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# Constitutionality of Torture in a Ticking-Bomb Scenario: History, Compelling Governmental Interests, and Supreme Court Precedents

Riddhi Dasgupta\*

## Introduction

Adopted in 1791, the Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>1</sup> Is torture a cruel and unusual punishment? How about torture in a ticking-bomb scenario where the pain of one man or woman *might* mean saving the life of many others? The constitutionality of torture is a complex question. It cannot be resolved with platitudes. Indeed, the platitudes that do exist in the form of legal prescription are often conflicting. Consider, for instance, the obvious conflict caused when these two commands, read in isolation, are taken to their logical extremes: self-preservation by any means and ensuring the human rights and dignity of all, irrespective of exigencies. Deciding whether the use of torture to ascertain secretive and potentially time-sensitive, disaster-avoiding information from an interrogated in a ticking-bomb scenario is constitutionally justified poses such a tension. Whether torture is actually revelatory is a question of substantial debate.

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1. U.S. CONST. amend. VIII.

American federal law enactments as well as international human rights conventions have outlawed the use of torture (even though procedural loopholes remain alive).<sup>2</sup> Prevailing military expert consensus attributes inefficacy to the use of torture. Revered American political literature harkening back to the Enlightenment tradition, represented by Jean Jacques Rousseau,<sup>3</sup> John Adams,<sup>4</sup> and the Preamble to the American Constitution<sup>5</sup> all disavow retribution, both public and private,

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2. See, e.g., Eric Engle, *The Alien Tort Statute and The Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 2 (2006) ("Though the United States is perceived as a chronic 'non-joiner' of international human rights treaties, several U.S. laws permit individual citizens and aliens to prosecute overseas human rights violations in U.S. courts. Examples include the Alien Tort Statute (ATS), the Torture Victims' Protection Act (TVPA), the Racketeer Influenced and Corrupt Organisations Act (RICO), the Foreign Corrupt Practices Act (FCPA) and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (or 'Helms-Burton Act'). Procedurally, however, the viability of such claims is tempered by the Foreign Sovereign Immunity Act (FSIA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA), both of which limit the availability of substantive remedies when the defendant is a state actor." (internal footnotes omitted)). Altogether, the federal law provisions outlawing many forms of coercive interrogation are 18 U.S.C. §§ 2340(1), 2340A, 3261–3267 (2000); 10 U.S.C. §§ 893, 918, 919, 924, 928, 933.

3. See, e.g., JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT* (1762) ("The passage from the state of nature to the civil state produces in man a very remarkable change, by substituting in his conduct justice for instinct, and by giving his actions the moral quality that they previously lacked. It is only when the voice of duty succeeds physical impulse, and law succeeds appetite, that man, who till then had regarded only himself, sees that he is obliged to act on other principles, and to consult his reason before listening to his inclinations.").

4. See, e.g., JOHN ADAMS, *ON PRIVATE REVENGE* (1763) ("For the great distinction between savage nations and polite ones, lies in this, — that among the former every individual is his own judge and his own executioner; but among the latter all pretensions to judgment and punishment are resigned to tribunals erected by the public; a resignation which savages are not, without infinite difficulty, persuaded to make, as it is of a right and privilege extremely dear and tender to an uncultivated nature."). Adams's analysis impliedly draws a contrast between the famed classical virtues, "Justice, Prudence, Fortitude, and Temperance," and the less desirable vices of certain officialdoms, "savage state, courage, hardness, activity, and strength."

5. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."). The Preamble denotes the aims of the Republic, and signals, as eloquently and meaningfully as any

as a reason underlying official conduct, and instead, counsel a deliberative approach. That constitutional deliberation did not occur in the now-famous “Bybee memo”—an advisory opinion issued by Assistant Attorney General Jay S. Bybee in the Office of Legal Counsel in President George W. Bush’s administration.<sup>6</sup> While the Bybee memo carefully discusses the statutory and treaty implications of torture, its constitutional analysis has little to do with individual liberties, specifically regarding the Eighth Amendment.<sup>7</sup> Instead, the discussion centers almost completely on the President’s commander-in-chief powers authorized by Article II of the Constitution. In fact, the Bybee memo makes a passing reference to the “rather limitless reach” of the Eighth Amendment’s ban against cruel and unusual punishment: it states that court decisions have “engage[d] in detailed regulation of prison conditions.”<sup>8</sup> More conversation is needed on the subject.<sup>9</sup>

These prescriptions ask, rather than answer, several questions. Are water-boarding and other forms of torture constitutional when imposed by a sovereign State (specifically the National Security Agency (NSA) or the Central Intelligence Agency (CIA)) confronted with imminent threats against its national security interest? Is there a constitutional distinction with respect to interrogated citizens *versus* non-citizens, particularly with regard to extraordinary rendition?<sup>10</sup> Has the

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document can, the coexistence and actuation of these ideals.

6. Letter from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Attorney General (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

7. *Id.*

8. *Id.* at 18 n.9.

9. Other scholars and academics have been harsher in their treatment of the Bybee memo. *See, e.g.*, M. Katherine B. Darmer, *Waterboarding and the Legacy of the Bybee-Yoo “Torture-Power” Memorandum: Reflections from a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist*, 12 CHAP. L. REV. 639 (2009); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1231 & n.182 (2006) (“In the two years since it was leaked to the public, the . . . [memo] has been withered by criticism for the poor quality of its legal analysis.” (referencing statement by former Yale Law School Dean Harold H. Koh, claiming it was “perhaps the most clearly erroneous legal opinion I have ever read”)); Jeremy Waldron, *Torture and Positive Law*, 105 COLUM. L. REV. 1681, 1703-09 (2005) (quality of memo “is a disgrace”).

10. *See* Owen Fiss, *Restoring the Full Rule of Law to America: Indemnify Torture Victims — A Commentary*, THE DAILY STAR, July 7, 2009, <http://>

United States Supreme Court applied the *strict scrutiny* test to analogous situations, such as the cases of tortured or abused prisoners in the United States' federal and state prisons? How can we best analyze the compelling governmental interests in support of torture in ticking-bomb scenarios? What are the far-reaching national security implications of these questions? And finally, what relevance do the experiences of terrorism-fraught nations such as Israel have for American constitutional adjudication? This Article cannot answer all these questions in sufficient depth, but, through the use of history, it does answer the fundamental ones.<sup>11</sup>

Part I explains why the Supreme Court's decisions support the argument that torture is in most situations forbidden by the Eighth Amendment. The prevailing constructions can be found in the Court's *Hudson v. McMillian*,<sup>12</sup> *Brown v. Mississippi*,<sup>13</sup> and *Miranda v. Arizona*<sup>14</sup> lines of decisions. There is a bifurcation between preventive detention torture and punishment torture, and the merits and disadvantages of both are explained here. Many objective deductions and some subjective value-judgments inform the inquiry.

In Part II, this Article explores the constitutionality of torture in time-sensitive, "clear and present danger"<sup>15</sup> scenarios

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[www.law.yale.edu/news/9844.htm](http://www.law.yale.edu/news/9844.htm) (defining extraordinary rendition as "the transportation of individuals suspected of terrorist activity to foreign countries for interrogation, sometimes torture" (referencing *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008))); Matteo M. Winkler, *When 'Extraordinary' Means Illegal: International Law and the European Reactions to the United States Rendition Program* (Yale Law School Student Scholarship Series, 2007), available at [http://digitalcommons.law.yale.edu/student\\_papers/46/](http://digitalcommons.law.yale.edu/student_papers/46/).

11. This exercise is intended to highlight the advantages and limitations of history as much as it is to answer the questions themselves.

12. 503 U.S. 1 (1992) (holding that excessive force against a prisoner may constitute a cruel and unusual punishment).

13. 297 U.S. 278 (1936) (holding that confessions exacted by torture and police violence violate due process and may not be admitted into trial as evidence).

14. 384 U.S. 436 (1966) (holding that defendant must be informed of her right to an attorney and her privilege against self-incrimination both before and during questioning by police; otherwise, inculpatory and exculpatory statements gained from such questioning is inadmissible).

15. *Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that

by using the following historical instruments: the English Bill of Rights, the Virginia and Massachusetts convention debates, and the somewhat enlightening exchanges between delegates at the First Congress, which adopted the Eighth Amendment. The Eighth Amendment was inspired by the English Bill of Rights, the Northwest Ordinance, Virginia's Constitution of 1776, and the Constitutions of seven other States. These 17th and 18th century documents, read collectively, express a limited view on imminent danger situations. However, their condemnation against torture *per se* is beyond dispute. I reject as unprecedented and injudicious the possibility of "retrenching" the pro-individual interpretation of the Founding era.

Part III explores the prospect of torture warrants, as explained articulately by Professor Alan Dershowitz.<sup>16</sup> Despite federal law having outlawed torture by government officials, the debate is not academic or moot. The "rhetorical" ban on torture frequently is violated with impunity, thus incentivizing the legal community to devise a better framework that respects societal interests and human dignity—transparently. Torture

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might be said in time of peace are such a hindrance to its effort that their utterance will not be endured . . ."). May other exigencies, apart from restricted speech, also be justified under the threat of a "clear and present danger"? The conflict between national security and civil liberties was brought to a great height during World War I and the espionage cases, such as *Schenck* and *Abrams v. United States*, 250 U.S. 616 (1919), but that conflict has an ancient pedigree that goes all the way back to the Founding generation. See ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY*, at xxvii (Houghton Mifflin Harcourt 1973) ("[P]erhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." (quoting James Madison)). The debate, then and now, continues. See generally Norman Dorsen, *Rights — Here and There: Foreign Affairs and Civil Liberties*, 83 AM. J. INT'L L. 840 (1989); George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, available at [http://www.prospect.org/cs/articles?article=war\\_and\\_the\\_constitution](http://www.prospect.org/cs/articles?article=war_and_the_constitution) (attending to "the fundamental question of whether the Constitution . . . is different in wartime versus peacetime" and observing that "[t]he fact of 'wartime' does not change the meaning or scope of due process — either linguistically or historically"); Brief of Petitioner at 71, *New York Times Co. v. United States*, 403 U.S. 713 (1971) (No. 1873), 1971 WL 147018 (noting that the United States' "experience with censorship of political speech is happily almost non-existent. Through wars and other turbulence, we have avoided it. Given the choice of risks, we have chosen to risk freedom, as the First Amendment enjoins us to do").

16. See generally ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002).

warrants, the argument goes, reduce the incidents of torture by dwindling both the number and severity of incidents to their absolute minimums. The test for whether a torture warrant should be authorized must be based on criteria grounded in the Supreme Court's qualified immunity jurisprudence, stemming from its decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*<sup>17</sup>. Although *Bivens* has been eroded through procedural vehicles, such as pleading standards, I argue that provided those errors are rectified, the *Bivens* standard, viewed in light of qualified immunity, provides a valuable test for courts to employ when evaluating the constitutionality of torture warrants. Because half a loaf is better than no loaf at all, precluding torture in some grossly unwarranted cases through torture warrants should be seen as superior to blameless torture victims being deprived of the chance to recover all relief after the fact. The issue of torture's constitutionality may well turn on evolving statutory and common law procedures rather than substantive constitutional law animating the Framers and the Republic's Enlightenment origins. In many ways, this entire Article and the mapping of torture's possibilities and constitutionality in the United States is really a tale of procedure. That is the *carrefour* where most real-life cases are decided.

Part IV identifies the need to engage in further debate. This Article is agnostic about whether torture, under specific situations, should be permissible as a matter of policy or even whether it comports with the Constitution. It presents arguments and uncertainties from both sides of the spectrum.

## I. Precedents for Torture as Punishment and as Preventive Interrogation

### A. *The Humanity Question*

Torture in a ticking-bomb scenario is deontologically challenging. Not only are there legitimate ethical and logical questions for circumstances where torture is imposed, there remain important constitutional and philosophical questions where the government actually *forgoes* torture. Even when the

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17. 403 U.S. 388 (1971).

government chooses not to commit torture in an extremely time-sensitive situation, it will be hard to know (with any reasonable certitude) the actual factors that stopped the attack in that instance. The ticking-bomb scenario is context-specific, given the probabilities of an attack and of the torturee<sup>18</sup> possessing the requisite information to stop the attack. The tipping point between seemingly incompatible “values and principles is not fixed. It differs from case to case and from issue to issue. The damage to national security caused by a given terrorist and the [N]ation’s response to the act affects the way in which the freedom and dignity of the individual is protected.”<sup>19</sup> In such times of panic, it is important to keep in mind that it “is not that law is suspended in times of emergency . . . The point rather is that law is flexible enough to allow judges to give controlling weight to the immediate consequences of decision if those consequences are sufficiently grave.”<sup>20</sup> Because of this vast room for judicial discretion, though, principles and consistency are ever more important so as to preclude judges from indulging their personal policy preferences at the cost of neutrality.<sup>21</sup>

Other issues informing the investigation are the amount of torture imposed (and the methods which are categorically impermissible), whether innocent lives can be saved without performing torture, and the use of torture in non-terrorist

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18. At times, this Article will use the term “torturee” to refer to prospective torturees and those who have already been tortured and are seeking post-torture relief through federal constitutional and statutory means.

19. OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 73 (2006) (quoting Aharon Barak, *The Role of the Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125, 135 (2003)).

20. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 294 (2003).

21. There remains much scholarly disputation regarding the ability of courts to serve as a forum where national security cases are litigated. The consensus seems to be that courts may not monopolize the discourse but must add a strong voice to ensure a balance between individual liberties and government interests. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 722-30 (3d ed. 2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375 (1997); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objects and Responses*, 80 N.C. L. REV. 773 (2002).

situations (counseled to be restricted or forbidden). The debate is clearly not “hypothetical, or . . . morally or legally irrelevant.”<sup>22</sup> Not only do too many assumptions go into a decision to use torture as a preventive interrogation technique, but the empirical odds of a detainee possessing valuable information—less than 0.1%—is notoriously discouraging.<sup>23</sup> A cold cost-benefit analysis inspired by utilitarianism also does not unambiguously support torture.<sup>24</sup> At any rate, the perpetual slippery-slope here is that unless we know that some forms of torture in some emergencies are unconstitutional, government torturers will always try to classify an emergency as a “ticking-bomb scenario,” and may reach a point of dangerous insouciance in that fashion. This approach cloaks officials with immediate immunity and precludes the plaintiff from ever recovering relief.

Puzzlingly, the possibilities could range from “This torture did work!” to “The attackers are aiming for a bigger target later.” Even more importantly, usually it will not be known whether future scenarios similarly require (or do not require) torture. Conversely, when the government *does* torture and the information gained from the interrogated is used and the

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22. See, e.g., Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1487 (2004).

23. See Jeannine Bell, “*Behind This Mortal Bone*”: *The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 352 (2008) (“More than 5000 foreign nationals were detained between September 11, 2001, and the time the photos at Abu Ghraib were publicized. Four years after the detention, only three were charged, and two of those were acquitted. Such a low hit rate, three charges out of more than 5000 detainees, certainly suggested that the Allied Forces were just guessing whether the detainees possessed intelligence with the lifesaving potential . . . . A hit rate of 0.06% seems awfully low to justify a practice that has the moral and ethical problems of torture ‘lite.’”). See also Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in TORTURE: A COLLECTION 281-90 (Sanford Levinson ed., 2004) (pointing out that it is speculative whether the subject of prospective coercive interrogation even possesses the requisite information, let alone whether this interrogation will yield that information; it is another fine line to interrogate in a manner that is coercive enough to be preventive but not so much as to become punitive, for the latter is a punishment that can only be imposed post-trial).

24. See, e.g., Jean Maria Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCI. & ENG’G ETHICS 543 (2004); JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 112 (2000); Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, § 6 (Magazine), available at 2005 WLNR 9302778; Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215 (2005).

attack is stopped, there is no strict causal evidence suggesting that but for the torture, the attack would have been executed. Reduced to its essentials, the moral philosopher Judith Jarvis Thomson's "trolley problem" would permit this manner of torture: torture of one person takes no life and might save many other lives.<sup>25</sup> To end the inquiry here, however, would ignore Anglo-American historical and constitutional traditions that respect bodily integrity and truth-seeking in criminal procedure.

Human dignity cannot be separated from the torture inquiry; it is the linchpin connecting the Fifth, Eighth and Fourteenth Amendments to the constitutional issues raised here. The uniform relevance of these constitutional provisions transcending time and space bespeaks the vision and intent of their Drafters. The question is governed, if not haunted, by Abraham Lincoln's now-famous assertion that "As I would not be a slave, so I would not be a master."<sup>26</sup> This statement is best characterized as a measure of empathy in the most measured sense. It is a reflection of its author's ability to understand the process at issue, while simultaneously engaging in self-check and self-regulation such that no unexamined biases and sympathies undermine a neutral, dispassionate and objective inquiry. Whether as a discrimination victim or as a torture victim, understanding how the process works from all sides of the equation—the powerful and the powerless—enriches the law. On the torture issue, the statement says more about the torturer, for at the time of the torture not much is usually known about the turpitude of or knowledge possessed by the torturee.

Some might say that imposing torture on the presupposition of a ticking bomb would be prudent and rational under many tests. But a government's imposition of that treatment does not detract from the fact that torture is morally troublesome (intrinsically) and creates an adverse and insidious precedent (purposively)—especially if conducted without safeguards. Jean Améry characterizes the act itself,

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25. See generally Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985).

26. LINCOLN ON DEMOCRACY 121 (Mario M. Cuomo et al. eds., 2004) (quoting Abraham Lincoln: "This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy").

irrespective of details (including how many instances it has been imposed), as “border violation of [self] by the other, which can be neither neutralized by the expectation of help nor rectified through resistance.”<sup>27</sup> Michel Foucault, somewhat bemusedly, attributes the disappearance of torture from the public sphere to society’s “humanization.”<sup>28</sup> Torture did not disappear altogether, however, and the irony of the Foucault inference (of which Foucault doubtless was aware) is that the hand of a torturer might even be strengthened by diminished visibility. Talal Asad acknowledges that the “modern dedication” to ridding the domain of what is lawful of torture “often conflicts with other commitments and values: the right of individuals to choose and the duty of the state to maintain its interests.”<sup>29</sup> This duality between the rights of the torturee and the rights of the innocent is where the Article becomes interesting.

This is also where the need for nuance grows even stronger. Details are terribly important, and there are many sides and counterpunches to the humanity argument.<sup>30</sup> Alan Dershowitz concedes that allowing *any* torture is a symbolic step back for human rights.<sup>31</sup> Adam Raviv responds, so what? According to Raviv, “to argue that people’s moral compasses will truly be damaged if torture is prohibited 99.9% of the time rather than 100%” is fanciful.<sup>32</sup> In advancing his reluctant case

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27. JEAN AMÉRY, *AT THE MIND’S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* 33 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980) (1966) (“[O]nly in torture does the transformation of the person into flesh become complete. Frail in the face of violence, yelling out in pain, awaiting no help, capable of no resistance, the tortured person is only a body, and nothing else beside that.”). *See also id.* at 39 (the torturer becomes the “absolute sovereign,” now empowered “to inflict suffering and destroy”).

28. *See generally* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1975).

29. Talal Asad, *On Torture, or Cruel, Inhuman, and Degrading Treatment*, in *SOCIAL SUFFERING* 285 (Arthur Kleinman et al. eds., 1997).

30. *See* William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Time of Security Crises*, 18 *ISR. Y.B. HUM. RTS.* 11 (1988). *See also id.* at 19 (“[A]bstract principles announcing the applicability of civil liberties during times of war and crisis are ineffectual when a war or other crisis comes along unless the principles are fleshed out by a detailed jurisprudence explaining how those civil liberties will be sustained against particularized national security concerns.”).

31. *See* DERSHOWITZ, *supra* note 16, at 145.

32. Adam Raviv, *Torture and Justification: Defending the Indefensible*,

for torture warrants, Dershowitz himself concluded that “there are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.”<sup>33</sup> Moreover, Raviv argues, “[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.”<sup>34</sup> Balancing security with liberty is an experiment that has long bedeviled governments, and they are entitled to attempt to perfect it. Richard Posner looks to world experience and concludes: France, the United Kingdom, and Israel have “used torture to extract information, yet none . . . has sunk into barbarism.”<sup>35</sup> The occasional restrictive use of torture does not, Posner suggests, lead to a complete meltdown in moral values.<sup>36</sup> The variety of perspectives here, all on the humanity question, should elicit respect for nuance and complexity.

But Professor Scott Goldberg is wrong to liken this line of argument with the observation that “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.”<sup>37</sup> Americans retain esteem and obedience for the rule of law *because* the rule of law does the same for their essential human dignity and because those punishments are proportionate to the crime, not abjectly rejected by history, and imposed *after* a fair trial with “the full panoply of protections”<sup>38</sup>—they are not imposed upon a hunch. It is considerably tougher to make that case for interrogative,

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13 GEO. MASON L. REV. 135, 144 (2004) (discussing 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. & FOREIGN AFF. 89, 101 (2001)).

33. DERSHOWITZ, *supra* note 16, at 137.

34. Raviv, *supra* note 32, at 145.

35. Richard A. Posner, *Torture, Terrorism and Interrogation*, in TORTURE: A COLLECTION, *supra* note 23, at 294.

36. *Id.*

37. Scott J. Goldberg, *Torture: Considering a Framework for Limiting Use* 13 (bepress Legal Series, Working Paper No. 946, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=4581&context=expresso>.

38. *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (articulating that in the Anglo-American tradition trials are the crucibles that determine the culpability of the accused).

preventive, pre-trial torture.

B. *Supreme Court Decisions: Due Process and Cruel and Unusual Punishments*

There is no support, in the text or history of the Constitution, for the hypothesis that torture is not “punishment” within the scope of the Eighth Amendment. The contemporary legal dictionary definition of “punishment” is “[a] penalty imposed on a defendant *duly convicted of a crime by an authorized court*,”<sup>39</sup> and there is no evidence to suggest that “punishment” meant something different when the Bill of Rights was proposed or ratified. The error is exacerbated by the important detail providing that the unwarranted imposition of torture violates the Due Process Clause.<sup>40</sup> How can torture, quintessentially a deprivation of liberty (to put it mildly), comport with the due process of law if imposed *ex ante* a fair trial, which would require finding the existence of guilt beyond a reasonable doubt?<sup>41</sup> In this analysis, I would use a three-part test.

First, due process requires notice and the opportunity to be heard before the government can deprive a person of her liberty or continue such deprivation for a period of time. The Supreme Court’s decision in *Wilkinson v. Austin* instructs that the “liberty interest in avoiding particular conditions of confinement . . . arise[s] from state policies or regulations.”<sup>42</sup> The Court in *Wilkinson*, adhering to its earlier decision in *Mathews v. Eldridge*,<sup>43</sup> required “notice of the factual basis

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39. OXFORD DICTIONARY OF LAW 428 (6th ed. 2006) (emphasis added).

40. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”). The Fifth Amendment applies to the Federal Government’s actions, whereas the Fourteenth Amendment—“nor shall any state deprive any person of life, liberty, or property, without due process of law”—applies the protections to state conduct. U.S. CONST. amend. XIV, § 1.

41. It is well-settled that “reasonable doubt” is the proper criminal law standard both in state court and in federal habeas corpus proceedings. See *Jackson v. Virginia*, 443 U.S. 307, 313-24 (1979); *In re Winship*, 397 U.S. 358, 368 (1970). See also JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME 15 (1977).

42. 545 U.S. 209, 222 (2005).

43. 424 U.S. 319 (1976) (establishing a framework for evaluating procedural due process and determining what constitutes a liberty interest).

leading to consideration” of harsh confinement “and a fair opportunity for rebuttal.”<sup>44</sup> The government must “play by its own rules,”<sup>45</sup> and must not deprive the torturee of a “fair warning.”<sup>46</sup> This constitutional analysis involved the duration and conditions of punishment. The constitutional safeguards were grounded both in law and in reliability: “these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.”<sup>47</sup> That is just the first step of the inquiry.

Second, consistent with prevailing judicial precedents, the appropriate punishment has to be determined. Determining whether torture is “warranted,” to be sure, implicates the hard-to-discern “sliding scale”—theoretically, at least, more sound than a strict tiered-approach. That accounts for the usual proportionality analysis under the Eighth Amendment, which is discussed later in this Article. But it also implicates the core requirements of due process. The Eighth Amendment and due process might not be strictly coextensive but they do overlap, especially in cases where particularly harsh treatment of a detainee (as punishment or as preventive interrogation) is followed by a cursory or nonexistent fact-finding procedure. Along with *Mathews* and *Wilkinson*, the Court’s holding in *Sandin v. Conner* provides that in order for a prisoner to maintain a viable constitutional claim, he must face atypical and significant hardship, which is harsher than normal prison life.<sup>48</sup> In the pre-trial context, we might transpose this rule to conclude that the degree to which a hardship significantly

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44. *Wilkinson*, 545 U.S. at 225-26.

45. *Carmell v. Texas*, 529 U.S. 513, 533 (2000) (reversing defendant’s conviction of sex crimes on the grounds that it violated the Ex Post Facto Clause of the U.S. Constitution). In *Carmell*, a Texas law providing that the victim’s testimony alone was sufficient for conviction came into effect after petitioner committed certain sex offenses. At the time the offenses were committed, the law required that the victim’s testimony be corroborated by other evidence in order to support a conviction. The Court found that such prosecution infringes on “fundamental fairness” as it is only advantageous to the State. *See generally Carmell*, 529 U.S. 513.

46. *See Weaver v. Graham*, 450 U.S. 24, 28 (1981) (defining “fair warning” as an individual’s ability to rely on the meaning of a law until it is explicitly changed).

47. *Wilkinson*, 545 U.S. at 226.

48. 515 U.S. 472 (1995) (holding that respondent’s placement in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest).

outweighs the usual inconveniences and conditions of pre-trial detention is an important factor in the due process inquiry.

*Wilkinson* reaffirmed *Sandin*, holding that “a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations.”<sup>49</sup> The Ohio prison procedure upheld by the *Wilkinson* Court was characterized as “informal” and “non-adversarial,” and therefore, considering that neither label applies to a torture scenario, *Wilkinson* does not reflexively immunize torture punishments from due process challenges.<sup>50</sup> *Wilkinson* maintained that “the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves ‘in relation to the ordinary incidents of prison life.’”<sup>51</sup> Put another way: was the conduct to which the torturee was subjected notably harsher than what an ordinary prisoner would face? Or, were there compelling, or at the bare minimum, rational reasons? Or finally, was the treatment excessive? *Sandin* creates a difficult standard for plaintiffs to satisfy, requiring evidence that the time and duration of confinement exacted a significant and atypical hardship constituting the deprivation of a liberty interest protected by due process.<sup>52</sup> But that more demanding standard is not implicated in the cases of pre-trial detainees, including torturees.

Moreover, some lower federal courts now hold that the imposition of painful physical restraints during the movement of pretrial detainees require “reasonable after-the-fact procedural protections to ensure that such restrictions on liberty will be terminated reasonably soon if they have no justification.”<sup>53</sup> Of course, in *Bell v. Wolfish*, the Supreme Court pieced together these different standards and rules.<sup>54</sup> The Court then restated the test for deciding if a *condition* of confinement (which may well include torture, in which case the government’s burden becomes nearly insurmountable) was

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49. *Wilkinson*, 545 U.S. at 222.

50. *See id.* at 229.

51. *Id.* at 223 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

52. *See Sandin*, 515 U.S. at 484.

53. *Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001).

54. 441 U.S. 520 (1979).

unconstitutional under due process:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>55</sup>

A third step, I demur, is also necessary in light of the historical Eighth Amendment condemnation (even though this is a due process inquiry) against torture. This step concerns something more than a proportionality analysis; it asks why the defendant must suffer a punishment that constitutional history forbids. Why must the absolute limitation on torture as punishment be infringed? The sentencing court must painstakingly analyze why, flying in the face of constitutional history, the categorical constitutional prohibition on torture as punishment might be breached. This line should not be crossed. While “adjudicating constitutional claims rooted in the Magna Carta or other common law institutions, the [Supreme] Court [previously has] noted [that] ‘[o]ne of the consistent themes of the era was that Americans had all the rights of English subjects.’”<sup>56</sup> Constitutional courts in the United States have no power to roll back or retrench a constitutional right considered and protected (in that *specific* sense) by the Framers. That would set a pernicious precedent and remove a constraint which has worked rather well throughout the Republic’s past.

If humanity is the aim of due process and the Eighth

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55. *Id.* at 537-38 (emphasis in original) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

56. Riddhi Dasgupta, *Boumediene v. Bush and Extraterritorial Habeas Corpus in Wartime*, 36 HASTINGS CONST. L.Q. 425, 442 & n.125 (2009) (quoting *Solem v. Helm*, 463 U.S. 277, 286 (1983)).

Amendment's Cruel and Unusual Punishments Clause, then ensuring the veracity and accuracy of confessions and information is the goal of the Fifth Amendment's Self-Incrimination Clause. The self-incrimination privilege states: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>57</sup> That right, "closely linked historically with the abolition of torture," is considered a "landmark[ ] in man's struggle to make himself civilized."<sup>58</sup> The Fifth Amendment's privilege against self-incrimination is functionally equivalent to any constitutional proscription against torture as a means of the suspect incriminating *herself*. The privilege does not protect the suspect from being a witness against another entity.<sup>59</sup> Professor Erwin Griswold defined the privilege as "one of the fundamental decencies in the relation we have developed between government and man."<sup>60</sup> Moreover, it is "a rule of conduct generally to be followed by our Nation's officialdom. It counsels officers of the United States (and of any State of the United States) against extracting testimony when the person examined reasonably fears that his words would be used against him in a later criminal prosecution."<sup>61</sup> There is no strong reason why "the [Fifth] Amendment ordinarily [w]ould [not] command the respect of United States interrogators, whether the prosecution reasonably feared by the examinee is domestic or foreign."<sup>62</sup> Just as constitutional

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57. U.S. CONST. amend. V.

58. ERWIN N. GRISWOLD, *THE 5TH AMENDMENT TODAY* 7-8 (1955) (The Fifth Amendment articulates "one of the fundamental decencies in the relation we have developed between government and man."). See also Eben Moglen, *The Privilege in British North America: the Colonial Period to the Fifth Amendment*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT* 109 (R. H. Helmholz et al. eds., 1997).

59. *Rogers v. United States*, 340 U.S. 367, 371 (1951); *Hale v. Henkel*, 201 U.S. 43, 69 (1906); Louis C. Wyman, *A Common Sense View of the Fifth Amendment*, 51 J. OF CRIM. L., CRIMINOLOGY, AND POLICE SCI. 155, 155 (1960); MCCORMICK ON EVIDENCE § 119 (Kenneth S. Broun ed., 6th ed. 2006); 81 AM. JUR. 2D *Witnesses* § 96 (2004).

60. GRISWOLD, *supra* note 58, at 8.

61. *United States v. Balsys*, 524 U.S. 666, 701 (1998) (Ginsburg, J., dissenting).

62. *Id.* at 702 (Ginsburg, J., dissenting) (citing DKT Memorial Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 307-08 (D.C. Cir. 1989) (Ginsburg, J., concurring in part and dissenting in part) ("[J]ust as our flag carries its message . . . both at home and abroad, so does our Constitution and the values it expresses."); *United States v. Tiede*, 86 F. R. D. 227 (U.S. Ct. for Berlin 1979) (holding that a foreign national, accused of hijacking a Polish

and statutory habeas corpus govern the *custodian* of the prisoner rather than the prisoner herself,<sup>63</sup> the Fifth Amendment's command usually applies to the official rather than the prisoner.

Two principles of constitutional law are in some tension here: the first is the notion that even "a case that may be of extraordinary importance" should be "resolved by ordinary rules."<sup>64</sup> The second is the fact that there is a difference between torture as *punishment* and torture as a *preventive deterrent*. If the two forms of torture are functionally different, there is no uniform constitutional rule covering both situations. One plausible exception is the prospect that constitutionally-approved torture as punishment will be considered as approving, *a fortiori*, the prospect of torture in tightly-defined preventive scenarios. Torture as punishment might be an "unnecessary or wanton infliction of pain" lacking in redeeming penological purposes applicable to that particular criminal and his crime(s).<sup>65</sup> Sanctioning torture within that context might prove to be a slippery slope. If the causality between torture and penological purposes is defined loosely enough, many other questionable treatments (aside from torture) could be approved. That entire line of decisions, consolidated by *Hudson v. McMillian*, a case concerning the "use of excessive physical force against a prisoner," asks "whether force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."<sup>66</sup>

A prisoner need not, under *Hudson*, demonstrate that this force caused a "significant injury."<sup>67</sup> The Supreme Court rejected the contention, expressed in Justice Clarence Thomas's dissenting opinion, that "claims based on excessive force and

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aircraft overseas, was entitled to the constitutional right of a jury trial when tried under German law in a Berlin court created by the United States)).

63. See *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 494-95 (1973) ("The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.").

64. *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part).

65. See *Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

66. *Id.* at 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)).

67. *Id.* at 9.

claims based on conditions of confinement are no different in kind.”<sup>68</sup> The majority countered that “[t]o deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the ‘concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment.’”<sup>69</sup> The “contextual” analysis bears upon a proportional relationship between the conduct of the prisoner and the response of the prison officials.<sup>70</sup> The *Hudson* Court refused unequivocally to resurrect the prison-inhabitation mirror image of the confession-oriented Star Chamber’s third-degree treatment—“the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.”<sup>71</sup> Nothing displaced the analogy even though this treatment was to happen *not* pursuant to a legislative or judicial order but upon the whim of prison officials.

*Hudson* is, by no means, *sui generis*.<sup>72</sup> It was the product of a long line of substantive Eighth Amendment jurisprudence. A bright star in this constellation is *Trop v. Dulles*, where a plurality of the Supreme Court established the proposition that the Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>73</sup> This manner of currently prevailing “original historicism” in interpreting the Amendment “is characterized by subtly calibrated, gradual modification of doctrine that tracks changes in the public’s settled convictions concerning

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68. *Id.* at 11.

69. *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

70. *Id.* at 8 (“What is necessary to show sufficient harm for purposes of the Cruel and Unusual Punishments Clause depends upon the claim at issue, for two reasons. First, the general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should . . . be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged. Second, the Eighth Amendment’s prohibition of cruel and unusual punishments draws its meaning from the evolving standards of decency that mark the progress of a maturing society, and so admits of few absolute limitations.” (citations and internal quotation marks omitted)).

71. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990).

72. *Stare decisis* requires contextual analysis whereby an aberration or two from lines and lines of settled cases and, of course, from clearly opposite constitutional text stand with far less precedential force than *vice versa*.

73. 356 U.S. 86, 101 (1958) (plurality).

specific types of punitive practices.”<sup>74</sup> Courts look to objective evidence to confirm those conclusions,<sup>75</sup> but they are also required to “bring their ‘own judgment . . . to bear.’”<sup>76</sup> This interpretive method presupposes, as it must, the “normative premise that [the ‘evolving standards’] doctrine *ought to be* adjusted to take into account enduring, widespread changes in fundamental values when those changes are consistent with the direction charted by the [F]ramers.”<sup>77</sup> In death penalty cases, for instance, the Court has categorically exempted from capital punishment certain classes of persons, namely minors,<sup>78</sup> the mentally retarded,<sup>79</sup> and the insane,<sup>80</sup> as well as cases involving the commission of non-homicidal person-on-person crimes.<sup>81</sup> In non-death penalty criminal cases, the Court has established a “narrow proportionality” test to analyze if the punishment imposed is “grossly disproportionate” to the crime.<sup>82</sup> And cases arising out of the prison context, such as *Estelle v. Gamble*<sup>83</sup> and *Whitley v. Albers*,<sup>84</sup> reaffirm the application of the evolving-standards prescription to the post-sentencing, prison-inhabitation scenario.

Prison officials have more than an obligation not to invade rights; they must also affirmatively protect the safety and health of the prisoners, including their medical needs. If the official conduct challenged in an Eighth Amendment suit “d[id] not conflict with competing administrative concerns” and “force

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74. William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1390 (2005). See also BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 82-83 (1921).

75. See *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“[C]ourts should be guided by objective factors that our cases have recognized.”); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

76. *Atkins*, 536 U.S. at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality)).

77. Heffernan, *supra* note 74, at 1390 (emphasis added).

78. See *Roper v. Simmons*, 543 U.S. 551 (2005), *overruling* *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

79. See *Atkins v. Virginia*, 536 U.S. 304 (2002), *overruling* *Penry v. Lynaugh*, 492 U.S. 302 (1989).

80. See *Ford v. Wainwright*, 477 U.S. 399 (1986).

81. See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

82. *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in judgment).

83. 429 U.S. 97 (1976).

84. 475 U.S. 312 (1986).

was applied [not] in a good faith effort to maintain or restore discipline [but] maliciously and sadistically for the very purpose of causing harm,” Eighth Amendment relief might be available.<sup>85</sup> These precedents, notably quoting *Farmer v. Brennan*, establish a “deliberate indifference” test to decide whether an official’s response overstepped the Eighth Amendment’s boundaries.<sup>86</sup> We operate well outside that box when torture is at issue. Creating a “significant injury” requirement for triggering the Eighth Amendment would open the city gates to “some arbitrary quantity of injury”—if that threshold was not met, then “the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman.”<sup>87</sup>

In *Estelle*, the Supreme Court candidly announced that forbidding torture and barbarous punishment was “the primary concern of the [Eighth Amendment’s] drafters.”<sup>88</sup> Likewise, in *Wilkinson v. Utah*, the Court “affirm[ed] that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by” the Amendment.<sup>89</sup> To the *Wilkinson* Court, these “punishments of torture,” characterized as “atrocities,” involved situations where the defendant “was embowelled alive, beheaded, and quartered,” and cases “of public dissection . . . and burning alive.”<sup>90</sup> Surely, the state of knowledge about torture at that point in history cannot limit *modern* constitutional analysis to the 1791 baseline. It would be one thing to state that there is no historical reference to torture that falls within the Eighth Amendment’s scope, and only tangentially within the sweep of the Due Process Clause (an argument which is unavailing), and quite another to suggest that the definition of torture should be limited to what was known by the Framers. The latter argument would discredit originalism as unworkable and too academic to be pragmatic, or simply as a flight of fancy. This is also the

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85. *Hudson v. McMillan*, 503 U.S. 1, 6 (1992) (citations and internal quotation marks omitted).

86. *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994).

87. *Hudson*, 503 U.S. at 9.

88. *Estelle*, 429 U.S. at 102 (referring to Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)).

89. 99 U.S. 130, 136 (1879) (citation omitted).

90. *Id.* at 135-36.

reason that this Article does not attempt to construct a comprehensive definition of torture.<sup>91</sup>

The constitutional law variant of the *ejusdem generis* doctrine does not choke off all other forms of torture from being proscribed by the Eighth Amendment. At any rate, the “evolving standards of decency that mark the progress of a maturing society”<sup>92</sup> recognize that at the very least, while paying due caution to the limited policing role of American courts (both federal and state), torture as post-trial punishment is unconstitutional and torture as a pre-trial preventive interrogation technique raises serious constitutional questions. Without adequate safeguards in place, the latter concerns ossify into constitutional violations. Recognition of these “evolving standards” is at the forefront of proportionality analysis through “objective factors to the maximum possible extent.”<sup>93</sup> The Supreme Court has “pinpointed that the clearest and most reliable objective evidence of contemporary values is

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91. Waterboarding, malnutrition, starvation, sexual abuse and intimidation (including rape), homicide, battery, assault, usage of the “Tucker telephone,” incessant harassment, and the giving of cause to believe that the interrogated or others will be harmed are forms of torture, but they do not represent the whole picture. The events at Abu Ghraib, which came to public attention, particularly stretched the imagination further and wider on this front. See *Hudson*, 503 U.S. at 14 (Blackmun, J., concurring) (prisoner abuse within the Eighth Amendment includes “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”); Seymour Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far up does the Responsibility Go?*, NEW YORKER, May 10, 2004, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact); HANIA MUFTI, HUMAN RTS. WATCH, THE NEW IRAQ? TORTURE AND ILL-TREATMENT OF DETAINEES IN IRAQI CUSTODY (Jan. 24, 2005), <http://www.hrw.org/en/node/11864/section/> (“Methods of torture or ill-treatment cited included routine beatings to the body using a variety of implements such as cables, hosepipes and metal rods. Detainees reported kicking, slapping and punching; prolonged suspension from the wrists with the hands tied behind the back; electric shocks to sensitive parts of the body, including the earlobes and genitals; and being kept blindfolded and/or handcuffed continuously for several days. In several cases, the detainees suffered what may be permanent physical disability.”). See also GAIL H. MILLER, *DEFINING TORTURE 1* (2005).

92. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

93. *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

the legislation enacted by the country's legislatures."<sup>94</sup> The Court has also retained the caveat that "objective evidence, though of great importance, d[oes] not wholly determine the controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability."<sup>95</sup> While the first prong (looking to trend and direction of the Nation's values to rectify one or two aberrant jurisdictions) has a democratic flavor, the second prong (judicial review against a Nation gone mad) gives us pause and also the hope that this doctrine will be invoked only in the most exceptional cases.

Along the same "evolving standards" line of thinking, the Supreme Court, in *Weems v. United States*, stated the proposition as a ban "against the infliction of punishment[s] so severe as not to fit the crime."<sup>96</sup> The proposition depends "both on account of th[e] degree and [the] kind"<sup>97</sup> of the punishment imposed. Connecting the dots for the *Wilkinson* rule, furthermore, *Weems* held that the Eighth Amendment's meaning is "elastic," "indefinite" and "must be capable of wider application than the mischief which gave it birth."<sup>98</sup> The *Weems* Court, referencing *In re Kemmler*, stated that "[p]unishments are cruel when they involve torture or a lingering death."<sup>99</sup> *Weems* also referenced the English Bill of Rights of 1689 as authority that proportionality analysis was a goal of the English common law carried over to the American colonies.<sup>100</sup> Then, *Louisiana ex rel. Francis v. Resweber* defined a "cruel and unusual punishment" as that which, in contravention of "[t]he traditional humanity of modern Anglo-American law," nonetheless "inflict[s] . . . unnecessary pain."<sup>101</sup>

Evidence of intent, in some cases, might be necessary to

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94. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation and internal quotation marks omitted).

95. *Id.* (citation and internal quotation marks omitted).

96. 217 U.S. 349, 376 (1910) (internal quotation marks omitted).

97. *Id.* at 377.

98. *Id.* at 373 ("Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes.").

99. *Id.* at 370 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

100. *See id.* at 402.

101. 329 U.S. 459, 463 (1947).

prove a constitutional violation, but if “unnecessary pain” recurs over and over again and if reasonable safeguards are not taken to diminish that possibility, then that creates a constitutional violation. The torture as punishment issue therefore is closer to the *Farmer* standard (“deliberate indifference”) than to the artificially cramped definition of intent developed in some decisions. Discrimination occurs when intent is “because of,” not merely “in spite of,” [the action’s] adverse effects upon an identifiable group.”<sup>102</sup>

As devised in *Personnel Administrator v. Feeney*,<sup>103</sup> the Court applied this concept of intent in *Ashcroft v. Iqbal*,<sup>104</sup> where it held that to prove discrimination, a detainee must “show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin” or otherwise violating the detainee’s rights. In *Iqbal*, which figures prominently in Part III (discussion of qualified immunity), the Court explicitly notes that “the plaintiff must plead and prove that the defendant acted with discriminatory purpose.”<sup>105</sup> However, the Court did not explain whether a pattern of discriminatory *effects* (disparate impact), especially in the face of easier alternatives which might abate (or entirely rid society of) that discrimination, begins to appear systematic.<sup>106</sup> This is a matter of iterations and the

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102. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (footnote omitted).

103. *Id.* at 256.

104. 129 S. Ct. 1937, 1948-49 (2009). *See also id.* at 1948 (“Under extant precedent purposeful discrimination requires more than ‘intent as volition or intent as awareness of consequences.’” (quoting *Feeney*, 442 U.S. at 279)).

105. *Id.* at 1948.

106. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993) (“Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the [decision-making] body. These objective factors bear on the question of discriminatory object.” (citations omitted)); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because, in various circumstances, the discrimination is very difficult to explain on nonracial grounds.”). For an illustrative piece demonstrating the issues litigators face trying to prove “intent” in disparate impact cases, see also William Cohen, *Proving*

consideration applies to methods, duration and conditions of torture, all of which attend a due process or an Eighth Amendment analysis of pre-trial torture's constitutionality.

Even though torture to impose punishment is constitutionally out-of-bounds, the constitutionality of torture as a preventive deterrent is more complex. Context matters.<sup>107</sup> The level of scrutiny that a government policy invites depends, as a broad (if nebulous) rule, on "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."<sup>108</sup> *Rational basis* scrutiny, as understood by the Supreme Court's presently governing law, might sustain well-regulated and time- and means-limited torture for the sole or primary purpose of *future* terrorism prevention. That degree of judicial care when reviewing the constitutionality of government actions merely asks whether there was a plausible reason for the government to act the way it did. So long as the law does not discriminate on the basis of race, sex, sexual orientation or other prohibited characteristics, the policy or law will be sustained.<sup>109</sup> Some of those characteristics might be the residency of the entity (states may not discriminate on that basis) or the differential structuring of

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*Discriminatory Intent in Constitutional Law Disparate Impact Cases*, 14 HARV. J.L. & PUB. POL'Y 78 (1991).

107. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."). "[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit)." *Id.* at 851. The *Estelle* context is the "normal pretrial custody" while the *Lewis* context is the "high-speed law enforcement chase[.]" See *id.*

108. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting).

109. See *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) ("[T]he Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental [decision-maker], and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." (citations omitted)).

tax laws.<sup>110</sup>

What happens under *strict scrutiny*? First, the deterrent effect of torture must be established as a compelling governmental interest, in light of the current situation and the information possessed by the officials in charge at the time; and, secondly, torture must be the narrowest and least drastic means of furthering that interest.<sup>111</sup> But such analysis is extremely fact-specific, and penalizing officials *post-hoc* carries the risk of illegitimacy. We are, by that time, temporally disconnected from the imminent and time-sensitive decision-making that the officials were required to undertake; judging these executive decisions in hindsight is risky. Based on existing case-law on prison officials' qualified immunity claims, there will be a presumption in the vast majority of cases that the officials acted responsibly in light of the facts and risks then-present before them. *Hudson* and *Whitley*, themselves, planted that seed: prison officials are often required to act "in haste, under pressure, and frequently without the luxury of a second chance"<sup>112</sup> and those determinations (unless "malicious[s] or sadisti[c]"<sup>113</sup>) deserve deference. There might be all the more reason that the presumption will carry over to the government official in the ticking-bomb torture context. That does the torturee no good.

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110. See *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003) ("The law in question does not distinguish on the basis of, for example, race or gender. It does not distinguish between in-state and out-of-state businesses. Neither does it favor a State's long-time residents at the expense of residents who have more recently arrived from other States." (citations omitted)). See also *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (the Equal Protection Clause requires state tax laws to "proceed upon a rational basis" and not to "resort to a classification that is palpably arbitrary").

111. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

112. *Hudson v. McMillan*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)).

113. *Id.* at 6 (quoting *Whitley*, 475 U.S. at 320-21).

C. *Relevance of the Self-Incrimination Privilege*

Past conduct is forbidden fruit under this exceedingly limited detour from ordinary standards of due process.<sup>114</sup> Admitting into evidence confessions derived from torture would eviscerate the fine line-drawing attempted here, and effectively obviate the Supreme Court's landmark decisions in *Brown v. Mississippi*<sup>115</sup> and *Miranda v. Arizona*.<sup>116</sup> These decisions render inadmissible statements (both inculpatory and exculpatory) attained through violence, coercion, or asymmetry of information that might induce fear. *Brown* was based on due process (before the Fifth Amendment was incorporated to apply to the States) and *Miranda* was based on the Fifth Amendment, which had been directly incorporated by the Fourteenth to apply to the States. Purposively-speaking, however, what *Brown* read the Constitution to require, *Miranda* converted into a "prophylactic" rule,<sup>117</sup> thus bridging the strait between *Brown* and its enforcement. Despite the criticism and judicial trimming that *Miranda* has endured in the years since, its core remains alive.<sup>118</sup>

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114. See, e.g., David Luban, Essay, *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."); Gross, *supra* note 22, at 1487-88.

115. 297 U.S. 278 (1936) (holding that confessions exacted by torture and police violence violate due process and may not be admitted into trial as evidence).

116. 384 U.S. 436 (1966) (holding that defendant must be informed of her right to an attorney and her privilege against self-incrimination before and during questioning by police; otherwise, inculpatory and exculpatory statements gained from such questioning are inadmissible).

117. See *New York v. Quarles*, 467 U.S. 649, 652-53 (1984).

118. The Supreme Court and individual Justices have, in a variety of cases, said, in effect, that *Miranda* rights are merely "prophylactic," designed to stop Fifth Amendment violations (and "not themselves rights protected by the Constitution."). See, e.g., *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). Nevertheless, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court expressly reaffirmed *Miranda*. But see *Davis v. United States*, 512 U.S. 452, 457-58 (1994) (holding that a defendant who was given a *Miranda* warning must explicitly demand an attorney in order to cease interrogation so that counsel could be present); *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) ("*Miranda's* safeguards are not constitutional in character."); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (holding that *Miranda* warnings need not be given in the exact form described in *Miranda*, but simply must reasonably

Even if one does not support the formalist difference between applying the self-incrimination privilege in an interrogation context as opposed to the trial itself, it is indeed a privilege against *self*-incrimination. Of their own volition, some States permit and some even mandate testimonial protection for certain relationships, such as spousal and parent-child kinships. Neither the Fifth nor the Fourteenth Amendment has been held to *require* such protections. Consequently, there exists no constitutionally-guaranteed privilege against incriminating *others*, absent such a provision being affirmatively made by positive law enacted by the States and by Congress. Like in the Sixth Amendment's Confrontation Clause context,<sup>119</sup> the self-incrimination test requires that the statement or information secured from the defendant be "testimonial."<sup>120</sup> Both the Confrontation Clause and the Self-Incrimination Clause define "witness" (or "witnesses") broadly enough to strike out most categories of out-of-court testimony, many of which are *practically* unreliable and all of which are *constitutionally* unreliable.<sup>121</sup>

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convey to a suspect his rights); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("[T]he *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights . . ."); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (holding that "[w]here a Fourth Amendment violation 'taints' the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence" (citation omitted)); *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring in result) (recognizing *Miranda* as a general prophylactic rule).

119. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."). See, e.g., *Crawford v. Washington*, 541 U.S. 36, 51 (2004) ("Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . ." (citations and internal quotation marks omitted)).

120. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 34 (2000) ("The word 'witness' in the constitutional text limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character.").

121. See *Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central

Imagine how this type of reliability inquiry could affect constitutional provisions that establish specific requirements without giving courts discretion to evaluate alleged violations. Arguably, courts could someday say that what matters in interpreting the Ex Post Facto Clause<sup>122</sup> is not the actual temporal order of the legislation enacted and the crime committed, but rather whether the legislature had a specific malicious intent in enacting the law after the commission of a crime. Similarly, the admittance of *ex parte* testimony into trial is presumptively unconstitutional. So serious and harsh is the office of Star Chamber-like ecclesiastical tribunals in Anglo-American history<sup>123</sup> that the Supreme Court has expansively extended the self-incrimination privilege.

The Court has accomplished this project by expanding the scope of the terms “testimonial” evidence and “witness.”<sup>124</sup>

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concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”).

122. U.S. CONST. art. I, § 9, cl. 3 (federal prohibition); U.S. CONST. art. I, § 10, cl. 1 (states). See *Stogner v. California*, 539 U.S. 607 (2003); *Calder v. Bull*, 3 U.S. 386, 390-91 (1798) (Chase, J.) (“I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.” (emphasis added)). The “manifestly unjust and oppressive” depiction, though subjective, is immaterial here because it is a descriptive rather than controlling rule to apply. Similarly, in *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810), the Court saw the Ex Post Facto Clause as a safeguard against “violent acts which might grow out of the feelings of the moment.”

123. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*266 (Star chamber “consist[ed] of diverse lords spiritual and temporal, being privy counselors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehavior of sheriffs, and other notorious misdemeanors, contrary to the laws of the land”).

124. See *United States v. Hubbell*, 530 U.S. 27, 50 (2000) (Thomas, J., concurring) (“[T]he term ‘witness’ meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term. If this is so, a person who responds to a subpoena *duces tecum* would be just as much a ‘witness’ as a person who responds to a subpoena *ad*

Justice Joseph Story used the phrases “to give evidence” and “to furnish evidence” to explain *self-incrimination*.<sup>125</sup> This right has not been confined to what the defendant said or did not say (literally or verbally) once in custody or on the witness stand. Even the act-of-production doctrine “provides that persons compelled to turn over incriminating papers or other physical evidence pursuant to a subpoena *duces tecum* or a summons may invoke the Fifth Amendment privilege against self-incrimination as a bar to production” when “the act of producing the evidence would contain ‘testimonial features.’”<sup>126</sup> The case of *Counselman v. Hitchcock* went so far as to hold that an “ancient principle of the law” is that “a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties or forfeitures.”<sup>127</sup>

English common law recognized that this giving of testimony or evidence encompassed the coerced production of archives, books, and records. The state constitutional conventions were aware of this line of English cases interspersed throughout the 18th century.<sup>128</sup> This terminology, in meaning if not in text, shares a certain kinship with the Fourth Amendment’s protection of “persons, houses, papers

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*testificandum*. Dictionaries published around the time of the founding included definitions of the term ‘witness’ as a person who gives or furnishes evidence. Legal dictionaries of that period defined ‘witness’ as someone who ‘gives evidence in a cause.’ 2 G. Jacob, *A New Law-Dictionary* (8th ed. 1762); 2 T. Cunningham, *New and Complete Law-Dictionary* (2d ed. 1771); T. Potts, *A Compendious Law Dictionary* 612 (1803); 6 G. Jacob, *The Law-Dictionary* 450 (T. Tomlins 1st American ed. 1811). And a general dictionary published earlier in the century similarly defined ‘witness’ as ‘a giver of evidence.’ J. Kersey, *A New English Dictionary* (1702). The term ‘witness’ apparently continued to have this meaning at least until the first edition of Noah Webster’s dictionary, which defined it as ‘that which furnishes evidence or proof.’ *An American Dictionary of the English Language* (1828).” (emphasis added).

125. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 931 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833).

126. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring) (citation and internal quotation marks omitted).

127. 142 U.S. 547, 563-64 (1892) (citations omitted).

128. Justice Thomas’s concurring opinion in *Hubbell* does a remarkable job of reciting this history. See *Hubbell*, 530 U.S. at 52-53 (Thomas, J., concurring) (discussing various states’ declarations affirming the right against self-incrimination during the pre-constitutional period).

and effects” (which cannot be unreasonably searched or subject to seizure).<sup>129</sup> That Amendment historically insists on protecting the dignity of the individual<sup>130</sup> by employing the “reasonableness inquiry,”<sup>131</sup> which evaluates the nature of the arrest and detention (including treatment) and the available evidence.

Both the history and the public policy arguments underlying the Self-Incrimination Clause maintain that the privilege may be invoked “to resist compelled explicit or implicit disclosures of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.”<sup>132</sup> “The 18th-century common-law privilege against self-incrimination protected against the compelled production of incriminating physical evidence such as papers and documents”<sup>133</sup> and in this digital era, it now extends to private electronic data. At the end of the day, the interrogated then finds herself in an unenviable Catch-22: if she concedes her involvement, then she may be charged. Alternatively, if the interrogated declines to claim involvement, then the privilege either becomes too watered down or does not apply at all.

Nonetheless, it cannot be denied that the self-incrimination privilege, as interpreted by the Supreme Court, prohibits using *pre-trial* torture to secure evidence of the

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129. U.S. CONST. amend. IV.

130. *See, e.g.*, *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (there is significant doubt as to “whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity”).

131. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 361 (2001) (O’Connor, J., dissenting) (courts have a constitutional obligation to “evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests” (citation and internal quotation marks omitted)). *See also id.* at 347 (majority opinion) (“[The specific litigant’s] claim to live free of pointless indignity and confinement clearly outweighs anything the [arresting authority] can raise against it specific to her case.”).

132. *Hubbell*, 530 U.S. at 34 n.8 (quoting *Doe v. United States*, 487 U.S. 201, 212 (1988)).

133. *Id.* at 51 (Thomas, J., concurring).

suspect's culpability. The Court's Eighth Amendment precedents similarly proscribe *post*-trial torture, irrespective of whether "significant injury" is caused. With respect to the torture warrants, this analysis receives further comment in Part III.

Moreover, there remains a practical imperative to borrow from international and foreign law in order to understand the ramifications of our own question. To properly delineate the United States' governing constitutional law on the question of torture in a ticking-bomb scenario, we must not be insulated from the rest of the world. Relevant are the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("UNCAT"),<sup>134</sup> the Universal Declaration of Human Rights,<sup>135</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>136</sup> and the Geneva Conventions<sup>137</sup>—and the State practices of Israel and other terrorism-challenged foreign jurisdictions.

For example, let us make the effort to define "torture," a question sure to arise under an Eighth Amendment challenge in United States federal courts. How the international authorities listed above define "torture" is not, in substantial part, so predicated upon foreign countries' unique histories and practices that the United States' constitutional doctrine finds nothing to learn from them. Is it relevant to United States courts that the UNCAT defines "torture" as:

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134. Adopted and opened for signature, ratification, and accession by resolution of the U.N. General Assembly December 19, 1984, G.A. Res. 39/46, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987). In October 1994, the United States ratified the UNCAT with the reservation that it will conform only to the extent required by the Eighth Amendment.

135. *See generally* G.A. Res. 217A (III), at 71-77, U.N. Doc A/810 (Dec. 10, 1948).

136. *See generally* G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. (Dec. 16, 1966).

137. See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516. "Torture of prisoners of war and others detained during wartime is prohibited by the third Geneva Convention protecting prisoners of war and the fourth Geneva Convention, which protects civilians during wartime." Bell, *supra* note 22, at 343 n.14.

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind?<sup>138</sup>

Is it relevant for our qualified immunity jurisprudence (certain to be claimed by government officials to avoid monetary damages) that the UNCAT forbids “pain or suffering . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”?<sup>139</sup> In addition, does it matter that the UNCAT’s ban on torture is absolute, non-derogable, and admits of “[n]o exceptional circumstances whatsoever”?<sup>140</sup> Each of these questions should be answered in the affirmative.

Shared humanity is another precept of human dignity, which is itself a resonating and recurring theme in the torture debate. Human intricacies that we hold in common, the torturee’s physical and mental responses to torture, and the law’s own responsiveness to these details are not somehow worthless or unavailable to United States courts because the conversation first arose elsewhere. On this important issue, United States courts and jurists must be careful to receive influence from, in addition to exerting influence on, the Western community. Our relationship with the legal and political systems must be cautionary but cannot be parasitic. In order for our worldview to be relevant to the European Court of Human Rights or to France’s Cour de cassation, we must engage with their perspectives. Their views are not binding on United States courts, but they *are* relevant. They help confirm the validity (or lack thereof) of our own conclusions, they are at least as valuable as law review articles,

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138. G.A. Res. 39/46, *supra* note 134, at 197.

139. *Id.*

140. *Id.*

and they serve as “common denominators of basic fairness governing relationships between the governors and the governed.”<sup>141</sup> Such comparative constitutional references help courts better understand the process or subject of an immediate case. Recently there has been much debate and discourse in the United States over the propriety of our courts taking other Western tribunals’ views into account.

One criticism is that judges who are not nominated by the President of the United States nor confirmed by the Senate, as required by the Constitution (in Article II, Section 2, cl. 2), should not influence, causally or as confirmatory evidence, the judicial outcomes in American courts. That view is logically inconsistent.<sup>142</sup> Another illogical argument is that these international authorities should not be considered because they have not been accepted by the President or ratified by a two-thirds majority of the Senate, which are the requirements for adopting a treaty (also required in Article II, Section 2, cl. 2 of the Constitution).<sup>143</sup> United States courts could obviate the whole controversy regarding their references to and citations of foreign and international law by not doing so explicitly. They always could do so *sub silentio* and no one would be the wiser (or, at least, be able to conclusively prove it). In fact, Professor Laurence Tribe does characterize the Supreme Court’s recent

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141. See Ruth Bader Ginsburg, U.S. Supreme Court Assoc. Justice, Speech to the Annual Meeting of the American Society of International Law: “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication (Apr. 1, 2005), <http://www.asil.org/events/AM05/ginsburg050401.html> (quoting Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL’Y 431, 442 (2004)).

142. Law professors, law students, and sometimes non-lawyers also influence the work of courts when judges read and are persuaded by their books or law review articles. At least since the legal realism heyday, many law schools have retained on their faculties economists, philosophers, psychologists, and other social scientists *sans* legal backgrounds. If the argument is that their work-products are based on *American* law, that is unavailing. Sometimes the judges themselves are persuaded, directly or from legal literature, by *non*-legal literature. This very Article, for instance, refers to works by Michel Foucault, Talal Asad, and Jean Améry, none of whom are lawyers or experts in American law. Applying the anti-foreign and international law refrain (in United States constitutional cases) across the board would leave the constitutional reasoning of American courts too insular.

143. Once again, those references are not binding on United States courts the way that a treaty is.

usage of foreign-law as confirmatory evidence for the Court's conclusions in the most obvious sense; the Court's mind is made up and the approbatory international law citation is just "icing on cakes that [the Court] insist[s] ha[s] already been baked."<sup>144</sup>

Still, refusing to cite international or foreign legal developments would not only be intellectually disingenuous, but it would also rob United States courts of the transparency for which they are revered and appreciated worldwide. The United States would be poorer for it, owing to a parochial perspective.<sup>145</sup> Moreover, the relationships between United States law and the legal frameworks of other nations, especially on the crucial issues of human rights and torture, are symbiotic. It simply cannot be that the time-tested Geneva Conventions, the UNCAT, and the judicial decisions of nations such as Israel, which confront terror threats daily, have no importance in American courts' analysis of torture's constitutionality. Lord Atkins of the British Law Lords rejected automatic administrative detention during World War II<sup>146</sup> and President Barak of the Israeli Supreme Court rejected the constitutionality of torture in ticking bomb scenarios<sup>147</sup>—

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144. See LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 187 (2008). See also *id.* at 186 (the outrage against foreign legal citations in American federal courts may well be the product of jurisprudential "antiglobalism" and "the evidently rising national anxiety about immigration, the outsourcing of important economic activities to businesses and employees overseas, and the decline of American prestige abroad in the wake of the Iraq war," rather than any principled American exceptionalism in law).

145. We might learn from the good and the bad in the practices and histories of other jurisdictions. See generally Ginsburg, *supra* note 141; Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models*, 1 INT'L J. CONST. L. 296 (2003).

146. See *Liversidge v. Anderson*, [1942] 206 A.C. 244 (H.L.) (Atkins, L.J., dissenting) ("In this country amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.").

147. See HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [1999] IsrLR 36, available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf) ("This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the

refuting Cicero's categorical statement that *inter arma silent leges*.<sup>148</sup>

The need to learn from Israel—about the issue of balancing national security with constitutional ideals related to individual freedoms—should be obvious to American constitutional courts. It is well-known that

Israel finds itself in the middle of difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity.<sup>149</sup>

Israeli jurists, who incessantly face the torture and terrorism questions, might know a thing or two. It is not that American courts will necessarily agree with or find relevant Israeli judges' constructions of their own constitutional text on the torture question, but these constructions should be considered persuasive authority, establishing that the Supreme Court of a terrorism-challenged democratic state like Israel has not barred terrorism or torture challenges on justiciability grounds.<sup>150</sup> The court has considered whether "the state may

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liberty of an individual constitute important components in its understanding of security."). See also HCJ 320/80 Kwasama v. Minister of Def. IsrSC 5(3) 113, 132 (Cohen, J.) ("What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy.").

148. Latin for "in battle, the laws are silent." See CICERO, PRO MILONE 16 (N.H. Watts trans., Harvard Univ. Press, 5th ed. 1972).

149. HCJ 3451/02 Almadani v. IDF Commander in Judea & Samaria [2002] IsrLR 5-6 (citation omitted), available at [http://elyon1.court.gov.il/files\\_eng/02/510/034/a06/02034510.a06.pdf](http://elyon1.court.gov.il/files_eng/02/510/034/a06/02034510.a06.pdf).

150. See, e.g., AHARON BARAK, THE JUDGE IN A DEMOCRACY 293-94 (2006) ("We have not used the act of state doctrine or non-justiciability under these circumstances. We consider these issues on their merits. Nor do we require injury in fact as a standing requirement; we recognize the standing of anyone to challenge the act. In the context of terrorism, the Israeli Supreme Court has ruled on petitions concerning the power of the state to arrest suspected terrorists and the conditions of their confinement. It has ruled on petitions

forcibly relocate residents of an occupied territory who pose a threat to state security;<sup>151</sup> how “freedom and dignity of someone whom the state wishes to confine in administrative detention” might be ensured;<sup>152</sup> the limited expertise of a court to inquire into military necessities;<sup>153</sup> and whether torture is ever permissible (as preventive interrogation *or* as punishment).<sup>154</sup>

To this last question, the Israeli Supreme Court responded with a resounding negative. Such considerations go to the relevance of the available alternatives when a torture proposal is afoot. They remain interspersed with the elephant in the

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concerning the rights of suspected terrorists to legal representation and the means by which they may be interrogated.” (citations omitted)).

151. See HCJ 7015/02 Ajuri v. IDF Commander in the West Bank [2002] IsrLR 33, available at [http://elyon1.court.gov.il/files\\_eng/02/150/070/A15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf) (“A delicate and sensitive balance is required. This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle.”). See also HCJ 5973/92 Ass’n for Civil Rights in Isr. v. Minister of Def. [1993], available at [http://elyon1.court.gov.il/files\\_eng/92/730/059/Z01/92059730.z01.pdf](http://elyon1.court.gov.il/files_eng/92/730/059/Z01/92059730.z01.pdf) (invalidating a deportation order devised without a proper hearing and due process and ordering a post-factum right to such a hearing).

152. CrimA 7048/97 Anonymous v. Minister of Def. [2000] IsrLR 11, available at [http://elyon1.court.gov.il/files\\_eng/97/480/070/a09/97070480.a09.pdf](http://elyon1.court.gov.il/files_eng/97/480/070/a09/97070480.a09.pdf) (“With that, there is no escape – in a freedom and security seeking democratic society – from the balancing of liberty and dignity and security. Human rights must not be turned into an axe for denying public and national security. A balance is required – a delicate and difficult balance – between the liberty and the dignity of the individual and national security and public safety. This balancing presumes – and in the petition before us the matter has not come up at all – that it is possible to enable – in a democratic freedom and security seeking state – the administrative detention of a person from whom a danger to national security is posed, but this possibility is not to be extended to the detention of a person from whom no danger is posed to national security and who merely constitutes a ‘bargaining chip.’” (citations omitted)).

153. HCJ 7015/02, Ajuri v. IDF Commander in the W. Bank [2002] IsrSC, available at [elyon1.court.gov.il/files\\_eng/02/150/070/a15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/a15/02070150.a15.pdf) (“In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted. Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld.” (citations omitted)).

154. See HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [1999] IsrLR 11, available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf).

courtroom: the institutional and jurisdictional competence of the Judicial Branch to decide questions involving national security. Delineating between legal and constitutional questions (which are within judicial competence) and national security questions (which are not) is no easy feat, but the Israeli Supreme Court has navigated this minefield successfully.<sup>155</sup> The Court has required proportionality of government need with action harming property and a due process hearing unless it interferes with imminent military necessity—occasionally permissible only as a preventive measure, not as collective retribution or punishment against the residents.<sup>156</sup> Most notably, in *Morcos v. Minister of Defence*,<sup>157</sup> the Tribunal invoked the equality principle in invalidating the disparate distribution of gas masks in the West Bank during the Gulf War.<sup>158</sup> That case fell squarely within the judicial province and is a contemplative lesson of Wars on Terror universally.

In this area, “engaging foreign and international law may assist in questioning our own understanding of the [American] Constitution by . . . (1) comparing the consequences of different interpretive approaches, (2) clarifying ‘the distinctive function of one’s own system,’ and (3) illuminating the dimensions of the universal constitutional rights.”<sup>159</sup> Finally, since courts are

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155. See HCJ 7015/02 Ajuri v. IDF Commander in the West Bank [2002] IsrLR 24, available at [http://elyon1.court.gov.il/files\\_eng/02/150/070/A15/02070150.a15.pdf](http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.pdf) (“In exercising this judicial review, we do not appoint ourselves as experts in security matters. We do not replace the security considerations of the military commander with our own security considerations. We do not adopt any position with regard to the manner in which security matters are conducted. Our role is to ensure that boundaries are not crossed and that the conditions that restrict the discretion of the military commander are upheld.” (citations omitted)).

156. See HCJ 5510/92 Turkeman v. Minister of Def. [1993] IsrSC 48(1) 217; see also DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 184-86 (2002).

157. HCJ 168/91 [1991] IsrSC 45(1) 467.

158. *Id.* at 470-71.

159. Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority,”* 69 ALB. L. REV. 653, 658 n.34 (2006) (internal quotation marks omitted) (citing Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 116-18 (2005)). See also Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 87 (2004) (“From the suprapositive perspective, the interpretive value of international human rights norms and decisions derives from the normative insight that they provide. The

usually path-dependent to follow through with the logic of Case A to Cases B, C, D and so on, looking to the courts of another jurisdiction and anticipating the scope and range of cases likely to arise in one's own jurisdiction is not only prudent, but imperative. It should not, for example, hurt American courts to envision the forms of interrogative techniques that the United Kingdom was accused of inflicting upon certain Irish Republican Army prisoners and to consider how the European Court of Human Rights reasoned through that dispute.<sup>160</sup> The United States will lose influence on the world stage,<sup>161</sup> if its federal judiciary declines to show "a decent [r]espect to the [o]pinions of [human]kind."<sup>162</sup> I will now move on to the histories of the Eighth Amendment and habeas corpus.

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interpreter should carefully examine whether the international conception of the right (or the feature at issue) rests primarily on consensual or institutional factors rather than on normative considerations, and whether its normative foundations are compatible with the basic assumptions of the U.S. constitutional system.”).

160. See Bell, *supra* note 23, at 345 (“1) [H]ooding at all times except during interrogation; 2) deprivation of sleep prior to interrogation; 3) holding the detainees prior to their interrogation in a room where there was a loud hissing sound; 4) wall-standing — that is, forcing detainees to stand against a wall for hours; and 5) subjecting detainees to reduced food and drink.” (referring to *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978))).

161. See Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1 (“The signature innovations of the American legal system — a written Constitution, a Bill of Rights protecting individual freedoms and an independent judiciary with the power to strike down legislation — have been consciously emulated in much of the world. And American constitutional law has been cited and discussed in countless decisions of courts in Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa and elsewhere.”); Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 114 (2002) (“[M]ost justices of the United States Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems.”).

162. See THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.”).

## II. History of the Eighth Amendment and Habeas Corpus: Applied to Citizens and Non-Citizens Alike

Enacted December 16, 1689, the English Bill of Rights stated that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>163</sup> Section 9 of the Virginia Declaration of Rights adopted the words verbatim.<sup>164</sup> Subsequently, “eight other states [(including Delaware,<sup>165</sup> Maryland,<sup>166</sup> New Hampshire,<sup>167</sup> North Carolina,<sup>168</sup> Massachusetts,<sup>169</sup> Pennsylvania,<sup>170</sup> and

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163. 6 ENGLISH HISTORICAL DOCUMENTS, 1660-1774, at 122, 124 (Andrew Browning ed., 2d ed. 1996). The English Bill of Rights characterized laws invading this guarantee as “utterly and directly contrary to the known laws and statutes and freedom of this realm.” *Weems v. United States*, 217 U.S. 349, 389 (1910).

164. VA. CONST. of 1776, § 9, *reprinted in* 7 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3813 (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

165. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 569 (“Sec. 11. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners.”).

166. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 1688 (“XIV. That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state; and no law to inflict cruel and unusual pains and penalties ought to be made in any case, or at any time hereafter . . . XXII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.”).

167. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 2456-57 (“XVIII. All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offense, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye. For the same reason, a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind . . . XXXIII. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

168. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, 2788 (generally prohibiting “cruel or unusual punishments”).

169. 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 1892 (“XXVI. No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.”).

170. 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 3101 (“Sec. 13. That excessive bail shall not be required, nor excessive fines imposed, nor

South Carolina<sup>171</sup>)] adopted the clause, the federal government inserted it into the Northwest Ordinance of 1787,<sup>172</sup> and it became the [E]ighth [A]mendment to the United States Constitution in 1791.<sup>173</sup> In his concurring opinion in *Furman v. Georgia*, Justice William O. Douglas acknowledged that contemporary debates “throw little light on its intended meaning.”<sup>174</sup> One constitutional scholar imputes the dearth of debate about the words “cruel and unusual punishment”—at both the First Congress and the state ratification conventions—to the intuition that, by the time of the Founding, the phrase had become “constitutional boilerplate.”<sup>175</sup> This supposed lack of controversy about the meaning of “cruel and unusual punishment” may suggest why the Supreme Court has not thought it necessary to evaluate the constitutionality of torture as punishment—that sentiment is encompassed by the very words of the Eighth Amendment.

Of course, correlation is not equivalent to causation, and the Eighth Amendment’s prohibition on torture cannot necessarily be assumed. Nonetheless, repeated and identical assertions about English history throughout the chain of documents leading up to the Eighth Amendment make such a deduction textually clear and more than just inferential.<sup>176</sup>

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cruel punishments inflicted.”).

171. 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 164, at 3264 (“Sec. 4. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.”).

172. U.S.C.A. Northwest Ordinance, art. II (1787).

173. Granucci, *supra* note 88, at 840 (internal footnotes added).

174. 408 U.S. 238, 244 (1972) (Douglas, J., concurring).

175. Granucci, *supra* note 88, at 840 (citation and internal quotation marks omitted).

176. *See, e.g.*, 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 Bill of Rights of 1688. The identical words appear in our Eighth Amendment.”); *Weems v. United States*, 217 U.S. 349, 394-95 (1910) (White, J., dissenting) (“The substantial identity between the provisions of these several constitutions or Bills of Rights shows beyond doubt that their meaning was understood; that is to say, that the significance attributed to them in the mother country as the result of the Bill of Rights of 1689 was appreciated, and that it was intended, in using the identical words, to give them the same well-understood meaning. . . . [T]he New Hampshire Bill of Rights contains a clause admonishing as to the wisdom of the apportionment of punishment of crime according to the nature of the offense, but in marked contrast to the re-enactment, in express and positive terms, of the cruel and unusual punishment clause of the English Bill of Rights, the provision as to

They highlight that, at least in the real world, the Eighth Amendment does not merely demand proportionality between the crime committed and the punishment imposed, but also that certain absolute limitations govern. The development of those limitations has followed the “evolving standards,” constitutional-development approach.<sup>177</sup> In addition to torture, those limitations include categorical prohibitions on the death penalty for certain types of crimes (non-homicidal person-on-person crimes in the civilian context) and for certain classes of criminals (the mentally insane, the mentally retarded, and minors). The English Bill of Rights concerned itself with the selective, random or irregular application of harsh penalties, and its goal was “to forbid arbitrary and discriminatory penalties of a severe nature.”<sup>178</sup> Professor Anthony F. Granucci explains the history as follows:

Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although amercement’s discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.

The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that “very likely

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apportionment is merely advisory, additionally demonstrating the precise and accurate conception then entertained of the nature and character of the prohibition adopted from the English Bill of Rights.”)

177. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

178. *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

there was no clause in the Magna Carta more grateful to the mass of the people.” Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments: A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . . .<sup>179</sup>

From the debates of the First Congress, we observe the following exchange:

Mr. SMITH, of South Carolina, objected to the words “nor cruel and unusual punishments;” the import of them being too indefinite.

Mr. LIVERMORE[:] The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it 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? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until 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.<sup>180</sup>

At the Massachusetts convention, debating over the Eighth

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179. Granucci, *supra* note 88, at 845-46 (citations and internal quotation marks omitted).

180. 1 ANNALS OF CONG. 782-83 (Joseph Gales ed., 1789).

Amendment, Mr. Holmes protested:

What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.<sup>181</sup>

Holmes's view, therefore, was that the Cruel and Unusual Punishments Clause imposed a restraint on Congress's right to create punishments for federal crimes. The concern was also about legislative power, since the new government created by the Constitution precluded, through a prohibition on the bill of attainder and other procedural protections, convictions and punishments by Executive fiat. On the other front, Livermore "favored rejection of the [A]mendment because of his fear of what later generations might make of it."<sup>182</sup> However, even though elasticity means both enhancement and retrenchment of protections, I have explained why in constitutional terms the latter is usually unacceptable. Indeed, the Livermore view suggesting rejection did not prevail, but of course the second prong of the Eighth Amendment proportionality analysis asks whether less drastic punitive alternatives are available. Apart from this, certain categorical prohibitions are also observed in the natural course of evolving societal standards.<sup>183</sup> The Framers' prohibition on "torturous punishments" does not demand the inference that *only* such punishments were outlawed by the Clause; it does, however, demand the inference

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181. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot ed., 2d ed. 1888).

182. Heffernan, *supra* note 74, at 1390.

183. See generally Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 666-680 (2004).

that torture *per se* was outlawed by the Clause. The fear that the legislature would have unlimited power to prescribe punishments was stated by Patrick Henry at the Virginia convention for ratification of the Eighth Amendment:

Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence — petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights? — “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Are you not, therefore, now calling on those gentlemen who are to compose Congress, to . . . define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more — you depart from the genius of your country. . . .

. . . .

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment.<sup>184</sup>

Henry then added:

But Congress may introduce the practice of the

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184. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (Jonathan Elliot ed., 2d ed. 1888).

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.<sup>185</sup>

Echoing the earlier point about the privilege against self-incrimination working in tandem with the Cruel and Unusual Punishments Clause,

Mr. George Mason [of Virginia] 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 . . . . Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.<sup>186</sup>

The Eighth Amendment, of course, would be applied to the States through the Fourteenth Amendment. Starting with the First Principles, irrespective of whether the Cruel and Unusual Punishments Clause is applied to the States through the Due Process or the Privileges and Immunities Clause of the Fourteenth Amendment, the effect is the same. Congressman Henry H. Bingham, when proposing the Fourteenth Amendment, maintained that “the privileges or immunities of citizens of the United States,” as protected by the Fourteenth Amendment, included protection against “cruel and unusual punishments”:

[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express

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185. *Id.* at 447-48.

186. *Id.* at 452.

letter of your Constitution, “cruel and unusual punishments” have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.<sup>187</sup>

We now arrive at the issue of equal protection of the laws in the national security setting. What of the difference in treatment between citizens and non-citizens? The Constitution, according to text or history, does not seem to permit a lesser degree of scrutiny for torture upon *non-citizens*.<sup>188</sup> “Under the Business as Usual model of emergency powers, a state of emergency does not justify a deviation from the ‘normal’ legal system.”<sup>189</sup> To date, the Supreme Court has approved of distinctions between citizens and non-citizens that bear a stronger affinity to matters of government jobs and other *privileges* as opposed to matters of *right*. Such privileges are few and far between and the government may reasonably prefer citizens over non-citizens in some cases.<sup>190</sup> But these privileges are worlds-apart from criminal law questions so central to an individual’s life, liberty and dignity. Here “selective and targeted infliction of punishments as serious as those dispensed by a criminal trial upon [those] without political potency (exercised through the franchise) registers equal-protection concerns.”<sup>191</sup> *Boumediene v. Bush*<sup>192</sup> and

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187. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

188. See generally Louis Henkin, *Foreign Affairs*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1071 (L. Levy & K. Karst eds., 1986).

189. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1043 (2003).

190. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.22 (1976) (non-citizens as a “class . . . suffer special disabilities”); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (government may not restrict ordinary civil servant jobs to citizens); *In re Griffiths*, 413 U.S. 717 (1973) (state may not exclude persons from law practice just because they are non-citizens); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“[C]lassifications based on alienage . . . are . . . subject to close judicial scrutiny.”). See also Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002).

191. Dasgupta, *supra* note 56, at 444. See also *id.* at 445 (“It is difficult to reconcile the Constitution’s equality instruction as the ‘salvation’ against inequities with . . . weak enforcement of that constitutional guarantee (especially when the group singled out for unique treatment (in this case

Guantanamo Bay do not provide the only context in which habeas corpus has been suspended in this country.<sup>193</sup> However, this recent scenario has breathtaking dimensions because of the citizen-noncitizen distinction, mirroring in many respects the Japanese internment during World War II (based on ancestry and race). Like the Israeli Supreme Court's *Morcos* decision insisting on equality for gas mask distribution, American courts, during the current War on Terror (and presumably we define the "War on Terror" that broadly), must not stop policing the protection of individuals' rights.

Sovereigns have a duty to govern impartially and neutrally, in observance of Justice Coke's centuries-old admonition to King James I that "quod Rex non debet esse sub homine, sed sub Deo et lege."<sup>194</sup> The word "neutrality" has widely been used by the United States Supreme Court to describe the role of the government in such situations. In *Romer v. Evans*, the Court spoke of the government's constitutional "[pre-]commitment to the law's neutrality where

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foreigners) lacks even the political agency to make waves electorally). If legislative changes cannot be made by the aggrieved group through democratic means, then the doctrinal foundation of the judicial restraint philosophy suffers a setback."). Even though we do not live in a system of parliamentary supremacy and instead in a regime where a written constitution allows the judiciary to question the legality of the actions of both the executive and the legislature, Congress has shown itself amenable to respecting the human dignity of persons in many cases. *See, e.g.,* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *overruled by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *overruled, in part, by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality); 1 BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 2 (3d ed. 1996) ("A spate of Court decisions in the late 1980s drew congressional fire and resulted in demands for legislative change [culminating in the 1991 Civil Rights Act]." (footnote omitted)).

192. 128 S. Ct. 2229 (2008).

193. *See, e.g.,* Justia.com, U.S. Supreme Court Center, <http://supreme.justia.com/constitution/article-1/51-habeas-corpus-suspension.html> (last visited Nov. 24, 2009) ("The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900)." (citations omitted)).

194. Latin for "the king is not subject to man, but subject to God and the law."

the rights of persons are at stake.”<sup>195</sup> This echoed Justice Stevens’ earlier assertion, in *City of Cleburne v. Cleburne Living Center*, that constitutional constraints on government conduct “include[d] elements of legitimacy and neutrality that must always characterize the performance of the sovereign’s duty to govern impartially.”<sup>196</sup> Invalidating a private litigant’s use of gender in a peremptory challenge and holding it to a presumptively unconstitutional criterion, Justice Kennedy, in *J.E.B. v. Alabama*, also invoked the same word.<sup>197</sup> Alienage or non-citizen status may well have to be used as a distinguishing factor, but never as a pretext or without an “exceedingly persuasive justification.”<sup>198</sup>

Even if the Court cannot or is unprepared to apply *de facto* strict scrutiny to such classifications, the Court should expressly remove them from *rational basis*-land. If not *strict scrutiny*, then some form of *heightened scrutiny* is necessary. Under existing case law, the deprivation of constitutional rights in criminal or detention law (including the freedom from torture) would be tantamount to fencing out of the judicial process those who already are excluded from the political process (at least through suffrage). Setting up a lenient torture warrant procedure or allowing torture altogether for non-citizens would penalize “millions of green card holders and five billion people across the planet” and slot them “into a category that enables a different, and far inferior . . . procedure than what American citizens face.”<sup>199</sup> Torture is not a situation where differential treatment based on alienage qualifies as a “plausible reason[ ],”<sup>200</sup> at least not a constitutionally justifiable

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195. 517 U.S. 620, 623 (1996).

196. 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

197. 511 U.S. 127, 153 (1994) (Kennedy, J., concurring in judgment).

198. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

199. Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1367 (2007) (in these circumstances, “standard checks on government abuse, such as political accountability, fail to operate”). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161-62 (1980); Guido Calabresi, *The Supreme Court: 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 92-93 (1991).

200. See *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). See also *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will

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Irrespective of what constitutes “torture” and how sound that definition might be, it only means something if the right to be free from torture can be vindicated in court. Therefore, the right not to be tortured shares an important connection with habeas corpus itself. Under the Constitution, an individual’s right to “the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety” so requires.<sup>201</sup> Without habeas corpus, the government has no obligation, and the accused no right, to have the facts tried in court. In the history of habeas corpus, we first encounter the infamous *Darnel’s Case* in Stuart England.<sup>202</sup> That dispute arose from King Charles I’s decision to issue a warrant to arrest those who refused to become his creditors. Public disapproval rising, the House of Commons rapidly enacted the Petition of Right,<sup>203</sup> reproving such “imprison[ment] without any cause,” and proclaimed that “no freeman in any such manner as is before mencioned [shall] be imprisoned or detained.”<sup>204</sup> Later, the Habeas Corpus Acts of 1640 and 1679 provided individuals a right to have their imprisonment (through the order or warrant of the Privy Council or the monarch herself) questioned by an impartial court. After the tense period of *interregnum*, Parliament stipulated procedures governing access to habeas relief.<sup>205</sup> It is fair to say that “[a]t its historical core, the writ of habeas

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eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” (footnote omitted).

201. U.S. CONST. art. I, §9, cl. 2.

202. *Darnel’s Case*, 3 How. St. Tr. 1 (K.B. 1627).

203. See 3 Car. 1, c. 1 (1627) (Eng.), reprinted in 5 STATUTES OF THE REALM 23-24 (1810).

204. *Id.* at 24.

205. This Act, which William Blackstone later considered the “second *magna carta*, and stable bulwark of our liberties,” served as the paradigm for the habeas laws of the original thirteen American colonies. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 137 (Adamant Media, 2000). See also 1 WILLIAM BLACKSTONE, COMMENTARIES \*137; Rex A. Collings, Jr., *Habeas Corpus for Convicts — Constitutional Right or Legislative Grace*, 40 CAL. L. REV. 335, 338-39 (1952). Moreover, THE FEDERALIST No. 84 (Alexander Hamilton), explained the writ of habeas corpus, the only common law writ appearing in the United States Constitution, as “the practice of arbitrary imprisonments” and “in all ages, the favorite and most formidable instruments of tyranny.”

corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”<sup>206</sup>

Remarkably, the New York state convention considering the ratification of the Constitution in July 1788 noted:

[E]very *Person* restrained of his Liberty is entitled to an enquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such enquiry or removal ought not to be denied or delayed, except when, on account of Public Danger, the Congress shall suspend the privilege of the Writ of Habeas Corpus.<sup>207</sup>

Notice the choice in diction. “The word ‘person,’ as opposed to the more limiting term ‘citizen,’ informs the universal character of the privilege, irrespective of the [tortured or interrogated person’s] citizenship status.”<sup>208</sup> What else can we infer? Perhaps we can infer that the reasoning behind the otherwise-salutary theory of judicial restraint falls apart when the group singled out for a disfavor lacks the political wherewithal to hold accountable those legislators and that President whom they could not oust through elections because they had no suffrage in our polity. Textually, too, the Constitution does not favor such distinctions. The adoption of the Fourteenth Amendment’s Equal Protection Clause extended to state action a requirement that the government may not arbitrarily discriminate against some persons in preference to others; this obligation had already been imposed upon the Federal Government through the Fifth Amendment’s Due Process Clause. Justice Robert H. Jackson advanced a theory of judicial review whose *fons et origo* was the government’s (and associatively, society’s) enforcement of equality: “Courts can take no better measure to assure that laws will be just than to require that laws be equal in

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206. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

207. Resolution of the New York Ratifying Convention (July 26, 1788), reprinted in 1 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 328 (Jonathan Elliot ed., 2d ed. 1888) (emphasis added).

208. Dasgupta, *supra* note 56, at 444.

operation.”<sup>209</sup>

The argument runs that the political process will not allow (or will respond with a backlash to) arbitrary, capricious and generally undesirable inconveniences when those inconveniences are distributed evenly throughout society. No one or two groups will disproportionately suffer. As Professor Louis Henkin points out, “[t]he choice in the Bill of Rights of the word ‘person’ rather than ‘citizen’ was not fortuitous; nor was the absence of a geographical limitation. [It] reflect[s] a commitment to respect the individual rights of all human beings.”<sup>210</sup> Same with the Fourteenth Amendment. The Amendment was initially drafted to forbid state action discriminating between “persons because of race, color or previous condition of servitude[,]” and instead, it went on to prohibit, in sweeping terms, such discrimination against “any person within its jurisdiction.”<sup>211</sup> Henkin’s view, publicly endorsed by at least one Member of the present Supreme Court, is that “[w]herever the United States acts, it can only act in accordance with the limitations imposed by the Constitution.”<sup>212</sup>

In the field of national security, where courts give the political Branches the most deference, even the war power is

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209. *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) (“[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”).

210. LOUIS HENKIN, *THE AGE OF RIGHTS* 139 (1990). This phrase “the People” has repeatedly been used in the Constitution’s text as conceptually different from the phrase “persons.” The former refers to the polity and the citizenry, in whose name the governments, both of the United States and of the several states, exist. “Persons” refers to individuals whose rights are protected and defended by some parts of the original Constitution, most of the Bill of Rights, and several of the Amendments.

211. *J.E.B. v. Alabama*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring in judgment) (citations omitted). Of course, it is the Fifth Amendment and not the Fourteenth that limits the reach of federal official action. Nevertheless, the inference is noteworthy because the Fourteenth Amendment was modeled upon and incorporated the Bill of Rights.

212. Ruth Bader Ginsburg, *A Tribute to Louis Henkin*, 38 COLUM. HUM. RTS. L. REV. 467, 468 (2007).

governed by “applicable constitutional limitations.”<sup>213</sup> “[I]n times of war or of perceived threats from abroad, civil liberties have been compromised by actions of the Congress or the president that were upheld by the courts.”<sup>214</sup> The Framers were brave and visionary statesmen, and they outright forbade torture—indeed it is clear that even if they could not define what a “cruel and unusual punishment” might necessarily look like, they did typify torture as such. However, their challenges were not of a nuclear-scale, as they are now, so ending the constitutional inquiry there would be extrapolating history out of context.<sup>215</sup> This should not provide license to silence our supreme domestic laws and international *jus cogens*; rather, it should be an invitation to work within the laws.<sup>216</sup>

### III. Why Qualified Immunity (Ironically) Helps the ‘Torture Warrant’ Argument

Even if we review an incident of torture after-the-fact with

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213. *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919).

214. Morton H. Halperin, *National Security, in OUR ENDANGERED RIGHTS* 281 (Norman Dorsen ed., 1984).

215. *See, e.g.*, Laurence H. Tribe, First Conference on Computers, Freedom & Privacy: The Constitution in Cyperspace (Mar. 26, 1991) (pre-conference paper available at <http://cpsr.org/prevsite/conferences/cfp91/tribe2.html>) (stating that “the Framers of our Constitution were . . . profoundly wise. They bequeathed us a framework for all seasons, a truly astonishing document whose basic principles . . . are suitable for all times and all technological landscapes”).

216. *See* LEE EPSTEIN ET AL., *THE SUPREME SILENCE DURING WAR*, at 1-2 n.4 (2004), [http://www.allacademic.com/meta/p83449\\_index.html](http://www.allacademic.com/meta/p83449_index.html); H CJ 168/91 *Morcos v. Minister of Def.* [1991] IsrSC 45(1) 467, 470-71 (“When the cannons speak, the Muses are silent. But even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.”); H CJ 428/86 *Barzilai v. Gov’t of Israel* [1986] IsrLR 140 (“[F]or there is no security without law, and the rule of law is a component of national security. Security needs dictate that the proper investigative machinery be found, or else the General Security Service will be unable to fulfill its task. The strength of the Service lies in the public confidence it enjoys, in the trust placed in it by the court. If security interests become the paramount consideration, the public as well as the court will lose their trust in the Security Service and in the legality of its operations. Without trust, the State authorities cannot function. That is the case with the public trust in the courts, and so it is with the public trust in the other governmental organs.” (citation omitted)).

tremendous deference to the instantaneous decision that had to be made, purely invidious criteria, such as unconstitutional discrimination or disparate impact (conscious or not), could well have injected themselves into the torturer's decision. The standard for qualified immunity has gradually been bent so favorably towards the government officials allegedly causing constitutional violations, and has put such an extraordinary burden on plaintiffs, that it no longer works in most situations. That is to say that qualified immunity is almost always granted, and therefore, it has stopped serving as a *post-hoc* deterrent. In effect, the current frequency of qualified immunity approval (by the Supreme Court to government officers accused of violating persons' legal rights) compels us to think of more workable alternatives to control how often and how inaccurately torture is imposed in ticking-bomb scenarios.

Torture warrants remain a feasible pre-trial and preventive interrogation alternative. A recent example should be illustrative. The United States Supreme Court's *Ashcroft v. Iqbal*<sup>217</sup> decision has received less coverage (both in the media and scholarship) than it should be receiving. *Iqbal* and its precursors render it likely that officials accused of torturing or otherwise violating the constitutional rights of those detainees who were rounded up immediately after September 11, 2001, will enjoy qualified immunity. The facts and claims addressed in *Iqbal* are notable.<sup>218</sup> Because the detainees were primarily

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217. 129 S. Ct. 1937 (2009).

218. The *Iqbal* Court noted:

The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant Mueller [then-Director of the Federal Bureau of Investigation (FBI)], arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft [then-Attorney General of the United States] and Mueller in discussions in the weeks after September 11, 2001." Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject"

Arabs and Muslims, discrimination claims were included. The governing statutory provision is Federal Rule of Civil Procedure 8(a)(2), which requires that a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” The law’s “constitutive principle[s]” are that the rules must, at a minimum, be transformative, accountable, and *prospective*.<sup>219</sup> Because Rule 8 states an implied cause of action (unquestionably raising important “separation of powers concerns”),<sup>220</sup> it is presumed to be a “federal analog to suits brought against state officials under Rev. Stat. §1979, 42 U.S.C. §1983.”<sup>221</sup>

Despite the due process arguments involving *Mathews*, *Sandin*, and *Wilkinson* (recited in Part I), the *Iqbal* Court raised the standard of pleading so high that it may be arguably insurmountable in cases involving similar torture scenarios. *Iqbal* thus makes clear that officials will, more likely than not, receive the benefit of the doubt and thus receive qualified immunity. Rule 8, the Court said, “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”<sup>222</sup> Such specific evidence is hard to come by in situations where a torturee does not know the names of the perpetrators; sometimes all a plaintiff will know is the supervisor’s name and identity. Raising the Rule 8 threshold so high effectively

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respondent to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” The pleading names Ashcroft as the “principal architect” of the policy, and identifies Mueller as “instrumental in [its] adoption, promulgation, and implementation.”

*Id.* at 1944 (citations omitted).

219. See LUC B. TREMBLAY, *THE RULE OF LAW, JUSTICE, AND INTERPRETATION* 150-55 (1997).

220. See, e.g., Ryan D. Newman, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 473 (2006).

221. *Hartman v. Moore*, 547 U.S. 250, 254-55 n.2 (2006). See also *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

222. *Iqbal*, 129 S. Ct. at 1949 (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders naked ‘assertion[s]’ devoid of further factual enhancement.” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

bars these cases from federal court.

Notwithstanding Rule 8's prescription that a plaintiff's factual allegations must be taken to be true, *Iqbal* rejected the plaintiff's allegations that the government defendants "agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that [the then-Attorney General of the United States] was that policy's 'principal architect'; and that [the Director of the Federal Bureau of Investigation (FBI)] was 'instrumental' in its adoption and execution . . . ." <sup>223</sup> Such a standard makes it likelier that the torturer will employ torture whenever she has some doubt, and it gives fruition to the prophecy that the government "might come to rely on torture to avert attacks": "legalizing torture in high evidence cases can reduce security and increase agency incentives to torture even in low evidence cases, leading to a 'slippery slope.'" <sup>224</sup>

#### A. *Applying Qualified Immunity*

The pivotal Supreme Court decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* <sup>225</sup> held that implied causes of action exist to protect against federal officials' violations of the Fourth Amendment (protecting against unreasonable searches and seizures). <sup>226</sup> *Bivens* "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." <sup>227</sup> As an *implied* cause of action, *Bivens* has been the target of enormous criticism (for allegedly anti-democratic judicial law-making). <sup>228</sup> Individuals

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223. *Id.* at 1941.

224. Hugo M. Mialon, Sue H. Mialon & Maxwell B. Stinchcombe, An Economic Analysis of Torture in Counterterrorism 1 (Dec. 12, 2008) (unpublished article), available at <http://ssrn.com/abstract=1268441>.

225. 403 U.S. 388 (1971).

226. *See, e.g.*, *Davis v. Passman*, 442 U.S. 228, 234 (1979) (holding that a congressional employee may bring a *Bivens* action against a former congressman for a Fifth Amendment violation); *Carlson v. Green*, 446 U.S. 14, 19-20 (1980) (holding that a deceased federal prisoner may be entitled to a *Bivens* action under the Eighth Amendment).

227. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

228. *See, e.g.*, *Carlson*, 446 U.S. at 34 (Rehnquist, J., dissenting) ("In my view, it is 'an exercise of power that the Constitution does not give us' for this Court to infer a private civil damages remedy from the Eighth Amendment or

victimized by the denial of this right may sue for the infraction of the Fourth Amendment itself, despite the absence of any federal statute expressly authorizing such a suit.<sup>229</sup>

The presumption was that an automatic remedy for the violation derives from the history and magnitude of the right violated, and that the cause of action fails to attach only when Congress disabuses the courts from applying such a remedy.<sup>230</sup> Here the *default* understanding is in favor of a federal law remedy since constitutional abuses require special enforcement, which is not necessarily appropriate for violations of federal positive law. In *Saucier v. Katz*,<sup>231</sup> and other cases, however, the Court has qualified *Bivens* by using the vehicle of qualified immunity.<sup>232</sup> The qualified immunity doctrine states that if the government defendant violated a constitutional right

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any other constitutional provision.” (quoting *Bivens*, 403 U.S. at 428 (Black, J., dissenting))).

We would more surely preserve the important values of the doctrine of separation of powers — and perhaps get a better result — by recommending a solution to the Congress as the branch of government in which the Constitution has vested the legislative power. Legislation is the business of the Congress, and it has the facilities and competence for that task — as we do not.

*Bivens*, 403 U.S. at 411-12 (Burger, C.J., dissenting).

229. See *Bivens*, 403 U.S. at 397.

230. See *id.* at 396-97. Some scholars would openly truncate Congress’ right to limit the causes of action, and they therefore do not bemoan the lack of Congress’ express validation. However, that step would be precipitous and would amount to cutting off a budding dialogue with a coordinate branch. See, e.g., George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs – Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 294-95 (1989) (asserting that because *Bivens* protects constitutional rights, less deference to Congress is required than in other cases); Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540-43 (1972) (analogizing federal statutes with the Constitution and arguing that courts should infer remedies constitutionally as they do statutorily); Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1153 (1989) (recognizing implied constitutional remedies as an essential aspect of federal judicial oversight); Joan Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 297-302 (1984) (arguing that *Bivens* remedies should also apply to the First Amendment).

231. 533 U.S. 194 (2001).

232. See, e.g., *id.*; *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

that was not clearly established when the right was violated, then the official remains immune from suit.<sup>233</sup> The qualified immunity defense is synonymous with the Model Penal Code's necessity defense.<sup>234</sup> This is the background of the post-torture scenario.

The pre-torture configuration, however, goes to the merit of a torture warrant: it might actually aid the suspect. Requiring the government to receive a torture warrant from a judge will ensure that the suspect retains some realistic chance of averting torture in the face of Executive fiat. An impartial arbiter, better situated in the moment, with 20-20 vision of the situation, is more capable of assessing the imminent need for torture than is the actual torturer. The deference I propose is a hybrid of Fourth Amendment search and seizure principles and the qualified immunity decisional law governing official conduct in hindsight. Qualified immunity, to be prospective and fair to the parties, requires: (1) that the reviewing standard be *de novo* and the reviewing court consider a district court's rejection of qualified immunity if the question turns on a legal point; (2) that a constitutional violation subject to *Bivens* federal actions be a matter of clearly established law; (3) that the personal involvement of the defendants be alleged and proven; and (4) that the pleading standard be such that a complaint "give[s] the defendant fair notice of what the

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233. *Saucier*, 533 U.S. at 200-01. Such cases include torture, discrete acts of discrimination, and other government behavior forbidden by the Constitution. *Bivens* is federal common law; Congress has not eviscerated its central holding. See, e.g., Riddhi Dasgupta, *Bivens in the War on Terror: Scope for the Supreme Court in its Upcoming Case*, 3 CHARLESTON L. REV. 397, 411-12 (2009) ("The Supreme Court deconstructed the qualified immunity inquiry into two parts: first, to determine whether the facts indicate and prove that a government defendant violated another's constitutional rights; and second, if indeed the defendant did do so, then was the constitutional right thus violated 'clearly established' at the time of the government official's infraction? . . . [T]he dilemma lies on the prongs of an *ex ante* versus *ex post* judicial inquiry over whether the defendant is entitled to qualified immunity." (citation omitted)); Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 460 (1978). Absent legislation by Congress, the Court weighs statutory *stare decisis* heavily.

234. MODEL PENAL CODE § 3.02. See also Goldberg, *supra* note 37, at 17 ("The Model Code rejects any limitations on necessity cast in terms of particular evils to be avoided or particular evils to be justified.").

plaintiff's claim is and the grounds upon which it rests."<sup>235</sup>

The hurdle a court must clear before reaching the merits is the pleading standard.<sup>236</sup> Constitutional rights violations are not the only context where pleading standards are used as a procedural roadblock.<sup>237</sup> Prior cases require litigants to satisfy the "notice" pleading requirements, providing fair and adequate notice to their opponents regarding the claim and its supporting grounds.<sup>238</sup> Rule 8 requires that the complaint "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory."<sup>239</sup> And even though courts must "give the plaintiff the benefit of every reasonable inference to be drawn from well-pleaded facts,"<sup>240</sup> they are not required to accept as true conclusory allegations, legal characterizations, unreasonable inferences, or unwarranted deductions of fact.<sup>241</sup>

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235. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The court "must take all the well pleaded allegations as true [and] construe the complaint in the light most favorable to the plaintiff." *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 665 (3d Cir. 1988) (citations and internal quotation marks omitted) (referring to FED. R. CIV. P. 8(a)(2)).

236. In an earlier article previewing *Ashcroft v. Iqbal's* deliberation in the Supreme Court, I predicted: "Even though this article does not delve significantly into the issue of pleading standards that may be the frontier where the battle for qualified immunity is decided. Allowing the case to go through those gates, or cutting off its movement, might make all the difference." Dasgupta, *supra* note 233, at 418. While accepting that *Iqbal's* First Amendment claims might be meritorious, by raising the pleadings standards the Court gave the high-ranking officials immunity from monetary damages.

237. Securities law is another such context. See *Dura Pharm. v. Broudo*, 544 U.S. 336, 347 (2005) ("[O]rdinary pleading rules are not meant to impose a great burden on a plaintiff. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. . . . [A]llowing a plaintiff to forgo giving any indication of the economic loss and proximate cause would bring about harm of the very sort the statutes seek to avoid.") (citations omitted)).

238. See, e.g., *Swierkiewicz*, 534 U.S. at 512; *Conley*, 355 U.S. at 47.

239. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (emphasis in original) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Courts of Appeals have applied this test with some success. See, e.g., *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006); *Snow v. Directv, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006).

240. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

241. See *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

All of these pleading requirements are on top of the fact that Rule 16 of the Federal Rules of Civil Procedure already provides for pretrial procedures to bar frivolous or other patently unmeritorious and vexatious claims.<sup>242</sup>

It follows that a heightened pleading standard might doom the torturee's money damages suit: due to the unusual circumstances and lack of specific knowledge during his prison confinement, his allegations do not decisively pinpoint when the alleged conduct took place, who the actors were, or what the locations were.<sup>243</sup> Especially when, as in *Bivens*, no criminal charges have been filed, a torturee has no remedy to recover other than money damages. In *Iqbal*, although the defendant was convicted of criminal charges, there is no other remedy for the plaintiff to pursue other than damages in a *Bivens* action—nothing else can make him whole or compensate him for the alleged violations of his constitutional rights (namely, the First and Fifth Amendments). The government-defendants would prefer a high pleading threshold, which would likely keep the merits of the case out of federal court (due to *Twombly*, or *Iqbal* itself). The torturee's allegations would likely be found insufficiently detailed. Sometimes, federal courts of appeal “review the district court's denial *de novo*, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor.”<sup>244</sup> This civil procedure rule is germane when

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242. See *Twombly*, 550 U.S. at 593 n.13 (Stevens, J., dissenting) (“Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, ‘the elimination of frivolous claims or defenses,’ Rule 16(c)(1); ‘the necessity or desirability of amendments to the pleadings,’ Rule 16(c)(2); ‘the control and scheduling of discovery,’ Rule 16(c)(6); and ‘the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems,’ Rule 16(c)(12).”).

243. See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 924-26 (2009) (identifying various forms of information asymmetry with respect to costs and facts—including “informed plaintiffs and uninformed defendants” and “uninformed plaintiffs and informed defendants”—as a primary cause of meritless suits; regulatory responses and gatekeeping rules must be calibrated, and, if necessary, recalibrated, to measure up to the task).

244. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001).

a district court rejects a Rule 12(b)(6) motion to dismiss the suit and denies a qualified immunity motion.

Supreme Court precedent, viz. *Mitchell v. Forsyth*, provides that when a federal district court denies a motion for qualified immunity, “to the extent that it turns on an issue of law,” its judgment is “an appealable ‘final decision.’”<sup>245</sup> *Mitchell* expressed the flip side to the plaintiff’s argument that she should be made whole after her suffering: specifically, the government defendants’ defense is that they were following the law as it existed at the time and which they had had no good-faith reason to believe would change in the middle of the game. Since qualified immunity, much like absolute immunity, is after all a right not to stand trial, such a right of *the officers* is violated if a false-start case goes to trial incorrectly.<sup>246</sup> Courts have held that “[q]ualified immunity is an immunity from suit and not just a defense to liability.”<sup>247</sup> Thus, a decision prejudicing this right might be reversed or vacated on an interlocutory appeal.<sup>248</sup> The federal statutory provision, 28 U.S.C. § 1291, does not require the case to come to an end or for a “final judgment” to be entered such that the district court’s denial of qualified immunity can be reviewed on appeal.<sup>249</sup> As soon as a federal district court finds that a plaintiff’s factual allegations are true, a reviewing court is empowered to determine if the facts point towards allegedly unconstitutional conduct and infringe upon a right clearly established at the time of the violation.

In *Johnson v. Jones*, the Supreme Court ruled that interlocutory appeals raising qualified immunity as a defense are permitted to the extent that they seek review of legal, as opposed to factual, questions.<sup>250</sup> Facts are within the jurisdiction of the court of original jurisdiction, and a very high burden must be met before factual conclusions are reversed. *Johnson* thus restricted the effect of *Anderson v. Creighton*, which provided that plaintiffs must demonstrate some factual similarities between constitutional holdings and officers’

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245. 472 U.S. 511, 530 (1985) (quoting 28 U.S.C. § 1291 (2000)).

246. *Id.* at 526 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).

247. *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d. Cir. 2007).

248. *Mitchell*, 472 U.S. at 528-29.

249. *Id.* at 530.

250. 515 U.S. 304, 319-20 (1995).

alleged violations.<sup>251</sup> Similarly, the Court in *Hope v. Pelzer* refused to hold that unconstitutional government acts must be “materially similar” to acts that already have been held unconstitutional.<sup>252</sup> Were the Court to fashion such a gerrymandered rule, officers might have the perverse incentive to purposefully avoid *that* specific violation but few others. “While *Bivens* . . . enables pecuniary damages suits to be brought against federal officials for their alleged unconstitutional acts, 42 U.S.C. § 1983 enables the same to be brought against state officials.”<sup>253</sup> The Supreme Court’s qualified immunity jurisprudence does not clear out the “tension between the Court’s objective that constitutional tort cases be terminated at an early stage of litigation and the inherently fact-based nature of the reasonableness inquiry that lies at the heart of the qualified immunity’s analytical framework.”<sup>254</sup>

Qualified immunity, as it stands now, is available to federal and state officials commissioned with *discretionary* functions in cases where their conduct did not violate “clearly established statutory or constitutional rights.”<sup>255</sup> As this logic goes, these officials had no forewarning that what they were doing to the individual skated close to a constitutional limitation or even went beyond it.<sup>256</sup> The *Mitchell* Court refused to grant absolute immunity to cabinet officials, deciding that “the considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President of the United States do not demand a similar immunity for Cabinet officers or other high executive

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251. 483 U.S. 635, 640-41 (1987).

252. 536 U.S. 730, 746 (2002).

253. Dasgupta, *supra* note 233, 409-10.

254. *Id.* at 410 (quoting Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230-31 (2006)). See *Flatford v. City of Monroe*, 17 F.3d 162, 166 (6th Cir. 1994) (“[T]he difficulty for all judges with qualified immunity has not been articulation of the rule, but rather the application of it.”); Charles R. Wilson, “*Location, Location, Location*”: *Recent Developments in the Qualified Immunity Defense*, 57 N.Y.U. ANN. SURV. AM. L. 445, 447-48 (2000).

255. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also *Procunier v. Navarette*, 434 U.S. 555, 565 (1978) (requiring a “clearly established” constitutional right to defeat the qualified immunity defense).

256. See *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007).

officials.”<sup>257</sup> Even if the plaintiff’s rights were violated under clearly established law, there remains a not-very-remote possibility that the officer might still receive qualified immunity. The Supreme Court has been developing this aspect of the qualified immunity doctrine for the past three decades and it does not yet appear that the Court has completed its project.

In 1982, for instance, the Court dramatically supplanted the “malice” standard (the government actor’s state of mind while violating the constitutional rights) with the “reasonable person” test (assessing whether a reasonable officer would have understood her conduct to be a constitutional violation, as the law stood).<sup>258</sup> The *Saucier* Court asked if “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”<sup>259</sup> Other than the most obvious cases, there is great room for subjectivity here: Who is a “reasonable” officer? What are the elements of the “clearly established” state of the law? Must that “reasonable” government actor have revealed her prior knowledge on the subject? If that is the standard we apply, then would officers be constrained to avoid certifications or promotions lest they reveal too much awareness of complex subject matters that could later deprive them of qualified immunity?<sup>260</sup>

This “reasonableness” does not depend on “what a *lawyer*

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257. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985).

258. *See Harlow*, 457 U.S. at 817-18. *See also* Lisa R. Eskow & Kevin W. Cole, *The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the Specter of Subjective Intent that Haunts Objective Legal Reasonableness*, 50 BAYLOR L. REV. 869, 881-88 (1998); Newman, *supra* note 233, at 460 (“Surely [an] officer could not *reasonably* believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.” (emphasis in original)).

259. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

260. The issue of racial profiling was once again brought to national attention when a police officer arrested Harvard University professor Henry Louis Gates, Jr., an African-American man, while the professor was entering his *own* home through the back door. *See* Kevin Johnson, Alan Gomez, & Marisol Bello, *Gates Arrest Reignites Debate on Race*, USA TODAY, July 23, 2009, available at [http://www.usatoday.com/news/nation/2009-07-23-cop-gates\\_N.htm](http://www.usatoday.com/news/nation/2009-07-23-cop-gates_N.htm) (reporting that arresting officer is “a police academy instructor on the dangers of racial profiling”).

would learn or intuit from researching case law.”<sup>261</sup> In its place, “the standard to measure liability has shifted from malice to assumption of expected prior knowledge, both of which are indecipherable elements of *scienter*, especially in close cases.”<sup>262</sup> The courts should make it crystal clear, however, that the defense is available for government officers only when none of the “reasonable inferences,”<sup>263</sup> including those that are implied or deduced logically from prior decisions, suggest that a plaintiff’s claims cannot survive the two-part qualified immunity test.

Without the defendant’s personal involvement, though, she cannot be held liable. Supervisory liability is not, according to *Iqbal*, cognizable<sup>264</sup>—even though Justice Souter’s dissenting opinion efficaciously pointed out that a claim would be actionable where government supervisors have “actual knowledge of a subordinate’s constitutional violation and acquiesce[ ];”<sup>265</sup> where they “know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see;”<sup>266</sup> “where the supervisor was grossly negligent;”<sup>267</sup> or “where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate.”<sup>268</sup> Justice Souter believed that the *Iqbal* Court discarded, not merely limited, the possibility of supervisory liability.<sup>269</sup>

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261. *Iqbal*, 490 F.3d at 152 (emphasis added) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001)).

262. Dasgupta, *supra* note 233, at 412 (emphasis added).

263. *See Iqbal*, 490 F.3d at 153 (quoting *Johnson*, 239 F.3d at 255).

264. The Court cited cases to that effect. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) (citing *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *Dunlop v. Munroe*, 11 U.S. 242 (1812); *Robertson v. Sichel*, 127 U.S. 507 (1888)). But the *Iqbal* Court neglected to note that judgments of policy made by those supervisors fall squarely *within* those “official duties.” *See Robertson*, 127 U.S. at 516.

265. *Iqbal*, 129 S. Ct. at 1958 (Souter, J., dissenting).

266. *Id.* (Souter, J., dissenting) (quoting *Int’l Action Ctr. v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004)).

267. *Id.* (Souter, J., dissenting) (citation omitted).

268. *Id.* (Souter, J., dissenting) (citation omitted).

269. *Id.* at 1957 (Souter, J., dissenting) (“Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very

### B. *Reviewing the Legality of the Torture Warrant*

The possibility of a torture warrant would only be put on the table if there was an extremely high probability that the torturee possessed valuable information and there was the risk of an attack of significant proportion, putting innocent lives at stake. If performing an illegal search upon an individual's person is presumptively unconstitutional, then so is torture—unless the actor is informed by a combination of probabilities that makes it significantly likely (at least more likely than not) that the torturee is in possession of information that could save lives and that the torturee will reveal this information under intense, perhaps searing, physical or mental pain.

The deference later given to judging the constitutionality of a specific torture warrant is not tantamount to an abdication of judicial review. Rather, it speaks to the balance that needs to be struck between genuinely compelling national security needs and the dignity of individuals, as enshrined in the Constitution. Professor Dershowitz's torture warrant mechanism is not perfect but it "brings the idea of foundational violence back to the surface" and "seeks to admit the violence [while] control[ling] it with law."<sup>270</sup> Dershowitz argues that the mechanism will pull the problem out into the sunlight and in fact "reduce the use of torture to the smallest amount and degree possible."<sup>271</sup> But torture secured by a warrant is superior to its alternatives on both extremes, and as a "least drastic means" it is narrowly-tailored to suit the compelling societal interests and to honor the rights of torturees. Applying the Model Penal Code's necessity defense parameters "suggests that it would justify torture in the extreme situations and, importantly, fail to justify it in less extreme situations."<sup>272</sup> The elements include: (i) "[t]he harm to be averted must be imminent"; (ii) "[t]he act charged must have been done to prevent a significant evil"; (iii) "[t]here must be a causal relationship between the criminal conduct and the harm to be

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principle that the majority rejects.").

270. John T. Parry, *Torture Warrants and the Rule of Law*, 71 ALB. L. REV. 885, 904-05 (2008).

271. DERSHOWITZ, *supra* note 16, at 141 (emphasis added).

272. Goldberg, *supra* note 37, at 17.

averted”; (iv) “[t]here must have been no adequate alternative”; and (v) “[t]he harm caused must not have been disproportionate to the harm avoided.”<sup>273</sup>

The mechanism must be enacted by Congress and signed into law by the President, as opposed to achieved by the President’s executive order alone.<sup>274</sup> What Congress may vaguely direct the President to do, the Executive might transform into actions that Congress could not have envisioned or will not countenance.<sup>275</sup> The most effective way to hold Congress accountable is to require the Legislature to pass those specific measures. I appreciate that Justice Jackson’s three-part test in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>276</sup> suggests a slightly different view. Justice Jackson is correct that, with regard to immediacies that the Executive must face, congressional action is occasionally unnecessary. But if the problem at issue lingers and Congress says nothing either way, as time passes the presumption initially favorable to the President incrementally fades away.

There is a reason that the separation of powers was thought to protect the “liberty of the person” in a manner such that the Framers initially “did not consider a Bill of Rights

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273. *Id.* at 17-18.

274. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary. Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine — through democratic means — how best to do so.”).

275. One example, though controversial, is that Congress’ Joint Resolution (in the Authorization for the Use of Military Force or the AUMF) authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided” the September 11, 2001, al Qaeda terrorist attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Were it drafting the measures in the first place, Congress may well have demanded greater oversight and different measures for actions so precipitous.

276. 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”).

necessary.”<sup>277</sup> Separation of powers and the authority of Congress, much like the authority of the Parliament in common-law England, were expected to guard a citizen’s liberty. Both in English history (including the enactments of the Petition of Right and the Habeas Corpus Acts of 1640 and 1679) and in American history, the Legislature (Parliament or Congress) has been far more responsive to the preservation of individual rights than has the Executive.<sup>278</sup> Courts, too, have the duty to protect individual rights guaranteed by the Constitution in the face of congressional and presidential overreaching.<sup>279</sup> In the area of national security, some courageous tribunals and jurists have exhibited this trait.<sup>280</sup> The Supreme Court’s recent Guantánamo Bay detention

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277. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (citing THE FEDERALIST NO. 84 at 513, 515 (Alexander Hamilton) (C. Rossiter ed. 1961) & GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 536-43 (1969)). See also THE FEDERALIST NO. 47, at 301 (James Madison) (C. Rossiter ed. 1961) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”).

278. See Dasgupta, *supra* note 56, at 442 (“Even though the Magna Carta asserted that no person would be unlawfully imprisoned, the lack of an enforcement provision and absence of a legal process to bridge the gap between the protections and their fruition exacerbated arbitrary detentions.” (citing Magna Carta, art. 39, *reprinted in* SOURCES OF OUR LIBERTIES 17 (Richard L. Perry & John C. Cooper eds., 1959))). “No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.” *Id.*

279. See, e.g., Barak, *supra* note 161, at 149 (“[M]atters of daily life constantly test judges’ ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual’s human rights is a much more formidable duty in times of war and terrorism than in times of peace and security. . . . As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict.”); ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 46-47 (1968) (“It is the courts — the independent judiciary — which have, time and again, rebuked the legislatures and executive authorities when, under stress of war, emergency, or fear of Communism or revolution, they have sought to suppress the rights of dissenters.” (citing *Ex parte Milligan*, 71 U.S. 2 (1866); *Taylor v. Mississippi*, 319 U.S. 583 (1943))).

280. See, e.g., *United States v. U.S. Dist. Court*, 444 F.2d 651, 664 (6th Cir. 1971) (noting that “[i]t is the historic role of the Judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is the greatest, the Constitution of the United States remains the supreme law of our land”).

decisions—*Rasul v. Bush*,<sup>281</sup> *Hamdi v. Rumsfeld*,<sup>282</sup> *Hamdan v. Rumsfeld*,<sup>283</sup> and *Boumediene v. Bush*<sup>284</sup>—granting the detainees access to United States courts via statutory and constitutional habeas corpus uniformly reject presidential unilateralism where individual rights are concerned.<sup>285</sup> Similar to the torture scenario, here too the President’s Office of Legal Counsel advised “that the great weight of legal authority indicates that a district court could not properly exercise habeas jurisdiction over an alien detained at [Guantánamo Bay].”<sup>286</sup>

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281. 542 U.S. 466 (2004) (exploring statutory habeas corpus applied to the detainees held at Guantánamo Bay).

282. 542 U.S. 507 (2004) (holding that due process of law requires U.S. citizens at Guantánamo Bay be given some acceptable process to determine their culpability and punishment before a neutral arbiter).

283. 548 U.S. 557, 706 (2006) (noting that the procedural and substantive rules governing the Guantánamo Bay military commissions lack the power to proceed “because of its failures to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949”).

284. 128 S. Ct. 2229 (2008) (holding that federal law denying Guantánamo Bay detainees the access to federal courts violates the Suspension Clause in Article I, Section 9 of the U.S. Constitution and that the substitute provided by the federal law is constitutionally inadequate).

285. *But see* Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001); Christopher Yoo, Steven Calabresi & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005). This philosophy was summed up by Justice Thomas in his dissent in *Hamdan v. Rumsfeld*, 548 U.S. 557, 679 (2006).

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act, and [s]uch failure of Congress . . . does not, especially in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive.

*Hamdan*, 548 U.S. at 679 (citations and internal quotation marks omitted). *But see* Peter Irons, “*The Constitution is Just a Scrap of Paper*”: *Empire versus Democracy*, 73 U. CIN. L. REV. 1081, 1091 (2005); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270 (1996).

286. Memorandum from Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to

How do we evaluate if a torture warrant comports with due process or the Eighth Amendment? An after-the-fact constitutional evaluation of a specific torture warrant involves all of the *principles* recognized in the Supreme Court's qualified immunity jurisprudence. But the application of those principles must be significantly tweaked and recalibrated. Artificially erecting insurmountable pleading hurdles based on Rule 8 of the Federal Rules of Civil Procedure is unlikely to be a workable or honest solution to this complex problem. Nor can we structure the officials' "individual responsibility" in such a way as to let all high-level officials off the hook. Most frequently, the subordinates are the ones who are executing the commands given from the upper echelons. Third, and on a related point, we must not so unnaturally restrict the definition of "official duties" (under *Robertson v. Sichel*)<sup>287</sup> to the individual tasks of the officials (high or petty). The supervisory duties of high-level administrators are just as "official" as other tasks composing their portfolios.

Inviting the "conscious disregard of the complex role of facts in constitutional adjudication," the Supreme Court's "clearly established law" test in its qualified immunity cases poses pragmatic and logistical problems as well. Professor Alan Chen argues the "multifaceted balancing tests in substantive constitutional law" are difficult enough to apply in the immediate case, let alone to argue that they serve in a multitude of cases as a benchmark reminder of what sort of conduct is constitutionally permissible.<sup>288</sup> Still, a principled-line must be drawn between judicial restraint and abandonment in order to continue enforcing liability (direct or some form of vicarious) in cases where government actors violate constitutional rights.

Obviously, as supervisory liability becomes more vicarious, the qualified immunity defense grows stronger and a plaintiff's chance of recovering money damages becomes weaker. In his *Iqbal* dissent, Justice Breyer mentioned that "a trial court,

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William J. Haynes II, Gen. Counsel, Dep't. of Def. on Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), available at <http://texscience.org/reform/torture/philbin-yoo-habeas-28dec01.pdf>.

287. 127 U.S. 507, 515-16 (1888).

288. Chen, *supra* note 254, at 230.

responsible for managing a case and ‘mindful of the need to vindicate the purpose of the qualified immunity defense,’ can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials.”<sup>289</sup> The court may “begin discovery with lower level government defendants before determining whether a case can be made to allow discovery related to higher level government officials.”<sup>290</sup> This approach would weed out meritless cases against higher-level officials, and is in line with the fact that “[t]he law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference.”<sup>291</sup> The *Iqbal* Court expressly noted a desire to disincentivize the discovery stages for high officials with demanding functions. Justice Souter’s dissent similarly explained that the Court’s failure to see the various degrees and shades of supervisory liability in *Bivens* actions led to the mistaken binary belief that there could either be complete supervisory liability or none whatsoever.<sup>292</sup> The Court chose the latter path.

Furthermore, the torture warrant procedure must take care to honor the “deep-rooted historic tradition that everyone should have his own day in court.”<sup>293</sup> This means more than just that persons should not be barred from challenging their torture by suspended habeas or lack of federal jurisdiction in those cases. Federal jurisdiction is not conferred by congressional enactments such as the Detainee Treatment Act of 2005 (DTA)<sup>294</sup> or the Military Commissions Act (MCA);<sup>295</sup>

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289. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961 (2009) (Breyer, J., dissenting) (citation omitted).

290. *Id.* at 1961-62 (Breyer, J., dissenting) (citation omitted).

291. *Id.* at 1961 (Breyer, J., dissenting).

292. *Id.* at 1958 (Souter, J., dissenting) (“Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.”).

293. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)) (acknowledging that the federal common law of preclusion is governed by constitutional due process restrictions).

294. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (codified at 10 U.S.C. § 801 (2000), 28 U.S.C. § 2241(e) (2006), and 42 U.S.C. § 2000(d)). Section 1005(e) of the DTA amended the erstwhile federal habeas corpus statute (28 U.S.C. § 2241) to provide that “no court, justice, or judge shall have jurisdiction to . . . consider . . . an application for . . . habeas corpus filed by or on behalf of an alien detained . . . at Guantánamo.” The

these statutes had a preclusive effect on federal court jurisdiction over habeas claims from Guantánamo. The Government must take special care to ensure that legal services, including attorneys and expedited procedures, are extended to those challenging their torture. Observance of these strictures is essential, but not necessarily sufficient, to satisfy the substance of the *strict scrutiny* test. The two benchmarks of that test, a compelling societal interest and narrow tailoring, are situation-specific and may authorize torture only in limited circumstances.

Despite the “absolute ban” on torture currently in place, that patchwork jurisprudence is fraught with government-approved exceptions (many of which are clandestine).<sup>296</sup> Such a façade of a rhetorical absolute ban clearly contravenes the rule of law because it obfuscates the truth and provides misinformation to the electorate. It also “encourages inappropriate torture by preventing proper assessment of the appropriateness of torture’s quantity and quality.”<sup>297</sup> Moreover, this regime makes no room for regulated torture that could be authorized by a United States Foreign Intelligence Surveillance Court (FISC) tribunal,<sup>298</sup> which would

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amended version has been codified at 28 U.S.C. § 2241.

295. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948-50 (2006); 18 U.S.C. § 2441 (2006); and 28 U.S.C. § 2241(c)-(e) (2006)).

296. *See, e.g.*, Gross, *supra* note 22, at 1484. *See also* Raviv, *supra* note 32, at 149 (“A number of the countries that have signed on to these conventions, including Great Britain and Israel, have quite plainly engaged in activities that violate the conventions, indicating that at least some officials in these countries think that torture can be an effective means of extracting desired information.” (footnotes omitted)).

297. Goldberg, *supra* note 37, at 4.

298. The FISC is a United States federal court (but not an Article III court) authorized by 50 U.S.C. § 1803 (or the Foreign Intelligence Surveillance Act (FISA) of 1978). This court oversees requests for surveillance warrants from Federal Government police agencies, such as the Federal Bureau of Investigation, against suspected foreign intelligence agents. Recently the FISC has been embroiled in several privacy-related controversies related to (1) allegations that its warrants exceeded the commission Congress gave the court, or (2) that government officials circumvented the court altogether. *See* Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest: Jurist Concerned Bush Order Tainted Work of Secret Panel*, WASH. POST, Dec. 21, 2005, at A01; Dan Eggen & Susan Schmidt, *Secret Court Rebuffs Ashcroft. Justice Dept. Chided On Misinformation*, WASH. POST, Aug. 23, 2002, at A01.

have an immediate, time-sensitive perspective and sufficient judicial independence to refuse a government request. The arguments supporting transparency would most likely not be undermined if Congress were to exclude ordinary Article III federal district courts from acting as Torture Warrant Tribunals. But, certainly, an adequate substitute and a strong appellate process are necessary—one candidate has been the Court of Appeals for the District of Columbia Circuit (the traditional forum for administrative and constitutional law).

As a result of the Supreme Court's qualified immunity jurisprudence, the threshold for relief in cases against government officials who committed torture in the aftermath of September 11, 2001 has been significantly raised. Indeed, it has been raised so high that it is now extremely difficult for a torturee to obtain pecuniary relief.<sup>299</sup> Part of the reason for this trend is that courts are unwilling to second-guess Congress or the President on national security issues due to the institutional competence of the latter branches; another part of the reason is that courts believe that the responsibility to conduct national security affairs sweeps so broadly as to eclipse individual rights in many situations;<sup>300</sup> and certainly part of the reason is that qualified immunity must be so controlled that only the most heinous conduct is punished. That said, what the Court might understand or apply as a "heinous" standard is also not quite clear. Does it mean something along the lines of genocide or crimes against humanity? Or can it be closer to a search-and-frisk Fourth Amendment violation? Where does torture fall between these two extremes?

These musings are not impractical or unlikely to arise. *Bivens*-like cases do not allow courts to make those determinations of their own initiative; rather the limited role of the judiciary is to determine whether there was a constitutional violation forbidden by *Bivens* and whether, under Rule 8, the plaintiffs have provided enough evidence to

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299. Of course, by way of distinguishing future cases, one might argue that the tragedy of September 11 justified measures that will not be justified by future instances of torture.

300. See, e.g., Philip B. Heymann, *Civil Liberties and Human Rights in the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL'Y 441 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Jules Lobel, *The War On Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002).

state a *prima facie* case. Preferring one set of violations over another would be judicial law-making in the quintessential sense. And while it is true that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” it does not mean that the exercise of power is automatically constitutional.<sup>301</sup> The *degree* of this “implied authorization” weighs heavily. For instance, if Congress passed legislation in the year 2015 providing that “The President shall have the power to take care that the Army’s practices and drills are helpful and successful,” it would not override a 2005 law that specifically described the protections that a certain species of animals enjoyed—even if the Army, at the President’s direction, found it easier to practice in a manner that harmed that protected species. The degree and specificity of the regulations as well as the possible, less drastic alternatives figure into the analysis. Only if an effort to reconcile the two statutes fails do we entertain the possibility that one might supersede the other. And we should not cavalierly assume that Congress is always constitutionally capable of transferring its prerogative to the President.

In all of those cases, the Court must be sufficiently sincere and candid, spelling out what the standard is and avoiding running away with the goal-post as soon as the plaintiffs reach the goal. In most cases, injunctive relief is out of the question (after the torture has already been committed). And most officials do not face disciplinary or other legal consequences for their actions. There is cause to believe, according to the United Nations Special Rapporteur of the Commission on Human Rights, Sir Nigel Rodley, that “impunity continues to be the principal cause of the perpetuation of human rights violations, and particularly of extrajudicial, summary or arbitrary

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301. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *See id.* at 637-38 (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.”).

executions.”<sup>302</sup> These reasons (in tandem with the fact that torture may never be fully eliminated) require that the torture dilemma be brought out into the open. Such transparency and discussion might help prevent procedural defaults from impeding substantive justice.<sup>303</sup> Foucault, earlier referenced in Part I, would have said the same: there might be real benefits in exposing the torture equation (the risks, the probabilities, and the frequencies of occurrence), without specific details and identities. Let not good become the enemy of perfect.

#### IV. Conclusion

We return to Square One: the morality, the effectiveness, and the dangers of torture. By and large, utilitarian thinking pervades governments’ approach to torture. It is true that rule-absolutists, whether theoretically or empirically, maintain that torture constitutes an invasion of the physical and mental sanctity of the human person and must remain categorically precluded—whatever the consequences. Rule-consequentialists, on the other hand, believe in the same bottom-line result but they reason differently. An absolute ban on torture, in many cases, leads to a better result than does tinkering with it and poking holes. Unreliability and the possibility of mistakes also inform this calculus; an absolute ban on torture is, for pragmatic reasons, superior. An obvious criticism leveled at the absolute ban against torture is that in attempting to prevent the pain or even death of one individual, authorities might give way to the pain of many more innocents. Of course, there is a difference between government action and private action. Justice Stevens characterized this sort of argument as “a classic *non sequitur*.”<sup>304</sup>

At the very least, however, this means there are some restraints on what the government can do—mainly with

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302. U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, FACT SHEET NO.11 (REV.1), EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, *available at* <http://www.ohchr.org/Documents/Publications/FactSheet11Rev.1en.pdf>.

303. *See, e.g.*, *Johnson v. N.Y., New Haven & Hartford R.R. Co.*, 344 U.S. 48, 62 (1952) (Frankfurter, J., dissenting) (“Procedure is the means; full, equal and exact enforcement of substantive law is the end.” (citation and internal quotation marks omitted)).

304. *Payne v. Tennessee*, 501 U.S. 808, 859 (1991) (Stevens, J., dissenting).

reference to conditions, duration, and degree. It establishes a compelling government interest and does not mean the government is entirely powerless to act. The counterpoint is that utilitarianism lacks safeguards, and torture is one such absolute limitation that forbids society's and the legal system's descent into madness. Similar to a proportionality analysis which balances the need to punish with the risk or culpability at stake, a theoretical slide down from an absolute ban on torture will also open us up to a cost-benefit analysis. The hazard of such an analysis is that it is subjective and discretionary (thus capable of arbitrariness) and susceptible of leading to too much torture. Additionally, a higher moral standard, it has been argued, enables the United States to remain a standard bearer of human dignity in the world. An absolute, immutable commitment against torture is indispensable to maintaining that high ground. These questions are difficult, and even an absolute result should not come without sufficient deliberation. In continuing that thinking, we must remember that

“[s]ecurity considerations” are not magic words. The court must insist on learning the specific security considerations that prompted the government's actions. The court must also be persuaded that these considerations actually motivated the government's actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights.<sup>305</sup>

The intersection and overlapping of due process and the Eighth Amendment reveal some of the moral concerns as well, but the decision is also at the Nation's public-policy doorstep. A decision by the People to ban or limit torture (as punishment *and* as interrogation)—and to mean it—may end the constitutional debate. Until then, the discourse should continue robustly. The destiny of constitutional republics is such that it gives them a mandate to ensure security but also

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305. Barak, *supra* note 161, at 157-58.

the requirement that individual liberties should not be compromised. The imposition of torture raises solemn questions about the violation of another's person and the integrity of their being, even in time-sensitive situations with innocent lives at stake. However we come out on the ultimate *constitutional* question, and our decision will most likely be case-specific, the moral and philosophical questions will keep gnawing at the heart of society's self-definition. Sophisticated mechanisms such as torture warrants may well detour the core debate, but, sooner or later, the main question will arrive at the judicial gate. Courts should answer the questions incrementally, not only with respect for judicial humility but also due to the fact that a sweeping answer too quickly given might prove deleterious to future cases.<sup>306</sup>

Moreover, societies need time and space to reason themselves through changed circumstances and contexts. The torture issue needs such space and public input so that the judicial decision is informed by, rather than preemptive of, society's contemporary understanding.<sup>307</sup> A constitutional

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306. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting) (“[O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own . . . .”); *Dickerson v. United States*, 530 U.S. 428, 441 (2000) (“No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.”).

307. *See* *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2341 (2009) (Souter, J., dissenting) (“Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally. Just as attachment to the familiar and the limits of experience affect the capacity of an individual to see the potential legitimacy of a moral position, the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point

court in a democracy, certainly one of last resort, appreciates as much.

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of being unconstitutional.”).