at 734–35 (describing how prisoner was handcuffed to a “hitching post” on two separate days for a total of nine hours in the hot sun, denied water, and taunted); *United States v. Lanier*, 520 U.S. 259 (1997) (vacating dismissal of civil rights prosecution of state judge who sexually assaulted and orally raped litigants and employees); *Hudson*, 503 U.S. at 4 (recounting that, while prisoner was in handcuffs and shackles, one guard punched him in the “mouth, eyes, chest, and stomach” while another “held the inmate in place and kicked and punched him from behind”); *United States v. Price*, 383 U.S. 787, 795 (1966) (describing the purposeful release of inmates so they could be caught and murdered).

⁸² *See, e.g.*, Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 649 (2000), *reprinted in* LEGALIZATION AND WORLD POLITICS 249 (Judith L. Goldstein et al. eds., 2001) (describing patterns of torture in Uruguay and

physical agony out of personal spite, because that person resembles an individual who has done wrong, or in order to intimidate a population by showing the barbarity of which the government is capable, a court would have no difficulty finding that official in violation of the demands of due process.

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

The demands of due process are not so anemic. In the root case, *Rochin v. California*,⁸³ the actions of the police arose not from gratuitous cruelty or personal spite, but from tangible law enforcement objectives. Mr. Rochin’s stomach was pumped in an effort to seize evidence needed to enforce the criminal penalties against drug possession. The intrusion was eminently reasonable as an instrumental matter; indeed, once the drugs had been swallowed, no less intrusive alternative could have achieved the objective. Nonetheless, the Court found the deputy sheriffs’ actions to be unconstitutionally shocking to the judicial conscience.⁸⁴ If *Rochin* is the model, cruelty cannot be justified simply because it seeks to achieve a legitimate objective.

government-sponsored disappearances in Argentina); Ruth Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2036 (1997) (addressing trials of Greek military colonels on torture charges and similar trials of members of Argentina’s ruling junta in the late 1970s and early 1980s); Meredith Turshen, *The Political Economy of Violence Against Women During Armed Conflict in Uganda*, 67 SOC. RES. 803, 805–08 (2000) (presenting summary of how internal conflict in Uganda has led to systematic violence against civilians by rebel and government armies); Alissa J. Rubin, *Seduced by Power in the Service of Madness*, L.A. TIMES, Aug. 2, 2003, at A1 (providing account of tortures inflicted on Iraqi civilians by Uday Hussein).

⁸³ 342 U.S. 165 (1952).

⁸⁴ *Id.* at 172.

2. *Balancing*⁸⁵

When claims of liberty contend with concerns of public interest, due process analysis often adopts a rhetoric of “balancing” or “comparison.” For example, the court in *Youngberg v. Romeo*, in evaluating the treatment of inmates in a hospital for the mentally retarded, announced that “[i]n determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance ‘the liberty of the individual’ and ‘the demands of an organized society.’”⁸⁶ The presence of a legitimate purpose is not enough to justify a severe imposition unless the “weight” of the purpose is commensurate to the imposition.

Similarly, in evaluating efforts to obtain evidence from the bodies of criminal suspects under the Fourth Amendment, the Court has taken account of both the magnitude of the imposition on the suspect and the exigency of the government’s need for the evidence.⁸⁷

⁸⁵ One argument that cannot be made in the cases contemplated by Professor Dershowitz under current doctrine is that one “constitutional right” is balanced against another. After *DeShaney*, destruction wrought by terrorists may be a tragedy and a horror, but the failure to prevent it cannot be said to be a “deprivation” by the government “triggering the protections of the Due Process Clause,” because there has been no “affirmative exercise of [state] power.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989).

⁸⁶ *Youngberg v. Romeo*, 457 U.S. 307, 320–21 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)) (advocating the process of “weigh[ing] the individual’s interest in liberty against the State’s asserted reasons for restraining individual liberty,” but determining that “this balancing cannot be left to the unguided discretion of a judge or jury”). See *Washington v. Glucksberg*, 521 U.S. 702, 767–68 (1997) (Souter, J., concurring) (“[A]pproach calls for a court to assess the relative ‘weights’ or dignities of the contending interests [W]hen the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied [it will violate due process]”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (reasoning that the scope of substantive due process rights is “determined by balancing [the individual’s] liberty interests against the relevant state interests” (quoting *Youngberg*, 457 U.S. at 321)); *Washington v. Harper*, 494 U.S. 210, 236 (1990) (approving “an accommodation between an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others”); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (comparing an individual’s right “that his person be held inviolable” against “the interests of society in the scientific determination of intoxication”); *Jacobson v. Massachusetts*, 197 U.S. 11, 26–27 (1905) (balancing individual’s liberty interest in being free from fine or imprisonment for not getting vaccinated against the state’s interest in protecting public health).

In *Youngberg*, the Court concluded that in a state-run hospital the state had “the unquestioned duty to provide reasonable safety for all residents and personnel within the institution. And it may not restrain residents except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training.” 457 U.S. at 324.

⁸⁷ See *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In reviewing suspicionless visual body cavity searches for pretrial detainees, the Court adopted a similar approach:

The test of reasonableness under the Fourth Amendment . . . [i]n each case . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular

In *Schmerber v. California*, the Court approved an involuntary blood test to determine the blood-alcohol level of a driver who had been involved in an accident. In determining that the action met “Fourth Amendment standards of reasonableness,” the Court—by a five-to-four vote—observed that while the blood test intruded on the body of the driver, the intrusion involved “virtually no risk, trauma, or pain,” was performed “by a physician in a hospital environment according to accepted medical practices,” and was a commonplace test comparable to those required for military service or a marriage license.⁸⁸ On the government’s side, in the majority’s view, the need was both pressing and ineluctable. Inebriation was difficult to prove by other means, “the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system,” and “[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol.”⁸⁹ A minimal imposition was warranted by an overriding government necessity.

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

intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id.

Notwithstanding the fact that the Fourth Amendment is not directly applicable, several substantive due process cases have treated it as providing benchmarks of “reasonable” behavior. See *Cruzan*, 497 U.S. at 278 (noting that prior to the incorporation of the Fourth Amendment via the Fourteenth Amendment, state searches and seizures were analyzed under the Due Process Clause, as in *Breithaupt*, 352 U.S. at 439); *id.* at 287–88 (O’Connor, J., concurring) (citing *Winston v. Lee*, 470 U.S. 753, 759 (1985), for the proposition that the Court’s Fourth Amendment jurisprudence has supported the ideas of “physical freedom and self-determination”); *Harper*, 494 U.S. at 229 (applying Fourth Amendment principles of *Winston*, 470 U.S. at 753, and *Schmerber v. California*, 384 U.S. 757, 772 (1966), in the due process context); *Schmerber*, 384 U.S. at 772 (noting relationship between Fourth Amendment and Due Process Clause).

⁸⁸ *Id.* at 768, 771 & n.13.

⁸⁹ *Id.* at 770–71. The Court had previously reached the same conclusion about the constitutional permissibility of blood testing under a substantive due process analysis in *Breithaupt*, 352 U.S. at 436–37, applying *Rochin v. California*, 342 U.S. 165, 172 (1952), prior to incorporation of the Fourth Amendment. But the analysis in *Breithaupt* focused entirely on the degree of brutality and the “sense of ‘decency and fairness’ that has been woven by common experience into the fabric of acceptable conduct.” 352 U.S. at 437.

individual's dignitary interests in personal privacy and bodily integrity," compared to "the community's interest in fairly and accurately determining guilt or innocence."⁹⁰ On the individual's side, the Court saw the potential of substantial medical risk and viewed the intrusion on privacy as "severe;"⁹¹ on the government's side, the interest in recovering the bullet was "hardly persuasive" given the "substantial additional evidence" against the suspect.⁹² Notwithstanding its legitimate purpose, a minimal gain to society did not render the intrusive surgery reasonable. On this analysis, the constitutional fault of the deputies in *Rochin* was the disproportion between the level of intrusion and the magnitude of the police justification; the "brutal" invasion of the body was carried out in an effort to enforce a prohibition of a virtually victimless crime.

Such a standard would place constitutional constraints on the use of torture. If the magnitude of the interest necessary to justify an intervention rises with its intrusiveness on bodily autonomy, health, and safety, surely torture lies at the top of the scale. Torture is hardly a commonly accepted medical procedure. Unlike the blood test in *Schmerber*, which carried with it "virtually no risk, trauma or pain,"⁹³ or even the surgery in *Winston*, which was to be carried out under anesthesia, torture is specifically designed to induce trauma and pain, and carries with it the risk of severe and lasting psychiatric damage. Even the "stress and duress" techniques of "torture lite" would require substantial justification under a Fourth Amendment balancing test; the mere possibility of obtaining useful information for the "war on terror" would not be sufficient.⁹⁴

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

⁹⁰ *Winston*, 470 U.S. at 760–62.

⁹¹ *Id.* at 766. The Court later noted:

[T]he Commonwealth proposes to take control of respondent's body, to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

Id. at 765 (citation omitted).

⁹² *Id.*

⁹³ *Schmerber*, 384 U.S. at 771.

⁹⁴ See, e.g., Campbell, *supra* note 56 (discussing the use of "torture lite" by the United States after September 11).

Analysts such as Professor Dershowitz, who make the case for the possibility of torture, tend to gravitate toward the ticking bomb scenario, where the captured terrorist announces that she and she alone knows the location of a devastating device about to explode. Real life is likely to generate examples substantially less clear-cut and compelling. The suspect may be innocent or ignorant, her information may be of only collateral or speculative value, the device may not exist, or alternative sources of information may be adequate to the purpose. It is important to emphasize that even an analysis of "reasonableness" analogous to the Fourth Amendment limits cannot be read to authorize physical abuse simply on the basis of the aggregate magnitude of harm that might be avoided. The requirement is that the incremental gain in avoiding a great harm be sufficient to justify imposing the contemplated level of harm on the individual. A speculative benefit in the future cannot be said to reasonably justify the real and present imposition of agony on a person screaming under the authorities' ministrations.⁹⁵

⁹⁵ The deployment of deadly force to prevent the flight of a dangerous felon, if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm," upheld in *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), is, on one level, justified by the magnitude of a contingent threat. But it is justified as well by the felon's defiance of public order, and the threat that the felon personally poses to law enforcement and the citizenry. By definition, a suspect under interrogation poses no similar threat. It is precisely her helplessness that makes the torture repulsive. See Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124, 130 (1978) (noting that torture is not a "fair fight"). Notwithstanding the "importance" of the law enforcement effort, the doctrine of *Garner* would not countenance an effort to pistol whip an apprehended knife-point mugger into revealing the whereabouts of an accomplice who had escaped.

The *Garner* Court did not engage in unconstrained balancing. Rather, it relied substantially on both common law practice and "prevailing rules in individual jurisdictions" to map the boundaries of legitimate use of force in arrest. 471 U.S. at 14-16 (discussing process of "translat[ing]" common law principle to present day). The Court has regularly relied on common law practice "woven into the fabric of early American law" to delineate the scope of "unreasonable searches and seizures." Compare *Atwater v. City of Lago Vista*, 532 U.S. 318, 333-41 (2001) (noting that the common law practice of disallowing warrantless arrest for misdemeanors was "riddled with exceptions," and could not serve as basis for judging such arrests "unreasonable"), with *Wilson v. Arkansas*, 514 U.S. 927 933-34 (1995) (holding that the "knock and announce" requirement of common law was "woven into" American practice and became a part of Fourth Amendment definition of reasonableness). Unlike the use of force to apprehend fugitives, there is neither common law warrant nor contemporary model for the use of torture against taciturn suspects. See *infra* Part III.B.3.

To be sure, it could be that the suspect violates a law by refusing to answer if subject to a legitimately empanelled grand jury inquiry, or by giving misleading answers to law enforcement officials. But *Garner* would not countenance deployment of lethal force to apprehend fleeing perjurers or contumacious witnesses. See 471 U.S. at 11 ("Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."). After appropriate process the recalcitrant suspect may be incarcerated indefinitely or subjected to heavy fines or imprisonment. No matter how important the interest that the state pursues, however, the punishment for such a fault cannot exceed the level of barbarity precluded by the Eighth Amendment. It would be an

On the other hand, if the judicial conscience is shocked only where there is not a reasonable arithmetic proportion between the incremental expected benefit to the public and the harm to the subject of torture, a sufficiently large fear of catastrophe could conceivably authorize almost any plausibly efficacious government action.⁹⁶ Even a small increase in the probability of avoiding a nuclear or biological holocaust could be argued to swamp almost any harm to a single individual. The danger, to borrow the formula of Dostoevsky's Ivan Karamazov, is that since 2,819 World Trade Center victims are dead, everything is permitted.

In this respect, a principle of arithmetic proportionality rooted in the prohibition against "unreasonable searches and seizures" does not exhaust the demands of "ordered liberty." As a matter of precise legal analysis, the Fourth Amendment's prohibition of "unreasonable searches and seizures" is inapplicable to the situations under discussion. By definition, a suspect in custody and available for torture is one who has already been "seized."⁹⁷ An effort to physically extort information is not a "search" for physical objects; it is an effort to break the will of the subject in order to force the subject to reveal information in that subject's mind. It is precisely because the physical "searches" involved in the blood-testing cases upon which Professor Dershowitz relies do not seek to force "communicative" actions that courts have held they fall under the Fourth Amendment rather than the more stringent protections against compelled self-incrimination.⁹⁸

The fact that torture is neither a search nor a seizure limits the usefulness of Fourth Amendment cases in construing the demands of "ordered liberty" and "due process of law," for the balancing doc-

odd result, indeed, if the state were able to impose heavier sanctions without judicial process than those available with it.

⁹⁶ This was the essence of the analysis in *Dennis v. United States*, 341 U.S. 494, 509 (1951), which accepted the government's argument that the magnitude of the harm associated with Communist subversion justified curtailment of First Amendment rights even absent a likely or present danger.

⁹⁷ See *County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (stating that a Fourth Amendment seizure occurs "when there is a governmental termination of freedom of movement"); *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (holding that Fourth Amendment covers "intentional acquisition of physical control"); cf. *Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[C]laims that law enforcement officers have used excessive force . . . in the course of an arrest . . . or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . .").

⁹⁸ See *Schmerber v. California*, 384 U.S. 757, 760-65 (1966) (finding that a blood test did not implicate subject's "testimonial capacities"); cf. *United States v. Hubbell*, 530 U.S. 27, 43 (2000) (concluding that "[t]he Government's anemic view of respondent's act of [document] production as a mere physical act that is principally nontestimonial in character and can be entirely divorced from its 'implicit' testimonial aspect . . . simply fails to account" for the reality that the respondent engaged in mental processes to recall what documents were relevant and thus did implicate his testimonial capacity).

trines under the Fourth Amendment evolved to apply to a relatively small spectrum of actions. No matter how important the issue, the capacity of individuals to resist the search for physical objects can be overcome by a relatively constrained expenditure of force. The martial capacity of the suspect forms a natural upper limit of the harm that is necessary to effect a “search or seizure.” For a suspect who is in custody, that upper limit will usually involve the forcible deployment of handcuffs, or in an extreme case, anesthesia. A “reasonable” search by definition will not reach the degrading and debilitating limits of torture, so it is not necessary to be concerned with the possibility of “reasonable” atrocities. Interrogation, by contrast, is subject to no similar upper bound; the pain and degradation that may be said to be “necessary” is limited only by the will of the torturer and the resistance of the tortured.

Notwithstanding the fact that a number of substantive due process cases speak in terms of the “accommodation” of competing interests on the basis of their “weights,” that accommodation reaches beyond arithmetic proportionality; the underlying question is whether the accommodation in question is consistent with the “essence of a scheme of ordered liberty” and the “traditions and conscience of our people.”⁹⁹

As a matter of doctrine, the analysis of the role of physical abuse in “ordered liberty” often diverges from consideration of arithmetic proportionality. The opinions of Justices Stevens, Kennedy, and Ginsburg in *Chavez* are uncompromising: torture, or its functional equivalent, is inconsistent with the concept of “ordered liberty.”¹⁰⁰ The opinions for the remainder of the Court, as I have noted, are

⁹⁹ *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937). See, e.g., *Chavez v. Martinez*, 123 S. Ct. 1994, 2011 (2003) (Stevens, J., concurring in part and dissenting in part) (citing *Palko*, 302 U.S. at 325–26); *Lewis*, 523 U.S. at 847 (same); see also *Lawrence v. Texas*, 123 S. Ct. 2472, 2492 n.3 (2003) (Scalia, J., dissenting) (inquiring into whether the right claimed is “implicit in the concept of ordered liberty”); *Sell v. United States*, 123 S. Ct. 2174, 2185 (2003) (also stressing concept of “ordered liberty” in the context of a court determining whether the forced administration of drugs to render a defendant competent to stand trial is justified). *Palko* itself, while rejecting the proposition that immunity “from compulsory self-incrimination” was part of the “essence of a scheme of ordered liberty,” went on to observe that “[n]o doubt there would remain the need to give protection against torture, physical or mental.” 302 U.S. at 325–26.

¹⁰⁰ *Chavez*, 123 S. Ct. at 2010 (Stevens, J., concurring in part and dissenting in part) (concluding that the “functional equivalent” of torture clearly violated the Constitution); *id.* at 2012 (stating that “official interrogation of that character is a classic example of a violation of a constitutional right ‘implicit in the concept of ordered liberty’”); *id.* at 2013 (Kennedy, J., concurring in part and dissenting in part) (“A constitutional right is trampled the moment torture or its close equivalents are brought to bear.”); *id.* at 2016 (“[T]orture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.” (citations omitted)); *id.* at 2019–20 (Ginsburg, J., concurring in part and dissenting in part) (reasoning that due process and self-incrimination protections are “connected with the struggle to eliminate torture as a governmental practice”).

more allusive. They refer to the statement in *County of Sacramento v. Lewis* that conduct “most likely to rise to the conscience-shocking level,” is the “conduct intended to injure in some way unjustifiable by any government interest.”¹⁰¹

Lewis, in turn, though the most extensive modern discussion of the issue, is likewise less than fully informative. There, the Court addressed the question of whether police who pursued a fleeing suspect in a high-speed chase had deprived the suspect’s passenger of life without due process of law when that passenger was killed as a result of what his representatives alleged was deliberate or reckless indifference on the part of the pursuing officers. The Court’s opinion began by twice reiterating the proposition that the substantive dimensions of due process “prevent government officials from ‘abusing [their] power, or employing it as an instrument of oppression,’”¹⁰² but emphasized that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional sense.’”¹⁰³ Citing *Rochin* and *Daniels v. Williams*, the Court declared that only conduct that “shocks the conscience”¹⁰⁴ would implicate “the large concerns of the governors and the governed.”¹⁰⁵

In determining that the representatives of Mr. Lewis had made no such showing, the Court focused on the officer’s purpose. It held that in the context of a high-speed chase “even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates ‘the large concerns of the governors and the governed.’”¹⁰⁶ In a high speed chase, the conscience would be shocked, the Court stated, by a “purpose to cause harm” or to “terrorize, cause harm, or kill.”¹⁰⁷ If this is the test, the torture proposed by Professor Dershowitz fails, for torture involves the specific intent to terrorize and inflict pain on a helpless suspect in government custody.¹⁰⁸

¹⁰¹ *Id.* at 2005 (quoting *Lewis*, 523 U.S. at 849); *id.* at 2008 (Souter, J., concurring) (same). As noted, Justice O’Connor seems to join none of the opinions on this point. *Cf. Oregon v. Elstad*, 470 U.S. 298, 312 n.3 (1985) (O’Connor, J., majority opinion) (taking as given that a confession “obtained through overly or inherently coercive methods” would “raise serious Fifth Amendment and *due process* concerns” (emphasis added)).

¹⁰² *Lewis*, 523 U.S. at 840, 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)) (alteration in original).

¹⁰³ *Id.* at 846 (quoting *Collins*, 503 U.S. at 129).

¹⁰⁴ *Id.* at 847 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

¹⁰⁵ *Id.* at 853–54 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

¹⁰⁶ *Id.* (quoting *Daniels*, 474 U.S. at 332).

¹⁰⁷ *Id.* at 854, 855.

¹⁰⁸ The Court in *Lewis* observed that in *Rochin*, “the case in which we formulated and first applied the shocks-the-conscience test, it was not the ultimate purpose of the government actors to harm the plaintiff, but they apparently acted with full appreciation of what the Court described as the brutality of their acts.” 523 U.S. at 849 n.9. The Court also reiterated that failure “to provide . . . basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety” to those in government custody “transgresses the substantive limits on state action set by

Elsewhere, the opinion made use of the Eighth Amendment as a benchmark for the level of abuse that would rise to administer a "shock to the judicial conscience."¹⁰⁹ In particular, the Court referred to the Eighth Amendment for the proposition that in the usual custodial situations "deliberate indifference" to the safety of those in custody would violate the Constitution, while in situations analogous to the control of a prison riot, liability should turn on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."¹¹⁰

Torture, which seeks to break the will of a suspect, is undertaken "for the purpose of causing harm," yet is not necessarily "malicious and sadistic." By definition, cases of interrogation raise a claim that the torture is necessary to achieve some important government end. Torturers need not be sadists; they may be cold-blooded professionals or even reluctant idealists. On the other hand, torture is not undertaken in an effort to "maintain or restore discipline," "in haste and under pressure," without time for deliberation.¹¹¹ Torture is not administered at split second intervals; indeed it is precisely the passage of time that often combines with the physical agony to render the conditions unendurable.

If the Eighth Amendment truly is the relevant source of normative guidance, torture cannot be justified on grounds of public necessity. The words of the Eighth Amendment prohibit "cruel and unusual" punishments;¹¹² it is difficult to maintain that torture is not both cruel and unusual today, as it was when the Amendment was adopted. The judicial gloss on the Eighth Amendment prohibits "wanton and unnecessary" imposition of pain. In the abstract one might argue that the pain of torture contemplates "necessary" pain, since the legitimate goal of preventing terrorist attacks is achieved only through the deliberate imposition of pain. But the rack and the screw were not viewed as entirely unnecessary by those who wielded them,¹¹³ and the

the . . . Due Process Clause." *Id.* at 851 (second alteration in original) (citation omitted). Torture is, of course, the polar opposite of the constitutionally required "reasonable provision[s] for the [prisoner's] welfare." *Id.* at 852 n.12.

¹⁰⁹ *Id.* at 852–53. The Court in *Whitley v. Albers* also read the two *in pari materia*:

It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment [citing *Rochin*, 342 U.S. at 172, 173], were not also punishment "inconsistent with contemporary standards of decency" and "repugnant to the conscience of mankind," [citing *Estelle v. Gamble*, 429 U.S. 97, 103, 106 (1976)], in violation of the Eighth [Amendment].

475 U.S. 312, 327 (1986) (first alteration in original).

¹¹⁰ *Lewis*, 523 U.S. at 853 (quoting *Whitley*, 475 U.S. at 320–21).

¹¹¹ *Whitley*, 475 U.S. at 320, quoted in *Lewis*, 523 U.S. at 852–53.

¹¹² U.S. CONST. amend. VIII.

¹¹³ Compare LANGBEIN, *supra* note 19, with EDWARD PETERS, *TORTURE* (expanded ed. 1996), and Mirjan Damaska, *The Death of Legal Torture*, 87 YALE L.J. 860, 876–77 (1978) (reviewing

heritage of the Eighth Amendment permits neither. The parameters are set by the Court's observation in *Hudson v. McMillian*,¹¹⁴ holding that a beating of an inmate by prison guards violates the Eighth Amendment:

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

In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today.¹¹⁵

3. "Traditions from Which It Broke"

These constitutional side constraints on the use of physical force cannot be explained by an arithmetic proportionality; rather, they reflect the nature of our society, from which our public tradition arises and which it reciprocally constitutes. In evaluating accommodations between order and liberty, as Justice Harlan observed, the Court must give regard to traditions of our country, both "the traditions from which it developed as well as the traditions from which it broke."¹¹⁶ Those traditions have no place for official torture.

LANGBEIN, *supra* note 19) (describing Continental claims that torture was necessary to prevent crime). One opponent of the adoption of the Eighth Amendment put the matter as follows:

[I]t is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? . . . [U]ntil we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 ANNALS OF CONG. 782-83 (Joseph Gales ed., 1789) (Statement of Mr. Livermore).

¹¹⁴ 503 U.S. 1 (1992). See also *Hope v. Pelzer*, 536 U.S. 730, 734-35 (2002), where the Court, in describing an inmate's shackling to a hitching post for a total of nine hours on two days, suggests that "torture lite" is equally impermissible.

¹¹⁵ *Hudson*, 503 U.S. at 8-9 (citations omitted).

¹¹⁶ *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J., dissenting) ("The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."), *quoted in Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992). *Cf. Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003) ("In all events we think that our laws and traditions in the past half century are of most relevance here."); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (beginning due process

Though torture was not entirely absent in fifteenth and sixteenth century English practice, it was always exceptional and the common law, by the time of Blackstone, excluded torture for purposes of obtaining information:

[T]he trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth. But when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for it's introduction in the civil law, and it's subsequent adoption by the French and other foreign nations.¹¹⁷

analysis "by examining our Nation's history, legal traditions, and practices" (citing *Casey*, 505 U.S. at 849–50, and *Cruzan v. Dir.*, Mo. Dep't of Health, 497 U.S. 261, 269–79 (1990)); *id.* at 764 (Souter, J., concurring in the judgment) ("[C]lashing principles . . . [are] to be weighed within the history of our values as a people.").

¹¹⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES *320–21. The assassination occurred in 1628. See LANGBEIN, *supra* note 19, at 139 ("For the future of common law criminal procedure, the English experiment with torture left no traces."); 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 185 (1924) ("[I]t is also clear from the works of Fortescue, Smith, and Coke, and from the resolution of the judges in *Felton's Case*, that the use of torture was wholly contrary to the common law." (citations omitted)).

Professor Dershowitz, relying on the research of Professor Langbein, maintains that "there was a time in the history of Anglo-Saxon law when torture was used to save life, rather than to take it, and when the limited administration of nonlethal torture was supervised by judges." WHY TERRORISM WORKS, *supra* note 11, at 155–56. He neglects to mention that torture was a dubious exception to the common law rule, and ended in the reign of the early Stuarts, before the Petition of Right in 1628 or the English Bill of Rights in 1689 that set the template for American constitutional thought. LANGBEIN, *supra* note 19, at 135 ("After 1640 [the year of the abolition of the Star Chamber], torture was never again warranted in England [After] 1626 the [Privy] Council never again issued a torture warrant.").

Professor Dershowitz also appears to be somewhat confused in suggesting that English practice resorted to torture to avoid a requirement of "the testimony of two eyewitnesses or the confession," WHY TERRORISM WORKS, *supra* note 11, at 156, or that the French practice of torture was somehow less "visible" than that in England, *id.* at 158. As the pages in Langbein to which Professor Dershowitz refers make obvious, the two-witness/confession rule and its attendant difficulty of conviction was the *Continental*, not the common law, rule. LANGBEIN, *supra* note 19, at 7; see also *id.* at 73 ("[T]he systematic use of torture to investigate crime never established itself in English criminal procedure."); *id.* at 78 (noting that England "developed no institutions to conduct torture" in part because jurors chosen already knew the facts of a case and did not need an "outside officer to investigate crime"). The French practice was wholly public and bureaucratized. Langbein suggests that the loosening of the laws of proof ended the necessity for torture on the Continent, but observes such rules already applied in England. *Id.* at 77–78.

Like Blackstone, the Framers of the American Constitution viewed torture as a mechanism associated with the vices of Continental despotism. Thus, Patrick Henry objected in the Virginia ratifying convention to the absence of a prohibition on torture:

What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.¹¹⁸

These origins have been regularly cited as constitutive of our constitutional tradition.¹¹⁹

This rejection of torture as alien to the heritage of English liberty held sway through the early decades of the Republic,¹²⁰ supplemented by the rejection of sanguinary and afflictive punishments more gen-

¹¹⁸ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTIONS OF THE FEDERAL CONSTITUTION 447–48 (Jonathan Elliot ed., Phila., J.P. Lippincott 1836). The debate continued:

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

Id. at 452. See generally, WILLIAM PENN, THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND, at iii (Phila., William Bradford, Philobiblon Club ed. 1897) (1687) (“In France, and other Nations, . . . if any two Villains will but swear against the poor Party, his Life is gone; nay, if there be no witness, yet he may be put on the Rack.”).

¹¹⁹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 170 n.17 (1976) (citing Patrick Henry’s remarks); *Culombe v. Connecticut*, 367 U.S. 568, 581 n.23 (1961) (same); *Chambers v. Florida*, 309 U.S. 227, 236 n.9 (1940) (citing *Weems v. United States*, 217 U.S. 349, 371–73 (1910), for Henry’s remarks).

¹²⁰ STORY, *supra* note 2, at 662–63 (“[The Self-Incrimination Clause] is of inestimable value. It is well known, that in some countries, not only are criminals compelled to give evidence against themselves, but are subjected to the rack or torture in order to procure a confession of guilt.”). See *Culombe* for a recognition of the constitutional status of:

a cluster of convictions each expressive, in a different manifestation, of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by officials charged with the investigation of crime. . . . This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments.

367 U.S. at 581.

erally as anathema to a culture of liberty.¹²¹ When European governments moved to eliminate official torture in the late eighteenth and early nineteenth century, America applauded.¹²²

The replacement of local justices of the peace by extensive police forces charged with investigating and suppressing crime in late nineteenth and early twentieth century America was accompanied by organized physical abuse of suspects designed to achieve those ends;¹²³ the term “the third degree” gained currency among American police officials during the early twentieth century.¹²⁴ “Third degree” brutality by police officials, however, was judged constitutionally anathema by the Supreme Court in the aftermath of the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission Report in the early 1930s.¹²⁵ That official rejection was reinforced by the revulsion against

¹²¹ See, e.g., ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 44 (1992) (explaining that, in building momentum for the establishment of penitentiaries in the eighteenth century, “[b]ecause carceral punishment sought to rehabilitate offenders, [American] advocates viewed it as a more ‘benevolent’ solution to crime than ‘sanguinary’ alternatives, such as capital punishment (and, as then functioning, the old corporal punishments)”); LOUIS P. MASUR, *rites of execution: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865*, at 61 (1989) (“[I]f severe and excessive punishments marked monarchies, mild and benevolent ones would have to characterize republics. The logic of republicanism forced some Americans to reconsider the problem of deviance and to oppose capital punishment as un-republican.”); MERANZE, *supra* note 59, at 68 (reporting that “Revolutionary-era reformers . . . linked the practice of capital and corporal punishments to the archaisms of tyranny and monarchy”).

¹²² For accounts of the Continental abandonment of torture, see, for example, MALCOLM D. EVANS & ROD MORGAN, *PREVENTING TORTURE* 7–13 (1998), PETERS, *supra* note 19, at 73–75, 99–102, LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE* (2001), and Damaska, *supra* note 113, at 876–83. For American reactions, see, for example, HENRY C. LEA, *SUPERSTITION AND FORCE* (Philadelphia, Collins 1866).

¹²³ See PETERS, *supra* note 19, at 111–12 (describing the corruption which resulted from the “entanglement” of American police forces and local political forces in the early twentieth century); Office of Legal Policy, Dep’t of Justice, *The Law of Pretrial Interrogation*, 22 U. MICH. J.L. REFORM 437, 463–64 (1989) (observing that as the “locus of interrogation moved from the courtroom to the stationhouse,” “the use of ‘third degree’ methods by the police to obtain confessions became common, and persisted as a widespread practice until at least the 1930s”).

¹²⁴ See NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, PUB. NO. 11, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT* 19–20 (1931) [hereinafter WICKERSHAM COMM’N] (defining the term “the third degree” and explaining its origins); Richard Sylvester, *A History of the “Sweat Box” and the “Third Degree,”* in *THE BLUE AND THE BRASS: AMERICAN POLICING: 1890–1910*, at 72–73 (1976). Professor Friedman reports that the term occurred as early as 1887. FRIEDMAN, *supra* note 59, at 501 n.18.

¹²⁵ WICKERSHAM COMM’N, *supra* note 124, at 5 (“[T]he practice is shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated.”). See EMANUEL H. LAVINE, *THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSE OF POLICE BRUTALITY* (1930) (report of American Bar Association’s Committee on Lawless Enforcement of the Law); JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* 61–66 (1993) (giving account of the impact of the Wickersham Commission and rejection of third degree practice).

torture as characteristic of America's totalitarian enemies.¹²⁶ It has now been three generations since American law enforcement has of-

Numerous opinions cite the Wickersham Commission report and condemn police use of third degree methods as unconstitutional. See, e.g., *Culombe*, 367 U.S. at 571-74 nn.2-3, 6, & 8 (citing WICKERSHAM COMM'N) (describing the pressure police feel to coerce a confession which may ultimately lead to violence); *Williams v. United States*, 341 U.S. 97, 101 (1951) ("[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution."); *Malinski v. New York*, 324 U.S. 401, 407 (1945) (stating that the coerced confession was one of fear, on the basis of which the court could not permit a person to stand convicted of a crime); *Ashcraft v. Tennessee*, 322 U.S. 143, 149-50 n.4-5, 151-52 (1944) (citing WICKERSHAM COMM'N) (portraying the various intimidation tactics employed by officers in an attempt to get a confession); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (holding that a prisoner's confession was not free and voluntary, but given under duress); *White v. Texas*, 310 U.S. 530, 533 (1940) (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)) ("Due Process of law . . . commands that no such practice . . . shall send any accused to his death."); *Chambers*, 309 U.S. at 238 n.11, 240 & n.15 (citing WICKERSHAM COMM'N) (asserting that the third degree is often used against the poor and has caused a general unwillingness to cooperate); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners . . .").

Compare McNabb v. United States, 318 U.S. 332, 344 (1943) (stating that the requirement of speedy arraignment seeks to avoid police having to "resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use"), with *Ashcraft*, 322 U.S. at 160 (Jackson, J., dissenting) ("Interrogation *per se* is not, while violence *per se* is, an outlaw.").

¹²⁶ See, e.g., *Chavez v. Martinez*, 123 S. Ct. 1994, 2012 (2003) (Stevens, J., concurring in part and dissenting in part) (deploring "the kind of custodial interrogation that was once employed by the Star Chamber, by 'the Germans of the 1930's and early 1940's,' and by some of our own police departments only a few decades ago" (quoting *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting)). In *Chambers*, the Court noted:

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. . . . The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose.

309 U.S. at 236-38. So, too, Justice Blackmun argued, in *Hudson v. McMillian*, that the Constitution prohibits:

[S]tate-sponsored torture and abuse—of the kind ingeniously designed to cause pain but without a telltale "significant injury" . . . [Such as] lashing prisoners with leather straps, whipping them with rubber hoses, beating them with naked fists, shocking them with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, or forcibly injecting them with psychosis-inducing drugs. These techniques, commonly thought to be practiced only outside this Nation's borders, are hardly unknown within this Nation's prisons.

503 U.S. 1, 13-14 (1992) (Blackmun, J., concurring in the judgment).

One of the counts in the Nuremberg indictment of Gestapo officials detailed official orders approving the application of "third degree" techniques, including "[a] very simple diet (bread and water)[,] hard bunk[,], dark cell[,], deprivation of sleep[,], exhaustive drilling[,]. . . [and] flogging (for more than 29 strokes a doctor must be consulted)" as a means of obtaining evidence, or "information of important facts" regarding subversion. 2 OFFICE OF THE U.S. CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 295 (1946), available at <http://www.ess.uwe.ac.uk/genocide/Gestapo6.htm> (last visited Oct. 16,

ficially denounced third degree techniques,¹²⁷ and by the middle of the twentieth century, the Court could declare:

The argument that without such interrogation it is often impossible to close the hiatus between suspicion and proof, especially in cases involving professional criminals, is often pressed in quarters responsible and not unfeeling. It is the same argument that was once invoked to support the lash and the rack "The Constitution proscribes such lawless means irrespective of the end."¹²⁸

That conclusion is no less true today; in the "balance" between order and liberty, American traditions have denounced the use of torture and its cognates not because they are irrational, but because they corrode the core of our public liberty and national identity.¹²⁹

2003); see also PETERS, *supra* note 19, at 124–25. One of the defenses raised by Gestapo officers was that such actions were necessary to protect against Resistance terrorism. 20 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: PROCEEDINGS, ONE HUNDRED AND NINETY-SECOND DAY (1946) (containing testimony of witness Karl Heinz Hoffman: "[T]hird degree was carried out during interrogations. To explain this I have to point out that the resistance organizations occupied themselves with the following: First, attacks on German soldiers . . ."), available at <http://www.yale.edu/lawweb/avalon/int/proc/08-01-46.htm> (last visited Oct. 16, 2003). See generally <http://www.nizkor.org> (last visited Oct. 16, 2003) (providing numerous Nuremberg trial documents).

¹²⁷ See PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967) ("[T]oday the third degree is almost nonexistent . . . few Americans regret its virtual abandonment by the police."); Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 49 (1992) ("By the mid-1940s, most police chiefs in America openly condemned the use of third degree practices.");

¹²⁸ *Culombe*, 367 U.S. at 587–88 (quoting *Chambers*, 309 U.S. at 240–41). Other examples of public policies that predictably result in the risk of physical harm or pain are distinguishable from interrogational torture. A military draft subjects citizens to the possibility, not the assurance, of physical danger, and in any event is governed by the laws of war, which prohibit torture.

A prohibition of the abortion of a viable fetus occupies a woman's body but does not impose torturous pain. The woman can always seek anesthesia in childbirth, and, in any event, a threat to the "health of the mother" constitutionally overrides any prohibition. See *Stenberg v. Carhart*, 530 U.S. 914, 930–31 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).

Jacobson v. Massachusetts permitted mandatory vaccination, but assumed that courts would protect a patient if the vaccination would "seriously impair his health" or result in "cruel and inhuman" impositions. 197 U.S. 11, 38–39 (1905).

Mandatory medical procedures have been upheld under due process scrutiny only where they are in the medical interest of the patient, a situation hardly applicable to interrogational torture. See *supra* note 75 (discussing *Washington v. Harper*, 494 U.S. 210 (1990), and *Sell v. United States*, 123 S. Ct. 2174 (2003)).

¹²⁹ As recently as 1999, the official position of the U.S. State Department was that "Every act of torture within the meaning of the Convention [Against Torture] is illegal under existing federal and state law, and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes." U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE, Part II.B (Oct. 15, 1999), available at http://www.state.gov/www/global/human_rights/torture_articles.html.

At the time of its founding, America invoked “a decent respect to the opinions of mankind,”¹³⁰ and over the centuries we have cultivated a self-image as a country at the vanguard of human rights. As a jurisprudence of human rights has taken root around the world, Supreme Court majorities have begun to refer to consensus opinion in international law as one guidepost to the nature of acceptable practice under our own constitutional guarantees.¹³¹ These references have not been uncontroversial,¹³² and I have myself registered some doubts about the process of uncritical constitutional borrowing.¹³³ Nonetheless, in my view, official international consensus is relevant to the domestic “conscience of the court,” particularly where it points to dangers of abuse that could plausibly threaten our own polity. It is clear that the international prohibition against torture and its cognates is rooted in an array of official declarations and conventions,¹³⁴ but it has evolved into a *jus cogens* norm of international law, grounded in the fundamental moral perceptions of the international community and the temptations that arise in mortal international confrontation.¹³⁵ In a globalizing world, these moral commitments

¹³⁰ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

¹³¹ See, e.g., *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (referencing the European Convention on Human Rights in constructing substantive due process rights); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (invoking international human rights law as a reference in construing the Eighth Amendment); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (invoking Nuremberg principles in construing demands of due process).

¹³² See, e.g., *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., dissenting) (“The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since ‘this Court . . . should not impose foreign moods, fads, or fashions on Americans.’”) (citing *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)).

¹³³ See Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 646–48 (1999) (discussing three structural problems that arise in attempts to apply doctrine developed in one nation’s constitutional jurisprudence to answer questions posed in the jurisprudence of another).

¹³⁴ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 reporter’s note 5 (1987) (setting forth international covenants and declarations condemning torture).

¹³⁵ See, e.g., *Doe v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *28 (9th Cir. Sept. 18, 2002) (“[T]orture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations.”), *vacated and reh’g en banc granted*, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (affirming Alien Tort Claims Act (“ATCA”) judgment against former Ethiopian official for torture and cruel, inhuman, and degrading treatment as violation of international law); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (concluding that alleged torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATCA as violations of international law). The court noted in *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*:

The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate.

reinforce the revulsion against torture which arises from our own history.

IV. THE EFFECT OF A CONTINUED PROHIBITION

Professor Dershowitz closes his account by declaring his belief that, paradoxically, “a formal requirement of a judicial warrant as a prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects.”¹³⁶ The argument proceeds in three steps. First, Professor Dershowitz believes that the record shows that “torture sometimes does work and can sometimes prevent major disasters” that can be averted in no other fashion.¹³⁷ Second, in light of this efficacy, he believes that public opinion would condemn a refusal to utilize it to prevent terrorist attacks, and that American officials would in fact engage in torture.¹³⁸ From these premises Professor Dershowitz concludes:

The real issue, therefore, is not whether some torture would or would not be used in the ticking bomb case—it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law.¹³⁹

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

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

25 F.3d 1467, 1475 (9th Cir. 1994). See also *In re Estate of Ferdinand E. Marcos, Human Rights Litig.*, 978 F.2d 493, 499 (9th Cir. 1992) (“[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law.”), cited with approval in *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (deeming torture by Guatemalan military to be actionable violations of international law under the ATCA); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (“A state violates [customary] international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment . . .”).

¹³⁶ WHY TERRORISM WORKS, *supra* note 11, at 158. See also Levinson, *Precommitment*, *supra* note 12, at 2048 (“If one believes that there is a genuine probability of what might be termed the underenforcement of the norm against torture—and any other view is willfully naïve—then we should take seriously Dershowitz’s suggestion that we look at torture from an *ex ante* perspective rather than the presumptively inadequate *ex post* one.”).

¹³⁷ WHY TERRORISM WORKS, *supra* note 11, at 138.

¹³⁸ See *id.* at 150–51 (referring to “a ticking bomb,” a “preventable act of terrorism,” a “preventable act of terrorism [that] was of the magnitude of the attacks of September 11,” and “torture of terrorist suspects”). It is unclear in which cases Professor Dershowitz believes that torture would inevitably be used.

¹³⁹ *Id.* at 151.

unguided discretion of street-level bureaucrats.¹⁴⁰ It would take place in secret and would be subject to substantial sanction only if it were discovered, a prosecution were brought, and a jury could be persuaded to convict after resolving conflicts of testimony.

By contrast, argues Professor Dershowitz, a torture warrant would not issue unless both executive officials and judges agree it is appropriate (and presumably a lawyer would be required to file the application). Officials, he claims, are unlikely to seek torture warrants and judges are unlikely to authorize torture warrants in the absence of "compelling evidence." A torture warrant would leave an official record; both judges and executive officials, argues Professor Dershowitz, would be held accountable for their excesses.¹⁴¹

Though some commentators express skepticism,¹⁴² for present purposes I would grant the first step in Professor Dershowitz's argument as he articulates it: torture "sometimes" can be the only mechanism that will prevent major terrorist attacks. Likewise, I would not disagree with Professor Dershowitz that a significant number of Americans might well condone torture to prevent terrorist attacks,¹⁴³ as they might condone a variety of other unconstitutional practices, and that American officials would in some circumstances act in accord with those opinions. Indeed, if torture could be confined to a limited situation in which it represented the only way of preventing vast devastation, there are not inconsiderable arguments that, as a matter of both policy and public ethics, an official might choose to violate legal and otherwise preemptory moral norms by ordering such torture.

¹⁴⁰ *Id.* at 154.

¹⁴¹ *Id.* at 152–53, 158–59.

¹⁴² See, e.g., Joe W. Pitts, *America and the World: Human Rights at Home and Abroad*, 5 SCHOLAR 5, 13 (2002) ("[T]orture just doesn't work. People under torture will often say whatever they need to say to avoid or stop the torture."); William J. Stuntz, Book Review, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1743 n.107 (2003) ("[Dershowitz's] argument seems to me unconvincing. . . . [FBI A]gents' preference for drugs over torture suggests that Dershowitz may be exaggerating torture's benefits. . . . [T]orture tends to reduce accuracy—suspects' incentives are to say whatever will stop the torture, true or not. . . ."); Chanterelle Sung, Book Review, *Torturing the Ticking Bomb Terrorist*, 23 B.C. THIRD WORLD L.J. 193, 210–11 (2003) (reviewing WHY TERRORISM WORKS, *supra* note 11) (arguing that alternative sources of intelligence information make torture unnecessary).

¹⁴³ See Abraham McLaughlin & Seth Stern, *How Far Americans Would Go to Fight Terror*, CHRISTIAN SCI. MONITOR, Nov. 14, 2001, at 1 (reporting that thirty-two percent of respondents could support government-sanctioned torture of terrorist suspects); Nancy L. Torner, *U.S. Say It's OK to Torture POWs*, UNITED PRESS INT'L, Oct. 19, 1999 ("[Thirty-two] percent of Americans believe it is acceptable to torture prisoners of war to obtain important military information, according to a survey commissioned by the International Committee of the Red Cross."). But see Retro Poll, *Poll No. 2*, Apr. 2003, at <http://www.retropoll.org/results.htm> (last visited Sept. 22, 2003) (presenting small nonprofit polling organization's survey of 215 people, which found that 88.1% rejected the "use of outlawed interrogation techniques such as torture" in the war on terror).

Professor Dershowitz's analysis, however, diverges from mine in his implicit assertion that torture would, in fact, be so confined. Professor Dershowitz asserts that "sometimes" torture will be 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.¹⁴⁴ It is far from clear that an institutional structure that contemplates "torture warrants" would minimize those latter "times." Indeed, under current circumstances, such an institution is likely to encourage officials to yield to what General Jacques de Bollardière referred to in the aftermath of the Battle of Algiers as the "mortal temptation of instantaneous efficacy."¹⁴⁵

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

Judges are not, in fact, omniscient. They must rely on the showings made by the officials who seek the warrants for their information. Current experience with search warrants suggests that even in situations in which the stakes are considerably lower, officials have embellished the truth in their efforts to serve the perceived ends of law enforcement.¹⁴⁶ By Professor Dershowitz's hypothesis, officials

¹⁴⁴ In 1956, after the French had used torture in the Battle of Algiers, Paul Teitgen, the secretary-general of the Algiers prefecture, resisted the pressure of his chief of police to authorize the torture of a terrorist who had been apprehended while placing a bomb in a gasworks. A second bomb was allegedly set to explode in the gasworks, and could have triggered an explosion of stored gas that would have endangered the entire city. In fact, no second bomb exploded, and it is not clear whether such a bomb existed. See EVANS & MORGAN, *supra* note 122, at 44 n.88 (describing the "ticking bomb" dilemma that faced Teitgen). Maitre Teitgen's resolve was based on the proposition that "if you once get into the torture business, you're lost. . . . All our so-called civilisation is covered with varnish." RITA MARAN, *TORTURE: THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR* 118 (1989) (quoting ALISTAIR HORNE, *A SAVAGE WAR OF PEACE* 204 (1977)).

¹⁴⁵ MARAN, *supra* note 144, at 117 (quoting JACQUES DE BOLLARDIÈRE, *BATAILLE DE L'ALGER* 98 (1972)).

¹⁴⁶ Where much less than a potential terror attack is at stake, police are known to lie on occasion. See, e.g., ALAN M. DERSHOWITZ, *REASONABLE DOUBTS* 60–61 (1996) (describing Professor Dershowitz's public discussions of the problem of police lying to admit incriminating evidence obtained in violation of the Fourth Amendment); 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) (summarizing interviews with law enforcement and court personnel suggesting that police perjury in Fourth Amendment context happens in nearly twenty percent of cases); 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*

would be willing to violate a prohibition of torture to achieve antiterrorist goals; one might suspect those same officials would be inclined to “sex up” applications for torture warrants.¹⁴⁷ On the judges’ side, a “torture warrant” court may not be the most skeptical bench, and they, like executive officials, would be subject to public pressure to do everything possible to prevent a recurrence of September 11.¹⁴⁸

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

Rule, 83 IOWA L. REV. 669, 725–27 (1998) (finding a suggestion in a survey of nearly 460 police officers that “the exclusionary rule on occasion does put officers in a position of manipulating the facts to avoid the loss of the evidence”); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1059 (1996) (describing the scope of police lying and suggesting that “rewards for truth telling, the redefinition of probable cause, and the elimination of the exclusionary rule” may be solutions).

Police perjury can also be problematic for courts outside the Fourth Amendment context. See Press Release, Los Angeles County District Attorney’s Office, District Attorney Points to Reforms as Final Cases Released (Nov. 25, 2002), available at <http://da.co.la.ca.us/mr/112502a.htm> (reviewing the scope of a scandal at the Los Angeles Police Department’s Rampart Division, in which a former gang unit officer admitted that he and others covered up for improper police shootings by lying on the stand in criminal cases against gang members, leading to “whole-scale dismissals of cases through writs of *Habeas Corpus* and *Coram Nobis*”).

¹⁴⁷ See, e.g., *In re Material Witness Warrant*, 214 F. Supp. 2d 356, 362 (S.D.N.Y. 2002) (containing a description of the government misleading the court in an application for a material witness warrant in the aftermath of September 11).

One could hypothesize an adversarial proceeding in which the suspect’s counsel could contest the showing. The current administration takes the position that “national security” bars revelation of the basis of “anti-terrorist deportations,” the identity of detainees, and the number of “sneak and peek” warrants. See *Cir. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003) (reiterating “the principle of deference to the executive in the [Freedom of Information Act] context when national security concerns are implicated”); *ACLU v. U.S. Dep’t of Justice*, 265 F. Supp. 2d 20, 23–24 (D.C. Cir. 2003) (detailing refusal to reveal the level of use of “sneak and peek” warrants on grounds of national security); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (finding persuasive the government’s “substantial evidence that open deportation hearings would threaten national security”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 705–07 (6th Cir. 2002) (summarizing and accepting the government’s national security arguments for prohibiting public access to deportation hearings). Given this background, the concept that the system likely to evolve is one that would offer real adversarial hearings rests in the realm of fantasy.

¹⁴⁸ Professor Levinson’s suggestion that “perhaps the judges should actually *experience* what they are condemning the victims to” in order to get for themselves a sense of what they will be dispensing as a means of “concentrating the judicial mind” seems even less likely of adoption than a contested hearing. Levinson, *Precommitment*, *supra* note 12, at 2049. We do not, after all, require judges to spend time incarcerated before they pronounce prison sentences. Moreover, given the mechanisms of cognitive dissonance, it might well make judges more willing to dispense torture. Cf. MARAN, *supra* note 144, at 102 (describing how, after Col. Jacques Massu, commander of the French paratroopers in the Battle of Algiers, experimented on himself with “electrical shocks to sensitive parts of the body” he concluded that “such methods . . . ‘did not degrade the individual’” (quoting JACQUES MASSU, *LAVRAIE BATAILLE* 165 (1971))).

stances just a little bit short of the exigencies of the prior case. The process can be observed in Professor Dershowitz's own account. Professor Dershowitz acknowledges the danger of the slippery slope, but maintains that the appropriate response is to build a "principled break." He proposes that nonlethal torture could be "legally limited to convicted terrorists who had knowledge of future massive terrorist acts."¹⁴⁹ As articulated, this "principled break" allows torture even if the act is not imminent but is threatened in the "future." So too, the stipulation of "massive" terrorist acts raises the question of whether the threatened act must endanger dozens, hundreds, or thousands of persons—or indeed, even "massive" loss of property or earnings. The only hard "break" seems to be a requirement that the torture be "legally limited to convicted terrorists."

Yet, in a true "ticking bomb" situation, there would hardly be time for a criminal trial and conviction. Professor Dershowitz's show piece is a hypothetical in which suspected terrorist Zacarias Moussaoui is detained and subjected to torture shortly before September 11.¹⁵⁰ As we know, in reality, criminal prosecution of Mr. Moussaoui remains unfinished after two years; torturing a terrorist after his conviction seems unlikely to achieve much in the way of terror prevention. Indeed, Professor Dershowitz's discussion seems to contemplate torturing not only convicted terrorists, but "terrorist suspects,"¹⁵¹ suspects as to whom there is "compelling evidence" that they have information needed to prevent a "terrorist attack";¹⁵² and those as to whom there is a showing of "probable cause."¹⁵³ If Professor Dershowitz has a hard time maintaining the "principled break" in the quiet of his study, it seems unreasonable to expect judges on the firing line to maintain it in the face of insistent prosecutorial assertions of potential devastation.

Let us grant, however, that some requests for torture warrants will be turned down, and that the prospect of a skeptical judicial eye will prevent others from being presented. To carry the weight of his argument, Professor Dershowitz would still need to show that the abuse

¹⁴⁹ WHY TERRORISM WORKS, *supra* note 11, at 147.

¹⁵⁰ *Id.* at 143–44.

¹⁵¹ *Id.* at 138, 151, 158–59. It is worth noting the number of "terrorist suspects" who were arrested in the aftermath of September 11, but were later determined to be entirely innocent. See, e.g., *In re Material Witness Warrant*, 214 F. Supp. 2d 356 (S.D.N.Y. 2002); *United States v. Awadallah*, 202 F. Supp. 2d 55, 60 (S.D.N.Y. 2002) (dismissing the indictment of a defendant held as a material witness and "treated as a high security federal prisoner" despite "any claim that there was probable cause to believe he had violated any law"); OFFICE OF THE INSPECTOR GENERAL, *supra* note 4, at 69–71 (criticizing "the indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism").

¹⁵² WHY TERRORISM WORKS, *supra* note 11, at 158–59.

¹⁵³ *Id.* at 135.

avoided by the denial of the warrants exceeds the abuse that his proposal would generate. This is a hard case to make.

The first danger is that, in the words of Judge Posner, "having been regularized, the practice will become regular."¹⁵⁴ The demand for warrants under Professor Dershowitz's system is likely to exceed the level of informal abuse under the current regime. Under a rule of official prohibition, a functionary who declines to abuse a suspect can defend her actions by announcing that she is following the law. If torture becomes an official option, a functionary must be prepared to justify not applying for the warrant in each case. Torture will be an ever-present option, and there will be no psychic cost in seeking to exercise it, because officials will be able to offload moral responsibility for the torture onto the issuing judge. Modern regimes, moreover, seem to find that torture is most effectively deployed by a corps of trained officers who can dispense it with cold and measured precision,¹⁵⁵ and such bureaucrats will predictably seek outlets for their skills. An institutionalized group of torturers will press for judges to issue torture warrants, and some of those warrants will issue erroneously.

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

Some officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their appointed task. Officials who, in the absence of Professor Dershowitz's system, would be willing to engage in physical abuse in defiance of an absolute legal prohibition would, presumably, be equally willing to engage in "civil disobedience" against the actual or

¹⁵⁴ Richard A. Posner, *The Best Offense*, NEW REPUBLIC, Sept. 2, 2002, at 28, 30 (reviewing WHY TERRORISM WORKS, *supra* note 11). It should be noted that in Judge Posner's emphatic view, "[I]f the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility." *Id.* Judge Posner takes issue with Professor Dershowitz's procedural prescription that such occasions justify the adoption of a "torture warrant."

¹⁵⁵ See generally JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE (2000) (portraying torture perpetrated in Belfast, Israel, and Chicago); MIKA HARITOS-FATOUROS, THE PSYCHOLOGICAL ORIGINS OF INSTITUTIONALIZED TORTURE (2003) (describing training of Greek torturers); MARTHA K. HUGGINS ET AL., VIOLENCE WORKERS: POLICE TORTURERS AND MURDERERS RECONSTRUCT BRAZILIAN ATROCITIES (2002) (describing training of Brazilian torturers).

possible denial of their proffered warrant request. The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.¹⁵⁶

Other officials will be inclined, by duty or morality, to respect the minima of civilized behavior. As long as our law articulates a norm that officials have an obligation to act decently even when confronting terror, the official inclined to act with basic decency but confronted with occupational temptation has a basis to claim that she fulfills her duty, rather than abandons it, when she acts humanely.¹⁵⁷ By contrast, in response to pressure from peers or superiors to cut corners, a conscientious official under a torture warrant regime can rely on no inflexible norm of civilized behavior. “The judge would not approve the warrant” is hardly as snappy a retort in the squadroom or midnight safe-house as “we are not Nazis.”¹⁵⁸

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

¹⁵⁶ See, e.g., EVANS & MORGAN, *supra* note 122, at 55 (“[T]he ‘law of inevitable increment—whatever powers the police have they will exceed by a given margin.’” (citation omitted)). Oren Gross noted:

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.

Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1099–1102 (2003).

¹⁵⁷ See Kreimer, *Dark Matter*, *supra* note 1, at 504–05; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 852 (1994) (arguing that constitutional enforcement provides an “alternative vision” for “good cop[s]” to follow).

¹⁵⁸ MARAN, *supra* note 144, at 117 (quoting the rationale of General Bollardi re, who refused to order torture: the French “were not Nazis”); *id.* at 114 (discussing Bollardi re’s order to troops to reject “temptation which totalitarian countries have not resisted” (quoting MASSU, *supra* note 148, at 222)).

Professor Levinson acknowledges with vehemence the danger of how a system of “torture warrants” might “take us down the road to accepting torture as relatively routine—since supine judges would grant the entreaties of overly aggressive security agencies.” Levinson, *Sanford Levinson Replies*, *supra* note 12, at 93. He suggests the possibility, nonetheless, that in the absence of a system for ex ante review, potential torturers will “realize that the actual prospects of [retrospective] punishment are very low,” and conclude that torture is legitimate. *Id.*; see also Levinson, *Precommitment*, *supra* note 12, at 2042–49 (discussing examples of torturers avoiding liability or condemnation).

In evaluating these two dangers, it seems to me, Professor Levinson initially misses the point that prospective review is likely to legitimize torture on the basis of imaginary horrors which will never come to pass, while retrospective review will be more likely to respond only to demonstrated realities. More importantly, Professor Levinson underestimates the expressive power of law in favor of a Holmesian positivism and hard-edged legal realism. The self-justifying arguments of torturers recounted by Professor Levinson are not phrased in terms of the fact that torturers may be able to “get away with” the torture; they rest on claims that the torturers have done the right thing. A “public, written opinion” issuing a torture warrant, *id.* at 2048, is likely to give more aid and comfort to such individuals (and to dispirit those who seek to avoid inhumanity more) than even a high possibility that torturers will be absolved of punishment.

to resort to torture "if an atom bomb were ticking somewhere in the city, and the roads were closed and the trains were not running, and the man who knew where the bomb was hidden sat grinning and silent in a chair at the country police station twenty miles away."¹⁵⁹ Professor Black argued that while "[t]he right not to be tortured cannot, literally, be an 'absolute' . . . the right not to be tortured is entirely unsuitable for 'balancing' against competing considerations of convenience, comfort, and safety, as we 'balance' . . . the ordinary affairs of life, with a view to setting the course of prudence."¹⁶⁰ The situation where a right against torture would be overridden, he maintained, would be so rare that the rule of absolute prohibition "most faithfully approximates and renders the attitudes and probable actions of most decent people," and it is the only judge who insists on allegiance to an absolute prohibition whom we can trust to decide such cases.¹⁶¹ The judge who issues a "torture warrant" in the ordinary course of business is not likely to be such a judge; and, *mutatis mutandis*, the counterterrorism investigator who seeks the warrant is not likely to be such an official.¹⁶²

CONCLUSION

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

¹⁵⁹ Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S MAG., Feb. 1961, at 63, 67.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See Guido Calabresi, Foreword, *Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 116 & n.108 (1991) (approving Professor Black's position). Judge Calabresi echoes Black's rhetorical question:

Whom would you trust more to decide both the case of the hydrogen bomb and torture cases generally, as we want them decided, . . . a judge who in hard and easy cases is always declaring that we must balance the costs and benefits of torture, or the judge who announces that our system has an absolute prohibition against torture?

GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 174 (1982); see also Yale Kamisar, *Physician-Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121, 1145 & nn.93-94 (1998) ("[B]y refusing to acknowledge that we should balance the costs and benefits of torture as a general matter, we strengthen the presumption against torture and maximize the likelihood that it will only be resorted to in the rarest and most compelling circumstances.").

¹⁶² Cf. Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1009 (2000) ("[Acknowledging the moral fault of a tragic decision] keeps the mind of the chooser firmly on the fact that his action is an immoral action, which it is always wrong to choose. The recognition that one has 'dirty hands' is not just self-indulgence: it has significance for future actions.").

choose to violate any provision of the Constitution. But on the question of whether scholars or courts should announce before the fact that the Constitution permits torture, the answer seems clearer: ours is not a Constitution that condones such actions. An official who proclaims fidelity to the Constitution cannot in the same breath claim the right to use methods "too close to the rack and the screw to permit of constitutional differentiation."