

Torture: Considering a Framework for Allowing Limited Use

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Article Abstract for *Torture: Considering a Framework for Allowing Limited Use*

Abu Graib, Guantanamo, the War on Terror—the debate over the use of torture is still very much alive in the world today. The debate can be divided into two questions: (1) whether there should be an actual absolute ban where torture is never allowed either ethically or legally, and (2) if torture should be allowed under certain circumstances what form of regulation is best able to ensure that it is used only in those most limited circumstances. Currently, there is an absolute ban in place, yet world leaders, applying a case-by-case utilitarian approach, in fact permit the use of torture in what they deem to be extreme circumstances, despite the ‘absolute ban.’

Assuming, as a result, that torture will never be eliminated completely and that it is, in fact, desirable in certain situations, the question becomes: what form of regulation most appropriately limits its use? The current system and any other system that uses a purported absolute ban where exceptions and violations are nonetheless authorized at the highest levels does not represent the most effective regulation because such systems force governments to break the law. Such systems thereby promote secrecy and a concomitant lack of accountability—two things antithetical to democracy, which requires an informed electorate. Instead, a system that promotes those values and erects strict procedural safeguards represents the most appropriate way to allow torture in the limited circumstances in which it may lead to the better utilitarian outcome. Torture Warrants, if established appropriately, may represent such a system.

I. Introduction

Civilized nations employ torture despite the apparent absolute ban on its use. Moreover, these violations often go undetected, and more importantly, unpunished. The question is whether a system that allows such disregard for the law represents the best we can do. Indeed, the current absolute ban is not unassailable; the Vice President of the United States recently appealed to Republican Senators to allow CIA exemptions to a possible ban on the torture of terror suspects in U.S. custody.¹ The historic terrorist attacks of September 11, 2001, have rekindled the debate on torture. It seems that the nature of the enemy has forced those prosecuting the War on Terror to turn to different and often less than ideal means to wage it. As a result, academics must address the torture issue not in an abstract or theoretical manner but instead in a way that can be practically applied by our leaders.

While academics have debated the theoretical legality and morality of torture, in practice the legal response is well established. The United Nations Convention against Torture placed an absolute ban on torture, and the United States has signed that treaty, albeit with reservations. Despite the uniformity in the law, however, torture is still practiced throughout the world—even by nations that have signed the treaty. As a result, the torture question remains an important issue worthy of continued discussion.

I propose that the absolute ban with no exceptions (hereinafter referred to as the rhetorical or theoretical absolute ban) is inappropriate and lacks utility in a world in which leaders in emergencies are guided by utilitarian goals that often militate in favor of ignoring the ban. As a result, the framework for analyzing the torture question should not be binary (should we allow it or not) but should instead recognize reality and focus on creating a system that limits

¹ David Espo & Liz Sidoti, Cheney Pushes Senate for CIA Exemption (November 4, 2005).

the application of torture to the “appropriate” amount. The current system, an absolute ban often ignored or undermined, does not yield this proper amount because it fosters secrecy, which encourages inappropriate torture by preventing proper assessment of the appropriateness of torture’s quantity and quality. I settle, somewhat reluctantly, on Alan Dershowitz’s Torture Warrants as the appropriate system because it appears to be the best suited to limit the use of torture to appropriate circumstances. I then attempt to lay the framework that will allow the theoretical Torture Warrant proposal to become reality.

A. The Current Law

In 1984, The United Nations General Assembly adopted the international Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).² This official ban of state torture represents a codification of longstanding prohibition in international law.³ CAT provides that “no exceptional circumstances whatsoever...may be invoked as a justification of torture.”⁴ CAT represents the primary source of U.S. obligations regarding torture and the United States ratified it in October 1994.⁵

The United States, however has only given limited effect to CAT. That is, the U.S. adopted the Convention with a reservation—it binds the United States only so far as to be

² Linda M. Keller, *Is Truth Serum Torture*, 20 Am. U. Int’l L. Rev. 521, 534 (2005).

³ *Id.*

⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly Dec. 19, 1984, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987) [hereafter “CAT”].

⁵ Keller, *supra* note 2, at 537.

consistent with the Eighth Amendment.⁶ In that vein, decisions by U.S. courts have suggested that the Eighth Amendment may allow preventive interrogation torture.⁷ Therefore, if the U.S. employed physical force in certain circumstances it could arguably remain in compliance with its treaty obligations.⁸

B. Torture as a Means to an End: What is Torture and for What is it Used?

Torture, taken alone, has little definite meaning.⁹ In an effort to determine whether particular actions amount to torture, authorities have often used a sliding scale. For example, the European Convention on Human Rights has often defined torture by applying a “severity of suffering” test.¹⁰ Applying a definition that exists on such a scale allows governments to justify the actions taken by their agents as events that do not rise to the level of torture by arguing that their interrogation techniques were lower on the scale.¹¹ As a result, “the threshold test of

⁶ ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 136 (2002).

⁷ *Id.*

⁸ *Id.*

⁹ Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of Democracy to Defend Itself and the Protection of Human Rights*, 6 *UCLA J. Int’l L. & For. Aff.* 89, 101 (2001).

¹⁰ Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 *Minn. L. Rev.* 1481, 1488 (2004).

¹¹ *Id.*

suffering has been used in an attempt to fly below the radar on the absolute prohibition on torture.”¹²

Torture, generally, represents a means to an end. In practice, there are two ends, punishment and interrogation. The latter, however, can be divided into two subsets, interrogation to elicit a confession and interrogation to elicit information necessary to prevent a future harm.¹³

First, I turn to torture as a means to effect punishment.¹⁴ Use of torture to achieve this end garners little support nationally or internationally. It has long been established in the United States that the Eighth Amendment’s prohibition of cruel and unusual punishment bans the use of torture for punishment.¹⁵ This ban is based on fundamental human dignity and decency and no exception or justification exists to suggest otherwise.

Second, torture can be used as an interrogation technique. Interrogation, however, can seek to elicit two different types of information, confessions and statements that can be used to prevent future harms. While the latter could also be a confession, it is not necessarily so—an

¹² *Id.*

¹³ David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1436 (2005) (“The crucial difference lies in the fact that the confession is backward-looking, in that it aims to document and ratify the past for purposes of retribution, while intelligence gathering is forward looking because it aims to gain information to forestall future evils like terrorist attacks.”), Oren Gross, *supra* note 10, at 1487-88.

¹⁴ *Id.* at 1433.

¹⁵ *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

individual might possess knowledge of an attack without being guilty for its planning or for carrying it out.

Torture has been used in the past to extract confessions from criminal suspects.¹⁶ A confession in the purest sense of the word is an incriminating statement that ordinarily relates to past activities. Use of torture to elicit such information has received treatment similar to that accorded torture for punishment. The Supreme Court has prohibited such torture under the Due Process clause of the Fifth Amendment.¹⁷ On one hand, a stronger justification exists for allowing this type of torture than for allowing torture to punish because it may help to put criminals in prison. On the other hand, however, the ban stands largely uncontested because such confessions are nearly universally thought unreliable. Moreover, the existence of other investigative techniques provides alternatives such that this last resort need never be used.

The second use of torture in interrogation—to prevent future harm from occurring—seems less well suited to the ban on torture.¹⁸ Preventive interrogation limits the use of torture to efforts designed to gain information that will assist authorities in blocking an uncompleted terrorist attack or other similarly imminent attack on innocent people.¹⁹ The purpose is exclusively directed towards the future and is not concerned with eliciting confessions to be used in a trial nor with punishing individuals for their past actions.²⁰ The use of torture to achieve this end has been subject to great debate since 9/11 and while prohibited by international law, reports

¹⁶ Luban, *supra* note 13, at 1435.

¹⁷ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁸ Luban, *supra* note 13, at 1436.

¹⁹ Oren Gross, *supra* note 10, at 1487.

²⁰ *Id.*

suggesting its use are often cited. Given the inconsistent application of the absolute ban, many academic papers have suggested that perhaps the absolute ban ought to be reconsidered with respect to this use of torture.

C. The Ticking Bomb Hypothetical

An often-discussed hypothetical, the ticking bomb emergency, is offered as moral and legal support for relaxing the ban on torture when used to prevent future harms.²¹ In a ticking bomb emergency, authorities have reason to believe that an individual has information about an imminent harm to innocent lives that could still be prevented. The harm, however, can only be prevented with the information the individual has. At the most extreme, this situation would exist if an officer saw an individual arm a bomb that could be deactivated by a password that only the individual knows. As a result, eliciting the password from the individual represents the only way to prevent the loss of innocent life. At the other end of the ticking bomb spectrum,²² the situation would exist if officers knew or had cause to believe²³ that an individual had information material²⁴ to the prevention of an act that would cause harm to innocent people. To the lay reader, common sense and a simple cost-benefit analysis suggests that torture of one less-

²¹ Luban, *supra* note 13, at 1440.

²² This still refers to an extreme situation; a crisis.

²³ *See infra* note 112 and accompanying text (discussing the appropriate level of cause necessary in the Torture Warrant context).

²⁴ This refers not to information merely relevant to stopping but instead to information that would be used directly to stop an attack.

than-innocent individual is justified by the prospect of preventing harm to many innocent people.²⁵

The hypothetical, however, has its inadequacies. Of note, the hypothetical assumes near perfect knowledge of the authorities and seems to focus on imminence. As an illustration of a situation in which torture may be appropriate, the hypothetical is perhaps more useful if that notion of imminence is broadened to focus less on timing and more on the absence of alternative means of preventing terrorist attacks. It is the original and this broadened hypothetical, discussed and evaluated below, that generally direct the discussion in this paper.

II. Examining the Arguments For and Against the Rhetorical Absolute Ban on Torture

The arguments for and against the absolute ban on torture are numerous and both sides have received support in the literature and elsewhere. In assessing the support for and against the absolute ban on torture, it is important to note the two types of absolute bans. One is the theoretical true absolute ban discussed with moral-type arguments for which no justification or excuse exists. The other is a legal absolute ban discussed with more practical reasoning under which circumstances exist that may excuse a violation or at the least, under which violations/exceptions occur despite the absolute ban. In assessing the arguments below, I focus on the former and conclude that the rhetorical absolute ban is undesirable; torture is appropriate in certain well-defined circumstances.

A. Arguments Against Breaking the Absolute Ban on Torture

²⁵ This assumes the veracity of the informal findings of Judith Jarvis Thomson in her Trolley Problem. *See infra* notes 58-62 and accompanying text (discussing the Trolley Problem). Moreover it assumes, based on those findings that most people apply, knowingly or not, utilitarian thinking to such problems.

i. *Philosophical argument*

Rule absolutists typically apply the deontological view that torture is intrinsically wrong.²⁶ Under this way of thinking, torture violates the physical and mental integrity of the recipient and removes his or her freedom.²⁷ Torture as a result is an evil that can never be justified or allowed morally or legally. Absolutists, if following their cause, must believe that they cannot torture an individual even when violating the prohibition on torture might prevent innocent people from being tortured.

With a similar outcome, rule-consequentialists support strict application of the ban in all circumstances. In rule-consequentialist moral theories, we ought to follow the rule strictly because in the end it leads to a better result.²⁸ Therefore, when confronted with a particular case, the ticking bomb, for example, decision makers should ignore the results of a cost benefit analysis in that particular case and strictly follow the rule as adopted.²⁹ But such rigid adherence to a rule could also be described as irrational because its proponents would favor abstract conformity to the rule and the idea of probable long term good that seems divorced from reality over the more concrete human suffering that could be avoided in the ticking bomb situation. Such a person might respond by arguing that people are frequently mistaken in assessing the extremity of the situation, so strict adherence to the rule is appropriate because it incorporates this likelihood of mistake. This chance of mistake, however, can be minimized with proper procedures.

²⁶ Oren Gross, *supra* note 10, at 1492.

²⁷ *Id.*

²⁸ *Id.* at 1495.

²⁹ *Id.*

Proponents of the rhetorical absolute ban on torture reason that the ban is designed to prevent pain, violence and death.³⁰ This reasoning, however, also serves to undermine the institution of an absolute ban when one considers the situation in which an authority would want to employ torture as a preventive interrogation technique. A government would do so only in an effort to avoid a greater harm of the exact kind that is sought to be avoided by the strict adherence to the ban on torture.³¹

On the other hand, proponents of allowing torture in certain circumstances often justify their belief with act-consequentialist type reasoning. This is a utilitarian approach to the problem and it leads to the following: given the costs and benefits in a particular situation, the benefits of torture may exceed the costs.³² The argument against act-consequentialists is that it leads to too much torture.³³ That is, since such reasoning has no built in boundaries the use of torture is decided on a case-by-case analysis weighing the benefits against the costs. There is a need to impose some limitations. Another critique leveled at this justification for an incomplete ban on torture is that those making the weighing will tend to be biased towards the immediate and may discount the long-term consequences. That is, authorities will consider the imminent threat to the masses and heavily discount, or ignore altogether, the long-term detrimental effects of allowing torture to be used in the particular case. The critique contends that we need absolute rules to control us in times of emergency when we may not be thinking clearly.

³⁰ Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 *Geo. Mason L. Rev.* 135, 145 (2004).

³¹ *Id.* at 145.

³² Oren Gross, *supra* note 10, at 1497-98.

³³ *Id.* at 1499.

Oren Gross argued that the problem is that since both pure philosophical perspectives make sense, neither prevails and they are mutually exclusive.³⁴ However, it seems that the critiques of the act-consequentialist justification could be offset by the imposition of rigorous procedures designed as strict limitations on the use of torture while the critiques of the absolutist arguments are immutable, inherent to their philosophical reasoning and thus irremediable.

ii. *The importance of setting a strong moral standard*

A convincing argument supporting an absolute ban has been made by those that tout the importance of setting a moral standard. Maintaining a strong commitment to an absolute ban on torture allows the United States to differentiate itself from the terrorists and to maintain that it is on the moral high ground.³⁵ Indeed, creating and adhering to an absolute ban on torture sends a strong anti-torture message to the international community.³⁶

Richard Posner argues forcefully that this proposition is incorrect; he notes that recently France, the United Kingdom and Israel have all “used torture to extract information, yet none is a country that has sunk into barbarism.”³⁷ He maintains that while torture is uncivilized, civilized nations have engaged in torture without becoming uncivilized.³⁸ Moreover, it is not necessarily clear that an explicit acknowledgement of its use coupled with efforts to limit that use sends a

³⁴ *Id.* at 1490.

³⁵ Oren Gross, *supra* note 10, at 1505.

³⁶ *Id.* Legitimizing the use of torture would constitute an important symbolic setback in the campaign for human rights. DERSHOWITZ, *supra* note 6, at 145.

³⁷ Richard A. Posner, *Torture, Terrorism and Interrogation* in TORTURE: A COLLECTION (Sanford Levinson ed., 2004), 291, 294 (internal quotations omitted).

³⁸ Posner, *supra* note 37, at 294-95.

worse moral message than the status quo in which one could argue that the United States knowingly ignores and intentionally circumvents an absolute prohibition.

Proponents of an absolute ban have also argued that allowing torture will fail to encourage people to adhere to a morally appropriate line by suggesting that it is legal to stray from that line.³⁹ However, as Adam Raviv points out, this logic ignores the purpose of legal rules that would permit officials to engage in torture. The ideal rule would allow torture only in the rarest circumstance, so it is ineffective “to argue that people’s moral compasses will truly be damaged if torture is prohibited 99.9% of the time rather than 100%.”⁴⁰ He astutely continues, “[j]ust because certain human rights norms are not absolute priorities of the state does not mean that the state has entirely lost respect for them.”⁴¹ For example, just as Americans have not lost respect for the right to freedom and self-determination in the face of a criminal justice system that takes that right from individuals in certain circumstances, they will not lose respect for the right to be free from torture if it is allowed in certain circumstances.

iii. *Uncertainty in the merits of the hypothetical ticking bomb and the effectiveness of torture as an interrogation technique*

The absolute ban on torture is premised on traditional thinking that suggests that the ticking bomb scenario is the outlandish fodder of academic debate and not fodder for principled practical law making. That is, maybe the ticking bomb hypothetical is so unlikely that it should remain in the classroom because the pure exception will so rarely be needed that the risk of

³⁹ Raviv, *supra* note 30, at 144 (citing Emanuel Gross, *supra* note 9, at 112).

⁴⁰ Raviv, *supra* note 30, at 144.

⁴¹ *Id.* at 145.

opening the door to torture outweighs the potential benefit that may occur in the rarest hypothetical circumstance hatched in the classroom and not in the courtroom or reality.

It should not, however, be ignored in the modern world where its occurrence seems more likely. In light of the attacks on September 11, 2001, and others in Europe and elsewhere, this type of extreme situation should not be brushed aside as merely “hypothetical, or as morally or legally irrelevant.”⁴² For example, like any terrorist attack, the recent hotel bombings in Jordan forcefully drive home this point; that is, growing numbers of attacks increase the likelihood that a situation will occur in which preventive torture represents the only effective way of saving innocent lives. The original and broader ticking bomb hypothetical should not be ignored as simply “unlikely” to occur.

Furthermore, some argue that the hypothetical itself, when placed in a real world context, has many holes. They ask: how certain could the police be that the person actually knows about the bomb? How certain could the police be that the bomb actually exists or that torture is the only way to go or that torture will even work at all?⁴³ Just because there are problems with the extreme situation does not mean it should be ignored when we establish rules. These are less “problems” with the hypothetical that require its elimination and more additional elements that need to be considered and incorporated into the hypothetical.

Absolutists level additional charges of uncertainty and ineffectiveness at the idea of sanctioned torture.⁴⁴ We do not know for sure that torture in a specific situation will result in the

⁴² Oren Gross, *supra* note 10, at 1487.

⁴³ *Id.* at 1502.

⁴⁴ *See* Posner, *supra* note 37, at 293 (noting that one objection to the use of torture is that it is ineffectual).

information necessary to prevent a terrorist attack from occurring. Furthermore, we cannot be sure that a specific torture technique will even elicit the desired information. As above, these problems should not be grounds for taking torture off the table; the uncertainties must be considered. Therefore, we weigh the uncertainty in the effectiveness of the torture against the risk to innocent lives—the benefit in the chance of preventing loss of innocent life may still exceed the cost associated with the risk of torturing a possibly innocent person.⁴⁵ Moreover, the reality is that torture sometimes works; indeed, Alan Dershowitz has noted “that there are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.”⁴⁶ While it does not always work, it sometimes does; this is why torture still exists in many parts of the world.⁴⁷

iv. *Slippery slope argument*

Slippery slope proponents are quick to suggest that once we allow state torture in some circumstances those circumstances will likely expand beyond the original intent. This slippery slope could include (1) the use of torture in non-preventive interrogational situations, (2) the use of torture in less than the most extreme situations, and (3) the use of torture in situations beyond real terrorism.⁴⁸ The only real slippery slope risk is in (2) because the others can more easily be prevented by, for example, clearly defining what is a preventive interrogation situation—the line between it and torture to punish and torture to elicit confessions would be easy to draw by analyzing the degree to which a future harm was perceived and addressed through the torture. In

⁴⁵ Posner, *supra* note 37, at 293.

⁴⁶ DERSHOWITZ, *supra* note 6, at 137.

⁴⁷ *Id.* at 137-38.

⁴⁸ Oren Gross, *supra* note 10, at 1508.

response to the slippery slope, Dershowitz argues that it is only an argument of caution since every compromise with an absolutist approach to human rights carries with it the risk of slipping further.⁴⁹

Furthermore, if we assume that preventive interrogation torture is effective in avoiding loss of innocent life there will be an incentive for authority figures (1) to become more dependant on it, and (2) to apply it to cases that are less extreme than the original catastrophic situation.⁵⁰ The risk of this ‘slip’ can be mitigated by imposing strict penalties for those that cross the line by torturing in inappropriate situations coupled with instituting a rigorous method for determining whether a situation is extreme enough to allow for torture.

B. Arguments Supporting The Use Of Torture to Prevent Future Harm

The use of preventive interrogational torture is inevitable in certain circumstances.⁵¹ Accepting that fact means that rational governments will engage in torture when the circumstances are the most extreme regardless of the legality of their decision. That governments will do it regardless of its legality, however, is not necessarily a justification for making it legal. Applying an absolute rule against torture, however, which itself exists on a spectrum of interrogational behavior, is a misuse of the word absolute. It merely shifts the ability to allow for exceptions one step up the chain from occurring during the application of the

⁴⁹ DERSHOWITZ, *supra* note 6, at 147.

⁵⁰ Oren Gross, *supra* note 10, at 1508-09.

⁵¹ Despite the current absolute ban, torture is still practiced by many nations, even those that have signed treaties banning it. DERSHOWITZ, *supra* note 6, at 137-38; *infra* note 63 and accompanying text.

rule to the decision whether to apply the rule at all. In addition, the use of torture in spite of an absolute ban impairs the idea of the Rule of Law.

i. *Traditional justification arguments*

The doctrine of necessity offers a reason for softening the absolute prohibition on torture in the context of preventive interrogation. The existence of necessity as a defense demonstrates a utilitarian bent to our construction and application of our laws. In analyzing torture, the applicability of the defense of necessity to the ticking bomb situation suggests that the rhetorical absolute ban should not exist. The necessity defense governs the situation “in which a person commits an offense, but, from a social and moral point of view, it is undesirable that criminal liability be imposed on him.”⁵² The absolute applicability of the necessity defense is well established in the United States where we allow it to justify the commission of a wrong. “The Model Code rejects any limitations on necessity cast in terms of particular evils to be avoided or particular evils to be justified.”⁵³ The code “reflects the view that the principle of necessity is one of general validity.”⁵⁴ As a result, torture seems to fall within the justification’s broad ambit.

Applying the traditional elements of the necessity defense suggests that it would justify torture in the extreme situations and, importantly, fail to justify it in less extreme situations. The elements of a necessity defense include:

1. The harm to be averted must be imminent.
2. The act charged must have been done to prevent a significant evil.

⁵² Emanuel Gross, *supra* note 9, at 107.

⁵³ American Law Institute, Model Penal Code and Commentaries, Comment to § 3.02 at 14-15 (1985).

⁵⁴ *Id.*

3. There must be a causal relationship between the criminal conduct and the harm to be averted.
4. There must have been no adequate alternative.
5. The harm caused must not have been disproportionate to the harm avoided.

In applying the necessity rule to the ticking bomb hypothetical (used as an example of the type of situation in which torture could plausibly be employed) we find a rough fit. First, in the ticking bomb hypothetical the harm to innocent lives is, as discussed above, defined as imminent. That imminence, however, many not rise to the level required by the necessity defense. The ticking bomb may be imminent in that it refers to a sense of urgency under which time constraints prohibit the application of other investigative techniques. This definition of imminence directly ties to the fourth prong of the necessity defense outlined above. Second, preventive interrogational torture prevents harm to innocent individuals. Thus, the second prong appears to be satisfied.

Third, the causal relationship prong applies less clearly. We must ask: does the torture cause the attack to be prevented? Is that an *ex ante* or *ex post* determination? It seems that the nexus between torture and stopping the bomb must be a close one. Ordinarily, the volitional illegal act alone abates the evil. Torture, however, is different because intervening events must occur—merely gathering information does not stop the bomb. Two intervening events must occur: (1) the torture victim must actually have and provide the information, and (2) the police must then use that information to stop the bomb. As a result, this situation is between traditional necessity cases and non-necessity cases. It is less direct than the act of breaking into a mountain cabin during a storm to avoid losing a limb to frostbite (a traditional example of necessity) but more direct than mere civil disobedience where the harm can only be averted by the act of

another (a situation in which necessity does not exist). In the preventive interrogation case, by viewing the police as a whole, it seems that the further step (actually getting the bomb) is not indirect, as it is, in effect, taken by the same party that tortured.

Fourth, the law implies a reasonableness requirement in judging whether alternatives exist. As a result, in an emergency situation in which the harm rises to the appropriate level of imminence it might not be reasonable to pursue other investigative techniques. Fifth, and finally, the ticking bomb situation, from a utilitarian perspective, clearly satisfies the balancing of the harms requirement since the harm in death to many exceeds the harm in torture to one.

Given that necessity may represent an adequate defense to murder, it seems that an even stronger case can be made that necessity can be a defense to torture. In *The Queen v. Dudley and Stephens*,⁵⁵ a storm caused the occupants of a ship to use an emergency boat belonging to the ship. Afloat for at least 18 days and out of food, the adult occupants killed an innocent boy and ate him so that they could survive. The court found the necessity defense unavailing for the survivors. The judge supported the decision not to apply the defense by noting the problems with its application: how could the harms be balanced, who would measure the value of the individuals' lives? The boy was an innocent. Moreover, the others chose him because of his weakness. The judge reasoned that if necessity were applicable then the weaker physically will always be sacrificed in that situation. The judge continued finding that no principled reason suggests that the stronger is more valuable than the weaker. The use of torture, however, can be distinguished from this case where necessity failed to justify the murder of the boy. Unlike the life raft situation, with preventive torture the criminal act sought to be justified is not as serious as death. While we know the innocence of the boy, authorities must have some degree of cause

⁵⁵ 14 Q.B.D. 273 (1884)

to believe that the torture victim is not. This mitigation of the problems discussed by the court in the lifeboat case suggests that the necessity defense is stronger in the torture case.

The Model Penal Code lends itself to justifying the use of necessity to allow for torture. The comment to the Code suggests that taking an innocent human life might be justified if a greater number of lives may be saved by the taking of the one life.⁵⁶ The reasoning supporting the use of necessity in defense to murder provides several reasons to support the use of torture in certain circumstances because the balancing of the harms is easier. While the commentaries support necessity as a justification for the murder of an innocent person, in preventive interrogation the victim is not innocent. More importantly, with interrogational torture the victim is not killed to save others, just pained. The balance of the harms weighs heavily in favor of allowing torture when contrasted with the commentary's discussion of the legality in taking an innocent person's life to save others.

The law has extended the justification reasoning behind necessity to allow the defense of others to justify murder. This justification supports murder whereas here torture is the extent of the harm. While such a defense used to apply only where the defendant had a special relationship with the potential victim of the murdered person, it now extends without regard to such requirements. Killing in the defense of others is justified if the defendant honestly and reasonably believed that the other's life was in imminent unlawful danger or there was an unlawful threat of serious bodily harm. This reasonableness element helps ameliorate some of the problems discussed above and associated generally with the necessity defense. In the defense of others context, we allow a necessity defense even though we know that some people

⁵⁶ American Law Institute, Model Penal Code and Commentaries, Comment to § 3.02 at 14-15 (1985).

will have reasonable, but ultimately incorrect, beliefs. Similarly, torture to prevent future harm to others should be allowed where authorities have reason to believe that innocent lives are in unlawful danger—as long as we can ensure that the belief will be correct with regularity.

ii. *Other reasons*

Generally, seemingly absolute rules do not exist because exceptions abound. Moreover, the mere existence of exceptions to other rules does not swallow nor negate the sanctity of the rule to which they apply. For example, murder is illegal, however, there are many situations in which the crime of murder can be committed but where an exception to the rule allows the actor to avoid punishment.

Torture as a means to conduct preventive interrogation should not be subject to an absolute ban because the behavior and actions governed by true absolute bans (with no exceptions) differ from torture to prevent a terrorist attack. The absolute prohibitions against slavery and genocide are principles commonly asserted as jus cogens norms. The use of torture to prevent future harms differs in several fundamental ways from genocide and slavery. On the one hand, no reasonable justifications exist to support slavery or genocide—so an absolute is appropriate and sustainable.⁵⁷ There are few if any hypotheticals worthy of intellectual debate in which genocide or slavery would be appropriate or justified. In stark contrast, such hypotheticals exist for the use of torture to prevent future harm. Indeed, there are moral, ethical, political and legal arguments that support the use of torture in certain circumstances. The differences suggest

⁵⁷ *But see* http://en.wikisource.org/wiki/Slavery_a_Positive_Good (reproducing a speech by John C. Calhoun made on the Senate floor given on February, 6 1837). Calhoun argued that slavery was a positive good and was based on notions of white supremacy that are at odds with current society beliefs. *Id.*

that torture in preventive interrogation should not be flatly prohibited in the same way that slavery and genocide are.

Judith Jarvis Thomson provides some evidence of the extent to which torture is an option desired by most in her Trolley Problem.⁵⁸ In this situation, a trolley car is barreling down its track.⁵⁹ The track splits and if it stays on its current course the trolley will strike and kill five people standing on the track and if its track is shifted, it will strike and kill one person.⁶⁰ The question is would a person able to switch the trolley as it approaches be justified in flipping the switch and sentencing the single individual to death to save the other five?⁶¹ Thomson found that everybody to whom she proposed this hypothetical said the person would be justified in flipping the switch.⁶² There, the innocent life was sacrificed whereas in the torture situation the individual would be neither killed nor innocent; therefore, it makes sense that torture would receive the same overwhelming approval in a similar situation.

Furthermore, the very fact that most countries seem to conduct torture while purporting to adhere to the absolute ban suggests that the rhetorical 100% absolute ban is inappropriate and undesired. It seems fairly widely accepted that even countries that have signed the CAT and publicly condemned torture have not strictly adhered to an absolute ban.⁶³ Indeed, it seems that

⁵⁸ Judith Jarvis Thomson, *The Trolley Problem*, 94 Yale L. J. 1395, 1395 (1985).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ E.g., Oren Gross, *supra* note 10, at 1484; Raviv, *supra* note 30, at 149. “A number of the countries that have signed on to these conventions, including Great Britain and Israel, have quite

not only is it sometimes practiced but it also has been successful in preventing acts of terrorism.⁶⁴ Where an absolute ban is ignored by utilitarian leaders in circumstances favoring doing so, it seems inappropriate to cling to it for the sake of theory and philosophy. It also seems clear given the Trolley problem's results that few would actually vote for a leader who followed absolutist views to their extreme at the cost of innocent lives. Indeed, Richard Posner has argued that no one who doubts that torture is permissible if the circumstances are extreme enough should be in a position of responsibility.⁶⁵

III. Avenues to Travel in Allowing Torture: Creating the Proper 'Amount' of Torture

The idea of a theoretical absolute ban against torture in which no exceptions can exist does not seem appropriate or feasible in light of history and the circumstances discussed above. Logically, this means that some torture should be allowed. Now the question is what system leads to the ideal or appropriate amount of torture? Accepting that torture cannot actually be absolutely prevented requires an analysis of the possible ways of handling torture to limit it to essential circumstances. It is important to emphasize, however, that in seeking to discover or to create an appropriate system for regulating torture we do not seek an absolute answer as exists for, say, the shortest distance between two points—a line. Instead, regulation of torture

plainly engaged in activities that violate the conventions, indicating that at least some officials in these countries think that torture can be an effective means of extracting desired information.”

Id.

⁶⁴ DERSHOWITZ, *supra* note 6, at 140.

⁶⁵ Oren Gross, *supra* note 10, at 1514 (citing Richard A. Posner, The Best Offense, The New Republic, Sept. 2, 2002, at 28, 30).

necessarily requires a balancing of evils and even the best regulation might not be ‘good’; it may merely be the least evil.

Two elements must be satisfied by a proper regulation of torture. First, the system should allow for “appropriate” torture. Appropriate, in this situation, has two distinct meanings. Appropriate torture refers to the use of torture only in the extreme cases where utilitarian based justification arguments apply; this limits the scope of situations (and thereby the quantity) in which torture can be employed. Appropriate torture also refers to the use of torture techniques that avoid grossly ignoring human rights; this limits the types of torture that could be employed. Limiting the types of torture, while not in line with a strict application of utilitarian thinking, would serve to minimize the damage to the benefit of setting a moral standard for the international community and to ensure an appropriate degree of human rights and dignity. Such a limitation would also ensure a degree of reasonableness in torture, ensuring that the minimum degree of torture is used to elicit the necessary information—i.e. there is no need to destroy 10 buildings to stop the spread of a fire when the destruction of one building will suffice. Such a limitation also acknowledges the uncertainties inherent in torturing as it limits the potential harm to the torturee by fixing a cost (extreme torture techniques) that the benefit (preventing harm) cannot exceed. Second, the system should preserve the Rule of Law by avoiding rampant exceptions and other forms of non-application of a governing law.

A. Torture Warrants

Alan Dershowitz argues that torture, if allowed, should be conducted overtly to promote regulation and limitation of its practice. The goal of his controversial Torture Warrant is “to reduce the use of torture to the smallest amount and degree possible.”⁶⁶ The Torture Warrant

⁶⁶ DERSHOWITZ, *supra* note 6, at 141.

system represents an effort to maximize civil liberties in light of the probability that torture will otherwise be employed covertly.⁶⁷ It is better for torture to be known and discussed so that practitioners can be held accountable and to strict standards. Torture Warrants arguably satisfy both elements of the ideal or proper regulation of torture: the appropriate level and the support of the Rule of Law.

The use of Torture Warrants could help ensure that the torture that is practiced meets the appropriateness requirements of a proper torture regulatory system. First, it could do so because Torture Warrants work to ensure accountability. Dershowitz argues that a formal, visible, system is easier to control than a system that promotes or allows for secrecy.⁶⁸ Torture Warrants represent a system in which torture would be conducted openly and in accordance with established legal procedure. In addition, to ensure accountability any alleged torturee could be provided a cause of action against the government. The use of torture is something for which we would want to facilitate civilian involvement in ensuring compliance with requirements.

Second, requiring a Torture Warrant could limit the situations in which torture is used by explicitly ensuring that it is only used as a last resort. Such a system would do so by requiring applicants to demonstrate that other methods have proven ineffective or are not feasible.

Third, a Torture Warrant may also reduce the use of torture because a potential torturee, knowing that the law authorized the threat of torture, might be more willing to provide the needed information.⁶⁹ A potential torturee, without being presented a Torture Warrant, might believe that an interrogator's threat to use torture is empty, that they would not actually torture

⁶⁷ *Id.*

⁶⁸ DERSHOWITZ, *supra* note 6, at 158.

⁶⁹ *Id.* at 159.

because they are limited by a lack of authority or will to engage in such practices. Such a person might withhold information based on that belief until that belief is negated by actual torture. By contrast, a Torture Warrant might convince the potential torturee that torture *will* be used, thus increasing the likelihood that the torturee will provide the information to avoid certain torture.

A Torture Warrant system might limit the harshness of the type of torture applied because such a system may counter the fact that the utilitarian justification alone has no inherent limiting principle; that is, if a simple cost benefit analysis is applied the torture techniques could be as extreme as necessary. A Torture Warrant could limit this by building in principled barriers that cannot be crossed, for example by requiring that the torture conducted result in no long-term effects on the torturee or that a medical professional be present.

Creation of a Torture Warrant system succeeds in supporting the Rule of Law where other torture regulation systems fail. Dershowitz states, correctly, that if torture is necessary in a certain case, then our laws must accommodate the practice.⁷⁰ Moreover, given that a vast majority of individuals support the use of non-lethal torture in an extreme case,⁷¹ it is appropriate for the law to consider and incorporate that reality. A Torture Warrant system recognizes that in reality leaders will engage in torture whether or not it is explicitly and absolutely banned, represents an acceptance of that fact and works with the probability of exceptions to an absolute rule to limit those exceptions explicitly. Such a system, by acknowledging that torture will be used, and building in limited exceptions, ensures that all actions that violate the law will be punished rather than allowing some violations to go unpunished.

⁷⁰ *Id.* at 153.

⁷¹ *Id.* at 150.

Dershowitz's Torture Warrants have been challenged on several fronts. Posner has suggested that a judicial screen would serve little effect given Dershowitz's distrust of judges' competency and would merely cover questionable practices with the misleading imprimatur of judicial approval.⁷² This attack misses the target, however, as an analysis by a judge or magistrate layered on top of an investigation by the warrant applicant would be better than trusting the competency of just an official or officer, as under the current system. Moreover, Posner admits that such a requirement would "no doubt make the officers seeking [Torture Warrants] a little more careful"⁷³ and this care would certainly limit the use of torture more than having no such requirement. To counter allegations that judges will become mere rubber stamps for Torture Warrants such a system could also require that such decisions be made publicly available with written decisions and that the proposed torturee be in the courtroom so that the judge or magistrate cannot escape into "abstraction."⁷⁴

B. Other Options

i. Maintaining the status quo

Accepting the notion that leaders will allow torture to occur in the extreme situation does not necessarily require a change in the current treatment of torture. The current system may in fact lead to the proper amount of torture. Maintaining the status quo, however, does not appear to do so because it fails to achieve both elements of a proper regulation of torture, appropriateness and preservation of the Rule of Law.

⁷² Posner, *supra* note 37, at 296.

⁷³ *Id.*

⁷⁴ Sanford Levinson, *Contemplating Torture* in TORTURE: A COLLECTION (Sanford Levinson ed., 2004), 23, 37.

Proponents of the status quo argue that current legal prohibitions should continue to regulate torture, with the understanding that they will not be enforced in certain circumstances.⁷⁵ Richard Posner suggests that the illegality of their actions will give leaders pause and reduce the danger of a ratchet effect by which restrictions of civil liberties in emergencies would continue after the end of the emergency.⁷⁶ Afterwards, the torturers would maintain that they do not use torture. In this circumstance, the responsibility for torture would, theoretically, be relegated to the political realm.

The status quo has received some support because it seems to meet the first prong of an ideal torture regulatory system. That is, proponents argue that under the current system, the occurrences are limited and as a result, the torture allowed may be the appropriate quantity. This is a superficial justification that overlooks the fact that the current system allows infractions to remain hidden which increases the risk of inappropriate torture methods and reduces accountability.

An essential problem with the current system is that it reduces accountability. With a lack of accountability, few can be punished for their violation of the absolute ban. The inability to punish allows torturers to ignore the deterrent effect that punishment would have on the scope of their torture. Moreover, accountability is an important value in a democracy.⁷⁷ Indeed, Dershowitz stated that “off-the-book actions below the radar screen are antithetical to the theory and practice of democracy” because “[c]itizens cannot approve or disapprove of governmental

⁷⁵ Posner, *supra* note 37, at 296.

⁷⁶ See Posner, *supra* note 37, at 297 (discussing Lincoln’s suspension of Habeas Corpus).

⁷⁷ *Id.*

actions of which they are unaware.”⁷⁸ If such torture were overt, it could be more easily limited by disapproval of torture in inappropriate situations. Unofficial, hidden exceptions should not be tolerated because they cannot be adequately regulated. We should not let such a serious infringement of human rights to continue to occur under the radar.

For example, one way that the United States has conducted torture under the current system is to export suspected terrorists to other nations that more freely engage in torture-type activities.⁷⁹ Ignoring the obvious timing problem (shipping them to a foreign country might negate the ability to prevent an extreme ticking bomb emergency), the secrecy with which this is done is problematic. First, we do not know how often and under what circumstances or conditions the United States is doing this. Second, as Adam Raviv accurately noted, sending suspects to other nations with the only instruction being “we need to know X and we don’t care how you get it” will almost inevitably ensure that excessive abuse, beyond that which would be necessary, will ensue.⁸⁰ Even if we instruct the other nation to act in good faith or within reason, the only party that will actually know what happened will be the torturer who has little incentive to be forthcoming and the torturee who can likely effectively be marginalized.⁸¹ Moreover, the interrogator charged with eliciting the information in a nation that allows torture will have incentives, pleasing the United States, which will encourage him or her to go beyond that which is necessary or reasonable to extract the information.⁸²

⁷⁸ *Id.* (internal quotations omitted).

⁷⁹ Raviv, *supra* note 30, at 151.

⁸⁰ *Id.* at 152.

⁸¹ *Id.*

⁸² *Id.* at 152-53.

Accountability and its deterrent effects are reduced in two other ways by this straw-man system of torture. First, the torturing nation would not receive the proper disincentive because if it provides the U.S. government with the information that it wants, the risk of retribution or reprisal should the atrocities become public would be slim since any reaction by the U.S. would likely just be a ploy to placate the international community.⁸³ Second, the U.S. would not be held accountable because officials could argue that a ‘rogue’ interrogator conducted the torture and that the United States did not encourage or foresee such actions. That is, the U.S. would not be forced to rethink its actions in the future because its complicity would be mitigated by merely voicing its disapproval. This method of conducting torture clearly undermines the elements of appropriate torture.

In a related circumstance, we need only look to the United States’ experience with interrogations to see that merely stating the illegality of certain interrogatory actions will not serve to limit them. In the context of police interrogations and protecting the right against self-incrimination, the Supreme Court grew dissatisfied with its test under the Due Process clause under which confessions are excluded if “involuntary.” Given the serious nature of the rights infringed and the methods used, the Court recognized a need for procedural safeguards to protect the right against self-incrimination and as a result adopted the Miranda warnings as a specific safeguard to ensure against coercion.⁸⁴ While the Miranda rules have been subjected to numerous manipulations, the Supreme Court has reasoned that having the procedures is better than not having them.

⁸³ *Id.* at 152.

⁸⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

In addition, the absolute ban on torture coupled with selective enforcement should be avoided because having an absolute ban that is ignored in certain circumstances undermines the Rule of Law. To call a ban absolute but then ignore it when appropriate reduces the law to rhetoric. Therefore, if we know beforehand that there will be exceptions that will be tolerated, the rule itself or system of regulation should acknowledge and allow for the exception.⁸⁵ The citizens in a democracy governed by the Rule of Law should never want its leaders to act illegally.⁸⁶

Accepting the notion that leaders will allow torture to occur in the extreme situation does not necessarily require a change in the current treatment of torture. However, as discussed above, the current system fails to achieve both elements of a proper regulation of torture. Any claim that torture must be secret to be effective is outweighed by those failures. The inherent uncertainty associated with torture coupled with the problems of accountability, the difficulty in assuring the appropriate level of torture and the harm to the Rule of Law caused by its disregard suggest that if secrecy is required then torture should never be employed because it would not survive a full cost-benefit analysis that incorporated those uncertainties. The current absolute ban should be lifted in favor of a strict ban that explicitly allows for torture in certain emergency situations akin to the ticking bomb situation.

ii. *Official Disobedience*

Oren Gross advocates for a similar standard that he calls Official Disobedience. In this system of regulation the absolute ban on torture is maintained in general circumstances but the truly exceptional cases might cause official disobedience in which public officials act outside of

⁸⁵ DERSHOWITZ, *supra* note 6, at 153.

⁸⁶ *Id.* at 152.

the law but must be ready to accept the consequences of their actions.⁸⁷ This argument seems to center on the notion that while torture cannot be prevented completely, the absolute ban could result in the proper limitation of its use. This argument is that the absolute ban in conjunction with public approval/disapproval will achieve the desired result, i.e. appropriate torture. Gross argues that in the ticking bomb case the appropriate response might be to go outside of the law and even violate accepted constitutional principles.⁸⁸

While Gross' official disobedience focuses on the absolute nature of the ban, it allows for an official who violates the ban to escape sanctions in certain exceptional circumstances.⁸⁹ This construction renders the term 'absolute' a nullity--for what is an absolute rule if you can violate it and not be punished? By allowing officials to avoid punishment in certain circumstances, official disobedience also begs the question: who should determine whether the circumstances are exceptional or not? Gross offers that society retains the role of making the ultimate determination whether the actor should be punished or rewarded.⁹⁰ He states that the "people may decide to hold the actor accountable for the wrongfulness of her actions, or may approve them retrospectively."⁹¹ But this begs another question: what standards will be used for determining these exceptional circumstances? Just politics?

⁸⁷ Oren Gross, *supra* note 10, at 1487.

⁸⁸ *Id.* at 1520.

⁸⁹ *Id.* at 1522.

⁹⁰ *Id.* at 1522-23.

⁹¹ *Id.* at 1523.

The decision to torture may result in several outcomes: punishment, reward or ratification of the decision to torture.⁹² The results are based on society's decision that the acts were either unjustified and subject to punishment or valid and subject to ratification. Society has too many facets and not all may agree. For example, Gross offers that ratification could come from a prosecutorial decision not to bring criminal charges.⁹³ Another ratification could be reelection. What if the public supports the decision but the prosecutor or official with the power to pardon follows the absolutist line of thinking? Moreover, when you consider the historic effect of "we" versus "they" thinking, the public, without having to follow any rigid standard, will be more willing to ratify torture conducted by an American official, a member of the "we" group, against an alleged terrorist, a member of the "they" group.

He suggests that ex post ratification by 'society' encourages and emphasizes government accountability⁹⁴ because "public officials have no one to hide behind."⁹⁵ Gross, however, does not address the means by which the torture will become known nor how it will ensure accountability. Gross fails to address the likelihood that the president or leader will not stand trial or be named responsible for this or that decision to torture—there will likely be a 'fall' guy. Furthermore, an ex post ratification by society without standards will allow the success or failure of the decision to torture to influence the decision to ratify or not ratify its use. Society will be far more likely to approve of the decision to torture if the government can demonstrate that its

⁹² *Id.* at 1523-24. Where society determines that the use of torture in that case is unjustified it may: quote that whole paragraph.

⁹³ *Id.* at 1523.

⁹⁴ *Id.* at 1528.

⁹⁵ *Id.* at 1529.

actions saved lives by preventing a terrorist attack. Indeed, faced with public support, most elected representatives would overlook the unreasonableness of the decision to torture in a given case in favor of carrying out the public's demand.⁹⁶ On the other hand, an *ex ante* decision by the courts is more appropriate because that would minimize the risk of bias. Indeed, even an *ex post* decision by the courts would be better because judges are far better equipped and, more importantly, experienced to make such difficult after-the-fact determinations.⁹⁷

Gross separates the general case from the catastrophic case, but that just hides the question and confuses the analysis.⁹⁸ He correctly notes that the general (i.e. non-catastrophic) situation should be governed by an absolute ban on torture.⁹⁹ He then says that the catastrophic situation should be addressed, seemingly, separately.¹⁰⁰ But by separating the catastrophic situation and suggesting an after-the-fact determination of its character, he ignores the very difficulty in assessing when a situation is catastrophic enough. The question is, what is a catastrophic case; how do we assess it and how do we ensure that it is the only situation in which torture is used. In reality, there is a spectrum of situations with catastrophic at one end and it makes little sense to apply an absolute rule to part of the spectrum and another rule to another. One rule should govern all circumstances.

It seems obvious that the removal of the absolute ban will harm the image of the U.S. in the rest of the world. Gross argues, correctly, that consideration of international opinion

⁹⁶ Raviv, *supra* note 30, at 155.

⁹⁷ Indeed that is largely the role of judges.

⁹⁸ Oren Gross, *supra* note 10, at 1519.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

increases the costs of acting illegally and as a result is a disincentive to engage in torture.¹⁰¹ But if torture is inevitable then by committing to a policy of official disobedience we are guaranteeing that a leader will frustrate the international community by acting outside the law. Moreover, applying Gross' idea, we would again draw the international community's ire if we allowed a leader to violate the ban and then our public chose not to punish. This is a bigger problem than the absolute rule because in that case, at least, there are no exceptions. What message does it send if our leaders can violate the law but are not punished? If we are not going to punish then it should not be a crime. So to avoid this possible outcome government will likely just continue to keep the violations secret, negating the argument that ex post ratification will result in openness—what incentive would there be to be forthcoming about torture?

In justifying his approach, Gross separates the notion of rule departure from the punishment for that violation.¹⁰² I would argue that it is more important not to have exceptions to the punishment than not to have exceptions to the violation of the rule. Allowing violations of the absolute ban to go unpunished at the whim of the public undermines long-term notions of the importance and sanctity of the Rule of Law by reducing it to mere rhetoric. Gross' Official Disobedience is subject to the same Rule of Law arguments that militated against maintaining the status quo.¹⁰³

iii. *Allow torturers to plead the Law of Necessity or Self-Defense*

Some proponents of institutionalizing torture have argued that the status quo should be maintained but that the necessity defense should be explicitly accepted as a viable justification

¹⁰¹ *Id.* at 1533.

¹⁰² *Id.* at 1522.

¹⁰³ *See supra* notes 85-86 and accompanying text.

for the use of torture.¹⁰⁴ Such legitimization has several flaws. It does not necessarily facilitate a reduction in torture to an appropriate amount. Allowing the necessity defense may not serve to create the same level of accountability that the Torture Warrants will allow because it does not create a system that promotes publicity. In addition, it does not provide the separation and additional level of consideration that a judge's analysis would have. Instead, it falls victim to many of the pitfalls that plague Gross' Official Disobedience. Such an after-the-fact analysis of the decision to torture will likely become intertwined with the ultimate outcome of the decision. It seems unlikely that a jury would convict a person whose decision rested on weak evidence but resulted in the prevention of a terrorist attack that would have killed thousands. Even if this likelihood is abated by prohibiting evidence of events which occur after the torture occurs, another type of jury bias is relevant and remains problematic. It seems reasonable to assume that a torturee will often be of Arab descent, therefore it stands to reason that an American jury might be more apt to believe the U.S. official's claim that they had the requisite belief to satisfy the necessity defense—this would be a classic instance of the oft-mentioned 'we' versus 'they' bias.

Many elements of the principles underlying the necessity defense are already incorporated into the Torture Warrant concept. The Torture Warrant is designed to limit torture to those situations in which it is the only means practically available and when the benefit seemingly greatly outweighs the harm—elements which seem to mirror the necessity elements. Moreover, an emergency exception to the Torture Warrant requirement will rely on necessity type arguments. As a result, Torture Warrants incorporate, to some extent, the principles underlying the necessity defense, but the warrant would also serve to formalize the application of

¹⁰⁴ Raviv, *supra* note 30, at 156-179.

the defense and add an element of prior approval thus making it more difficult to get away with torture.

IV. Creating the Torture Warrant

Creation of the Torture Warrant in the United States¹⁰⁵ requires the satisfaction of two elements. First, torture as a means of preventive interrogation must be allowed under the Constitution. Second, the Torture Warrant must be created and justified by more than the practical considerations discussed above.

A. The Constitutionality of Torture Warrants

i. The Constitutionality of preventive interrogation torture

In the United States allowing a torture exception in the preventive interrogation situation would not run headlong into the long-standing Supreme Court precedent against the use of torture because the situations in which it would be appropriate can be distinguished from those prior cases. In addition, preventive torture could be appropriately tailored to achieve the government's interest in protecting its citizens.

Torture as a means to prevent future harm can be distinguished from the situations in which the Supreme Court has already ruled on the use of torture or related conduct. The Court's ruling in *Brown v. Mississippi* has made it an unconstitutional Fifth Amendment Due Process violation to elicit a confession through torture.¹⁰⁶ While interrogation to elicit a confession looks to the past, interrogation to elicit information to prevent a terrorist attack looks to the future. As

¹⁰⁵ I am ignoring international law and treaty issues and just discussing the availability of legal torture in America.

¹⁰⁶ *See Brown v. Mississippi*, 297 U.S. 278 (1936) (excluding involuntary confessions elicited through coercion).

a result, the latter, if done successfully, can prevent the loss of innocent life. In contrast, the former serves merely to uncover what has already happened and to help effect punishment. These differences suggest that the *Brown v. Mississippi* holding could be limited to eliciting confessions that seek to uncover the past and that a different standard should apply to forward-looking preventive interrogation. In addition, the Fifth Amendment refers only to self-incrimination at a trial, which does not occur if the information is not used in a trial against the torturee. Moreover, preventive interrogation does not influence the right to be free from cruel and unusual punishment under the Eighth Amendment because that has been interpreted to apply only to punishment after conviction.¹⁰⁷ Here, by contrast, we are concerned with pre-conviction torture that is not intended to punish.

The use of torture in particular circumstances likely does not violate established Fifth Amendment substantive Due Process jurisprudence. Torture represents an invasion of a person's bodily integrity and such violations represent an invasion of the Fifth Amendment's Liberty interest. As such, torture may only be used if it is narrowly tailored to a compelling government interest.¹⁰⁸ It is important to note that torture to punish and torture to elicit a confession could fall into the same balancing test but in those cases the cost always outweighs the benefit. Preventive interrogation torture would be narrowly tailored when appropriately limited. In addition, the government has a compelling interest in preserving the lives of its citizens by protecting them from a terrorist attack. That is, torture, under certain circumstances, meets strict scrutiny standards. It is important to note, however, that the opposite is also true; preventive

¹⁰⁷ DERSHOWITZ, *supra* note 6, at 135.

¹⁰⁸ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (describing the balancing test to be applied to fundamental rights).

interrogation torture can fail to meet strict scrutiny standards. For example, the use of torture would not meet strict scrutiny if it were used to break-up a terrorist cell that had no immediate plan of action because such a use would be unjustified for the same reasons that incarceration is unjustified where an alleged criminal's actions fail to amount to an attempt. Moreover, such a circumstance would clearly accentuate and exacerbate the problems with torture—if no attack is yet planned, what information could the police believe the torturee has?

Given the seriousness of the harm imposed by the use of torture, Dershowitz' notion of Torture Warrants may represent the right course because its intent would be to ensure that the use of torture in a specific case is narrowly tailored and that the end (the harm sought to be avoided) is compelling.

ii. *Possible Constitutional support for Torture Warrants*

For a Torture Warrant to exist there must be both a source of that power and an absence of contrary rights. First, it is appropriate to mention the methods by which a Torture Warrant System could be established. One method would be the legislative creation of such a system. It could also arise with the use of torture by the executive coupled with a judicial response that could be the creation of Torture Warrants to limit the Due Process infringement. By recognizing an interest in bodily integrity, the Supreme Court in fact has already provided an initial step towards this. Justice O'Connor, in concurring in *Cruzan*, recognized an interest in the bodily integrity of individuals by stating that “[b]ecause 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.” Torture would constitute a state incursion into the body repugnant to the Due Process clause but maybe that repugnancy could be overcome and thus torture allowed under certain circumstances.

The Due Process clause could require Torture Warrants because they could strike the balance between the state's interest in protecting its citizens and an individual's right to bodily integrity.

With judicial reasoning not unlike that supporting the Miranda decision, it could be argued that the serious nature and implications of using torture in interrogation require that a Torture Warrant must be secured. There must be a test that the potential torturer must pass in order to prove its case—that is, a test of what a compelling government interest is. The Torture Warrant process could ensure that the government interest is compelling.

B. Other Support for the Creation of Torture Warrants

- i. *Torture Warrants allow for the appropriate limitation of the use of torture as a means to conduct preventive interrogation*

Accepting the premise that exceptions to the absolute ban on torture should be made in certain circumstances, it becomes necessary to assess the type of exception. Exceptions to a rule come in two general categories: discretionary exceptions and categorical exceptions.

The first rule, as its name states, allows the judge or other person assessing the validity of the rule wide latitude in any given case. As a simplistic example, you could argue that the rule should be that torture should not be allowed unless it is 'really really' necessary. This rule suggests a balancing test that attempts to construe the rule narrowly in an effort to limit exceptions. But, so the slippery slope argument goes, this type of rule inherently allows for ever wider interpretations that might allow the exceptions to grow and slide away from the original intent to limit exceptions. Even a serious discretionary rule like that which could be extracted from the constitutional test described above (paraphrased: Torture is valid if and only if the harm to the person tortured is outweighed (or to limit it further, substantially outweighed) by a compelling government interest). This discretionary Constitutional balancing test is subject to the same slippery slope arguments. So how do we narrow it?

We turn to the second type of exception, categorical exceptions to rules. This type of rule seeks to eliminate the risk of increasing exceptions. Dershowitz's Torture Warrants can do just that--by explicitly establishing rules and requirements for such a warrant we limit the tendency for the slippery slope to come true. The Court, for example, applied a more categorical rule by creating the strict requirements of Miranda where the right infringed was too important for a discretionary rule to govern. Similarly, in the torture context a warrant could establish appropriate safeguards to ensure that torture is only used in limited circumstances. For example, torture itself and the situations in which it is justified could be defined more concretely and rigorously. Furthermore, the categorical nature of a Torture Warrant is not an absolute categorical rule; it instead lends structure, the benefit of a categorical rule, certainty of application, and judicial review and scrutiny to the torture arena.

ii. *Practical Support for Torture Warrants*

While a Torture Warrant is not explicitly mentioned in the Constitution or its amendments, if we accept its constitutionality a Torture Warrant could be supported by reasoning similar to that offered in favor of traditional warrants articulated in *Johnson v. United States*. Traditional warrants protect people against an infringement of their constitutional rights by regulating against unjustified searches and seizures; a Torture Warrant would protect a similar constitutional right by regulating against unjustified harm to bodily integrity.¹⁰⁹ A warrant ensures that a disinterested party, a neutral third person, acts as a check against the officer's actions; this serves to reduce capricious behavior and to limit the risk of a rash decision.¹¹⁰ Just as a traditional warrant limits the Fourth Amendment infringement by defining the scope of the

¹⁰⁹ *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹¹⁰ *Id.*

search or seizure a Torture Warrant would limit the bodily integrity infringement by defining the scope of the torture, including the methods that can be used and the information sought. In addition, a warrant requirement forces officers to do their homework before they apply; in the torture context, this would ensure that torture is done only when appropriate. The warrant application allows for a record to be made and thus acts as a check on officers and allows the magistrate to assess the level of cause based on one package.

C. Creating a Proper Torture Warrant

For the Torture Warrant to be useful as anything more than an interesting thought experiment the requirements for its issue need to be fully developed. The appropriate issuance of a Torture Warrant should be governed by practical tests and balances that the court system can apply with regularity and predictability. In response to the Dershowitz proposal Wayne Renke outlined many of the questions that need to be answered before a Torture Warrant requirement can be applied.¹¹¹ These questions and others are discussed below.

i. *Primary Issues Related to Securing Warrants*

Similar to traditional warrants, a Torture Warrant should require that the potential torturer demonstrate an appropriate level of cause¹¹² to believe (1) that a crisis situation exists; and (2) that the individual has vital knowledge that can be used to prevent that crisis. This is unlike a traditional warrant where the crime has already happened and the cause is relevant to the

¹¹¹ Wayne N. Renke, *Special Issue Globalization and the Law: Book Review: Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, Alan M. Dershowitz, 41 Alberta L. Rev. 771, 794 (2003).

¹¹² *See id.* (questioning what standard of proof would be required for a Torture Warrant to issue); *see infra* notes 117-122 and accompanying text (discussing the appropriate level of cause).

particular person to be arrested or the place to be searched because here the analysis is bifurcated into the likelihood that the crisis exists (since it has not yet happened) and the likelihood that the individual has information. While some may argue that in the War on Terror we are in a permanent state of crisis, but that merely conceals the test to be applied. The crisis situation must be a situation beyond the current baseline or norm; even in the War on Terror there is not an imminent attack all the time in which details of the attack are known.

First, each of the two parts of the bifurcated analysis must be fleshed out. As to the first prong, demonstrating the existence of the crisis (crisis seems stronger than mere emergency) requires that several questions be answered. What types of risks will be sufficient?¹¹³ How many individuals must be at risk?¹¹⁴ How “imminent” must it be? Dershowitz would confine it to the ticking bomb hypothetical.¹¹⁵ I would say that it should apply in the broader ticking bomb scenarios in which alternative means of investigation are not applicable or will likely prove futile. As to the second prong, the following question must be answered: what type of information must the person allegedly have?¹¹⁶ It would seem that he or she would need to have information that if known will directly lead to preventing a future harm.

Second, the level of cause that an officer must demonstrate for each prong must be determined.¹¹⁷ In ordinary investigations the cause required to be demonstrated by an officer varies with the seriousness of the right infringed. For example, no level of cause or suspicion is

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ DERSHOWITZ, *supra* note 6, at 142.

¹¹⁶ Renke, *supra* note 111, at 794.

¹¹⁷ *Id.*

required for a mere encounter with the police because the Fourth Amendment is not implicated at all.¹¹⁸ Moving down the line to more serious infringements, reasonable suspicion is required for stops that do not rise to the level of an arrest and frisks that do not rise to the level of a full-blown Fourth Amendment search.¹¹⁹ This level of suspicion requires that the officer have a reasonable suspicion that criminal activity is afoot.¹²⁰ Finally, probable cause is required for the more serious violations involved in searches and seizures.¹²¹ Probable cause is a still higher threshold that requires that there be a fair probability that criminal activity was done or is being done.¹²² Given that the right to bodily integrity upon which torture encroaches is more serious than a search or seizure, in the case of torture the level of cause should be higher and the evidence should be convincing.

Having provided a framework to think about the level of cause required, the question remains unanswered: what level above probable cause is appropriate? Preponderance of the Evidence? Beyond a Reasonable Doubt? Since an encroachment on the right to bodily integrity cannot be undone like a violation of the right to be free from unreasonable search or seizure (i.e. by exclusion of the evidence or release from custody) a Torture Warrant should issue only when there is at least a preponderance of the evidence, but given the severity of torture and the desire

¹¹⁸ *United States v. Mendenhall*, 446 U.S. 544 (1980), *California v. Hodari D.*, 499 U.S. 621 (1991).

¹¹⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹²⁰ *See id.* (invoking the reasonableness clause over the warrant clause to govern stops and frisks).

¹²¹ U.S. Const., 4th Amendment.

¹²² *Illinois v. Gates*, 462 U.S. 213 (1983).

to limit its use, perhaps we should require clear and convincing evidence (the most cause short of that necessary for criminal conviction). This would further serve to limit the application of torture. While the level of cause required increases when moving from Terry Stops to official arrests to torture, the level of cause required should not vary once the situation is in the Torture Warrant bin because the level of cause required is related to the right involved not the ends for which the right is inhibited.

ii. *Secondary Issues Related to Obtaining Warrants*

Once the requirements for the issuance of a Torture Warrant have been established, a host of additional questions need to be answered. First, what sorts of torture can be employed?¹²³ In an effort to satisfy the second part of the appropriate torture requirement (type/severity) for proper torture regulation, the Court should outline certain types of torture that can be employed while maintaining that certain kinds of torture are still subject to the absolute ban. For example, torture allowable under a Torture Warrant should be required to be (1) designed not to cause permanent damage; and (2) undertaken in the presence of medical personnel. Second, what should the penalty be for violating the warrant requirement? These limits serve to reduce the damage to international reputation that allowing torture will cause and to ensure a limited infringement of bodily integrity.

Third, and very importantly (especially in light of the already established traditional warrant framework and the unique circumstances surrounding the ticking bomb hypothetical), special care must be given and attention paid to the situation wherein there is no time to get a warrant. Should there be an emergency exception as there is in the Fourth Amendment analysis? To be clear, would there be an emergency exception to the Torture Warrant which itself only

¹²³ *Id.*

issues in an emergency situation? This seems like a bizarre exercise in redundancy. But the reasoning behind the emergency exception to the warrant requirement would transfer to the Torture Warrant context.¹²⁴ However, since the Torture Warrant only occurs in emergency situations the emergency exception would have to be correspondingly heightened. That is, since the situations in which Torture Warrants will be issued will already be exceptional circumstances, the whole warrant application process surrounding the Torture Warrant will be shifted upstream towards emergency-- since a greater level of urgency than the traditional warrant situation will be required to be shown for any issuance, a greater level of emergency in the Torture Warrant situation will have to be shown as compared to the traditional emergency requirement.

Given the unique degree of urgency required in the situations contemplated, it would undermine the whole rule if an emergency exception were not allowed. A benefit of having the Torture Warrant requirement is that it creates a rigorous structure for the ex post analysis necessary where a Torture Warrant is not issued before a suspect is tortured. An officer or other authority will have to prove that a Torture Warrant could not have been attained in time. That proof required will parallel the quasi-necessity type arguments offered in the traditional warrant arena and as such could be called a modified strict-justification test that would incorporate the Torture Warrant requirements. The modified test that a torturer would need to satisfy would be more rigorously and thoroughly laid out than the traditional justification analysis.

V. Conclusion

Given the degree to which torture continues under the rhetorical absolute ban, it is likely that the international community would not support a functioning truly absolute ban. Torture is,

¹²⁴ Oren Gross, *supra* note 10, at 1538.

for better or worse, perceived as unavoidable. As a result, it is necessary to determine which method of regulating and limiting the use of torture as a means of preventive interrogation is the most effective. The ideal system of regulation will best achieve two goals, (1) limitation of torture to that which is ideal or appropriate; and (2) support for the Rule of Law. While the search for an ideal system of torture regulation may not yield a “best result” or even a “good result,” to avoid the decision for fear of choosing among evils is irresponsible and a derogation of government’s duty. Given the problems related to secrecy and accountability that inhere in maintaining the status quo and in Gross’ *Official Disobedience*, it appears that Dershowitz’s *Torture Warrants* most effectively achieve both a limited quantity and type of torture while preserving the Rule of Law.