SMU | Dedman School of Law

SMU Law Review

Volume 61 | Issue 2 Article 2

2008

Overcoming Necessity: Torture and the State of Constitutional Culture

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I. INTRODUCTION

NECESSITY has played a prominent role in post-September 11 events, purporting to justify official government actions, including torture.[1] The topic of torture has become pervasive in American discourse over national security and foreign affairs, with Bush Administration officials admitting that they have subjected detainees to "waterboarding" and other "harsh" interrogation techniques.[2] Internal Department of Justice memos reveal that Administration officials have considered possible justifications for use of torture or "harsh interrogation" techniques.[3] Moreover, the question of whether torture might be necessary in some circumstances has entered the national consciousness,[4] not simply through debate over imaginary "what if" scenarios,[5] but also

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1. Jeremy Waldron is correct to note that "[i]t is dispiriting as well as shameful to have to turn our attention to this issue." Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1683 (2005). *See also* Seth 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, 278 (2003) ("There are some articles I never thought I would have to write; this is one.").

2. Scott Shane, *CIA Chief Doubts Tactic to Interrogate Is Still Legal*, N.Y. TIMES, Feb. 8, 2008, at A9; Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

3. David Johnston & Scott Shane, *Memo Sheds New Light on Torture Issue*, N.Y. TIMES, Apr. 3, 1998, at A19. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel to William Haynes II, Gen. Counsel, U.S. Dep't of Def. (Mar. 14, 2003) (regarding the "Military Interrogation of Alien Unlawful Combatants Held Outside the United States") [hereinafter "Yoo Memo"].

4. *See, e.g.*, Jim Rutenberg, *Torture Seeps Into Discussion by News Media*, N.Y. TIMES, Nov. 5, 2001. Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51.

5. *See* FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS (Aug. 2004), *reprinted in* MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 401 (2004) ("For the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the 'ticking time

through government action[6] and popular culture.[7] Because it touches core moral, political, and legal conceptions of the proper limits to state power and the obligations owed to other persons, torture has also become a topic of intense academic debate. Indeed, there may now be an academic consensus that in extreme circumstances one could justify the practice of torture as a lesser evil to avoid the greater evil of many thousands, or even millions, of innocent deaths.[8]

What is interesting about this growing cacophony (one hesitates to call it a chorus) is that in the very few years following the events of September 11, 2001, the focus on human rights, which included a near-universal consensus on the prohibitory norm against torture, could dissipate so quickly. In a series of cases brought under the Alien Tort Statute, U.S. federal courts have proclaimed that the prohibition against torture is one of the *jus cogens* norms, such that the "torturer has become like the pirate and the slave trader before him hostis humani generis, an enemy of all mankind."[9] Commentators and international law treatises have largely agreed. International treaties to which the United States is a signatory, such as the Covenant on Civil and Political Rights,[10] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

bomb' scenario."). For criticism of the hypothetical, *see* Henry Shue, *Torture*, 7 PHIL. & PUB. AFFAIRS 124, 141-42 (1978).

6. For example, recall the events at Abu Ghraib. *See generally* DANNER, *supra* note 5. "[E]veryone seems to acknowledge that the U.S. government continues to torture or use other kinds of shadowy, cruel practices all the time. Before, we treated torture as absolutely forbidden. Now, we accept that even as we speak, our government is engaged in a widespread set of shadowy cruel practices on ghost detainees held abroad." Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J. 1145, 1151 (2005).

7. Perhaps the most relevant to the threat of terrorism is the popular show "*24*." *See* Jane Mayer, *Whatever it Takes: The politics of the man behind "24"*, THE NEW YORKER, Feb. 19, 2007, at 66; *see also* Teresa Wilz, *Torture's Tortured Cultural Roots*, WASH. POST, May 3, 2005, at C1 ("If you're addicted to Fox's '24,' you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk. . . . Torture's a no-brainer here. Jack's got to save us all from imminent thermonuclear annihilation.").

8. *See generally* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004). *See also* CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 221 (2005) ("In imaginable circumstances, torture is indeed justifiable.").

9. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980). *See also*, Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995); Hilao v. Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (stating that the right to be free from torture is a norm of *jus cogens*); Siderman v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("Given this extraordinary consensus, we conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."). The Supreme Court applied the *Filartiga* approach to private rights of action under the Alien Tort Statute in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

10. International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171.

or Punishment,[11] and the Geneva Conventions,[12] all prohibit the use of torture. Moreover, the Convention Against Torture contains an explicit non-derogation provision, proclaiming that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification for torture."[13] The Supreme Court has declared that the use of torture violates the Due Process Clause.[14] In the words of Justice Kennedy, the "use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person."[15] Presidential statements affirm the unequivocal fact that "America stands against and will not tolerate torture."[16]

Despite Congress's implementation of legislation forbidding the practice of torture,[17] and despite recent legislative prohibitions and pronouncements,[18] the conversation concerning torture continues, and most likely, so too does the practice. Why is so much attention paid to such a gruesome practice? The simple answer is that the practice may appear necessary in response to threats from global terrorism. Necessity, however, has a vexed relation to constitutional principle. Constitutional principles function as constraints on official action only when officials are tempted to exceed principled boundaries. If there is no temptation, there is no constraint. If, however, necessity trumps principle when officials are tempted by circumstances to violate the Constitution, then constitutional principles offer no constraints precisely when they most apply. Thus, the role we assign to necessity fundamentally shapes constitutional practice and culture.

Another reason for the continuing discursive salience of torture is the existence of countervailing practices and principles within U.S. constitutional doctrine and debate. On the one hand, rights provide limits to the exercise of state power over individuals. On the other hand, rights are

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11. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 108 Stat. 382, 85 U.N.T.S. 1465 [hereinafter Convention Against Torture].

12. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, § 1(a) and art. 12, Aug. 12, 1947, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

13. Convention Against Torture, *supra* note 11, art.2.

14. *See e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936) (overturning convictions based on confessions elicited by torture as breaches of due process, violating "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

15. Chavez v. Martinez, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part).

16. Statement on United Nations International Day in Support of Victims of Torture, 1 PUB. PAPERS 1141 (June 26, 2004).

17. *See* 18 U.S.C. § 2340A(a)-(b) (2000) (providing for criminal sanctions against perpetrators of torture). *See also* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 135 note (2000)) (authorizing civil liability against perpetrators of torture).

18. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2739 (codified at 10 U.S.C.A. § 801 note and 42 U.S.C.A. § 2000dd (West Supp. 2007)).

protected always against the backdrop of state interests. Under appropriate conditions, some rights may be balanced against governmental interests to allow actions that might otherwise violate those rights. Under the Constitution, we frequently do not view basic rights, such as the right to free speech or due process, as absolute. Often the time, place, and manner of our speech is subject to regulations seeking to achieve an important government interest.[19] Moreover, we have a right not to be deprived of life without due process of law, but in some circumstances state agents will be justified in using extra-judicial "deadly force" against a dangerous individual.[20] The more compelling the state's interest in deviating from absolute respect for a right, the greater the justification for the state's action, and the more willing a court will be to find the official action constitutional. The most compelling form of state interest is expressed in terms of necessity.

Necessity arguments claim that in particular circumstances officials may undertake exceptional actions to achieve their legitimate goals, such as protecting national security, that would otherwise be prohibited if the normal rule of law governed during normal conditions. Necessity is closely related to the practice of balancing rights against competing interests such as security, because, "[a]s threats increase, the value of security increases," and the "government will then trade off some losses in liberty for greater gains in increased security."[21] Thus, by accepting the principle that under conditions of necessity there is an appropriate balance between liberty and security, officials may seek to justify practices that deprive individuals of their human dignity by subjecting them to torture or to cruel, inhumane, or degrading treatment. Expediency and necessity thus seem to pull in the direction of unfettered action. After all, the threats are real, as well as possibly grave. Adherence to principles, by contrast, requires official restraint in accordance with prior constitutional commitment.

Those who would justify the practice of torture, if only in extreme circumstances, do so by appeal to necessity. Necessity often appears as a compelling state interest to act in particular circumstances in ways that might otherwise violate a constitutional right. Claims to necessity also have compelling rhetorical force. It can be difficult to oppose what is deemed necessary in concrete circumstances by appeal to abstract constitutional principles. When generalized as a justification for official action, necessity can displace constitutional commitments to constrained action because necessity, not the Constitution, becomes the ultimate arbiter for

19. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding a state statute requiring a license to march on city streets because the state "cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets").

20. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 11 (1985).

21. ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 27 (2007).

authorizing actions.[22] For example, although shying away from embracing the term "torture," Vice President Dick Cheney has stated, concerning the waterboarding of suspected terrorist, Khalid Shaikh Mohammed, that "[h]e and others were questioned at a time when another attack on this country was believed to be imminent. It's a good thing we had them in custody, and it's a good thing we found out what they knew."[23] According to the Vice President, circumstances render necessary the use of "harsh interrogation" in order to ensure protection for national security—"we" need to know what they know. The now notorious Department of Justice "torture memo," which sought to justify unilateral executive action to engage in practices that would include torture, also relied on necessity arguments.[24] Indeed, the memo explicitly argued that statutory prohibitions against torture are unconstitutional insofar as they "seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States."[25] Even if Department of Justice officials sought to hold officials engaging in torture at the behest of the President criminally liable for their actions, according to the memo, "[s]tandard criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens."[26]

Emergencies and other exigent circumstances thus present the following problem: external threats may seem to require actions, such as torture, that violate fundamental law. When acting according to necessity, we either act outside the law, or we find justification for acting from principles embedded in the law. Latent principles of necessity, found in the Constitution under the latter approach, rescue otherwise lawless actions by according them rule-of-law status, operating under special conditions of necessity. A "necessity Constitution" provides the flexibility that executive officials believe is required to respond effectively to real and perceived threats to national security. This approach is problematic, however, because necessity subjects all rights to derogation as circumstances require, undermining the notion of rights as principled constraints. For those who think that consequence trumps constraint, it follows that all rights are subject to balance by executive officials, free from other institutional constraints, as circumstances dictate. As I shall argue, consequentialist apology on behalf of unfettered executive action during claimed emergencies fails to account for prominent features of our constitutional culture, including pervasive suspicion of unchecked and un-

22. *See* Thomas P. Crocker, *Still Waiting for the Barbarians: What Is New about Post-September 11 Exceptionalism?*, 19 LAW & LITERATURE 303 (2007).

23. David Stout & Scott Shane, *Cheney Defends Use of Harsh Interrogations*, N.Y. TIMES, Feb. 7, 2008.

24. Memorandum from Jay S. Bybee, Assistant Att'y Gen. to Alberto R. Gonzales, Counsel to the President 39-41 (Aug. 1, 2002) [hereinafter "Bybee Memo"].

25. *Id.*

26. *Id.* at 39.

balanced unilateral action.[27] Even if thought necessary under the circumstances, legitimating the practice of torture ultimately alters central, constitutional commitments, subjecting them to derogation on the basis of vague notions of necessity. Moreover, unprincipled claims to necessity depend on the perceptions of the very officials the law is meant to constrain. I argue that if necessity becomes a route to unconstrained official action, then to the extent that abiding constitutional commitments remain relevant to constitutional culture, we must overcome the temptation to rely on necessity.

If an internal principle of constitutional necessity is unavailable, then perhaps officials can rely on an external principle of necessity. When officials act outside the constraints of fundamental law, the domain of law remains unsullied, but action taken according to necessity becomes lawless. In this situation, the difference between lawful and lawless action is determined by conditions external to law—the very circumstances that give rise to claims of necessity. But is lawless action illegitimate, especially if the stakes for national security are high? Might the Constitution be entirely consistent with extra-constitutional authority in times of emergency or crisis?[28] Legitimacy rests on consent of the people. If the people consent to lawless practices, then they grant an important form of legitimacy to those practices, even though their consent comes at the expense of strict adherence to the Constitution. Consent presupposes limits on actions in accordance with the fundamental dignity, autonomy, and liberty of persons—the constitutive substance of due process. When persons are not afforded these protections, official action attacks the very conditions of legitimacy. Consent also flows from a self-conception of who we are as a constitutional culture. A self-conception embedded in constitutional culture is not fixed and final, but responds to circumstances and to perceptions of our current situation. Thus, constitutional equilibrium is always fragile. Our shared responses to crises can always legitimate actions that, in turn, change our constitutional culture. These considerations reveal the underlying fragility of any particular state of constitutional culture. Constitutional practices may change in light of external conditions and popular consent. In this way, constitutional culture is not merely a matter of Supreme Court constitutional opinion, but is a matter of the interaction between citizens and officials.[29]

Relying on necessity to justify extralegal official action is therefore especially problematic for constitutional culture. How both officials and citizens see their shared social and political world as an ordered whole, expressive of core values and commitments and embedded in particular

27. For a sustained critique of consequentialist apologies for unconstrained executive authority to engage in practices such as torture, see Thomas P. Crocker, *Torture, with Apologies*, 86 TEX. L. REV. 569, 601-07 (2008).

28. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1383 (1989).

29. *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Changes: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

practices, comprises fundamental features of a constitutional culture. As such, constitutional culture is susceptible to a particular form of fragility—it can be altered in fundamental ways by shifts in the meaning and application of its defining constitutional principles and commitments. Meaning changes as practices change. The prohibition against torture, although not explicitly embedded in constitutional text, has taken on a fundamental role in expressing a central commitment to the dignity and liberty of persons. This commitment is further embedded as a core feature not only of domestic law, but also of regional and international human rights instruments. So when talk turns to torture, and when practice follows, we begin to change core constitutional meanings, which in turn reshape constitutional culture. New constitutional understandings can further institutionalize these transformative practices. We may begin to live under a Constitution of necessity rather than a Constitution of constraint.

If these changes were easily circumscribed within the emergency situation, perhaps there would be less reason to be concerned. As I will argue, however, changes regarding fundamental aspects of constitutional culture cannot be isolated, especially given the tendency of necessity to become normalized. Engaging in exceptional practices such as torture can change how we see other principled commitments that remain equally subject to balancing under conditions of necessity. The ultimate issue is not whether a particular action by a particular state official offends or complies with the Constitution. Rather, it is whether a particular way of prioritizing necessity is one that is made available within a particular constitutional culture. When we prioritize necessity, we change how we look at the world in ways that have pervasive legal and cultural consequences. To avoid justifying practices such as torture under perceived emergency or exigent circumstances, we must learn to overcome necessity as a way of limiting legal constraints to normal occasions. This Article argues that we should overcome the temptation to rely on necessity, whether construed as an internal constitutional principle or as an extralegal justification, when doing so threatens to alter our broader commitments to living under constitutional constraints reflected in rights-protecting and separation of powers principles.

II. THE NECESSITY CONSTITUTION

Finding an implicit principle of necessity nestled among the Constitution's other enumerated powers is the simplest route to justifying unconstrained executive authority in times of perceived emergency or exigency. Indeed, such a principle retains executive action within the purview of the Constitution by finding a constitutionally authorized way to prioritize necessity over other constitutional values. As Michael Paulsen posits, "the Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it

and judging the degree of necessity in the press of circumstances."[30] As I shall argue, the problem with this approach is that it invites executive officials to see everything in terms of emergency and exigency. How much easier it would be to claim emergency and thereby act free from principled constraints and judicial review. More than the national security constitution,[31] we invite the creation of the national necessity constitution. Those who live under such a constitution will be inclined to see the world as organized around the authority of necessity, rather than on enumerated, and limited, government powers. I argue that no such principle of necessity resides, latently or implicitly, in our Constitution. To the extent that the Constitution does not support an internal principle of necessity, then executive claims to act on the basis of necessity become lawless. The extra-legal nature of such action may provide the basis for institutional restraint, but if Congress, the courts, and the citizenry consent to such actions, our constitutional culture becomes one circumscribed by regular illegality, which likewise constructs its own problematic way of seeing the world. The ultimate issue necessity raises is whether we want to sustain a constitutional culture based on principle and commitment to fundamental values of human dignity and liberty, or whether we want to create a constitutional culture subordinate to the indefinite concepts of emergency and exigency.

A. The Constitutional Principle of Necessity

Under the Constitution of necessity, state vulnerability sometimes requires extra-legal action. There are two ways the Constitution can accommodate necessity: externally and internally. First, the Constitution of necessity may sanction extra-legal action that preserves traditional powers of executive prerogative. Second, the Constitution of necessity may contain an internal principle of necessity tethered to constitutional structure and text.

1. Is There an External Principle of Necessity?

Operating under the "law of necessity," executive officials would be justified in suspending the Constitution, in whole or in part, in times of perceived emergency in order to address a dangerous situation free from ordinary legal constraint. Under emergency circumstances, extra-legal action may be required because normal legal limitations, such as those protecting civil liberties, may conflict with those security measures deemed necessary to preserve the nation's survival. Thus, during times of emergency, officials would be justified in suspending civil liberties in order to preserve them for the future. Such actions are not without serious and troubling consequences. When this theory has been put into practice,

30. Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1258 (2004) (emphasis added).

31. *See generally* Harold Hongju Koh, The National Security Constitution: Sharing Power after the Iran-Contra Affair (1990).

civil liberties have been suspended or circumvented, whether by the suppression of political dissent, internment of Japanese Americans, or the practice of domestic spying.[32] When acting to accomplish what necessity requires, ordinary legal constraints easily give way to overriding demands.

With regard to the external authority of necessity, the work of Carl Schmitt, a Weimar Republic political theorist, suggests one way of relating the rule of law under ordinary circumstances to law, or its absence, under exceptional circumstances.[33] Whether there is a constitutional or extra-constitutional principle of necessity, one way of understanding what happens in emergency situations is in terms of what Schmitt calls the state of exception.[34] Under the state of exception, Schmitt observes that "[t]he state suspends the law in the exception on the basis of its right of self-preservation."[35] What exists as normal is bounded by the domain of necessity, which includes a prior right and duty to preserve the state against existential threats. According to Schmitt, the sovereign is the one who has the power to decide when the exception exists. "For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is 'situational law.' The sovereign produces and guarantees the situation in its totality."[36] The sovereign decides whether the state of exception exists, justifying suspension of the ordinary rule of law in the name of preserving it, based on conditions of necessity.[37] This preserving function can lead to perverse results. For example, Article 48 of the Weimar Constitution specifically provided for a state of emergency, a device often used, and with the rise of the Nazi Party, a device that superseded the rule of law it was meant to preserve.[38] The ready resort to emergency

32. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004); *see also* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 228–29 (2003) (stating that governments overreact in times of crisis and that "at some point after—and often long after—the emergency has passed, the government's conduct is widely acknowledged to have been an overreaction").

33. *See, e.g.*, Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 706 (2006) ("[T]he legal philosopher who provides the best understanding of the legal theory of the Bush Administration is Carl Schmitt. . . ."); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1009 (2004) ("[T]he place to start in thinking about theoretical justifications for states of emergency in a system of democratically accountable, representative, and rights-respecting government is with Carl Schmitt.").

34. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 12 (George Schwab trans., Mass. Inst. of Tech. 1985) (1922).

35. *Id.* at 12-13.

36. *Id.* at 13.

37. Giorgio Agamben observes that "[t]he state of exception is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept." GIORGIO AGAMBEN, STATE OF EXCEPTION 4 (Kevin Attell trans., U. Chi. Press 2005) (2003).

38. *See id.* at 2 ("[F]rom a juridical standpoint the entire Third Reich can be considered a state of exception that lasted twelve years."). *See also* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 33-37 (1948) (detailing the origins of Article 48); Scheppele, *supra* note 33, at 1007-09.

powers in the name of preserving constitutional order repeatedly proved too tempting, normalizing a state of emergency in everyday life.[39] Thus, one observation to make is that when exceptional circumstances arise justifying actions taken under the rule of necessity, and when the executive has the authority to decide when those circumstances exist, there is a risk that such exceptions may become increasingly normal.

Although not articulated specifically as states of emergency or exception, the Bush Administration has justified its powers and policies in public statements, memos, and court filings broadly within Schmitt's framework.[40] One persistent feature of the post-September 11 situation is the Administration's rhetorical invocation of war.[41] President Bush warned, "[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[42] By invoking a so-called "war on terrorism," government officials seek the availability of exceptional powers to act. Moreover, by figuring the scope of the war to have "global reach" and indefinite temporal limits, those exceptional powers risk becoming a normalized feature of our constitutional order.[43]

Necessity, in terms of Presidential war power, can provide substantial latitude for executive action. As the Supreme Court stated in the *The Prize Cases*,[44] "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."[45] Because the challenge is levied by others, the scope of the President's authority to act is dictated post hoc by the circumstances, not ex ante by ordinary constitutional con-

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39. Scheppele, *supra* note 33, at 1008.

40. For example, the Administration claims: "The Constitution vests the political branches and, in particular, the Commander-in-Chief, with the power necessary to 'provide for the common defense,' . . . including the authority to vanquish the enemy and repel foreign attack in time of war." Brief for Respondents at 13, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

41. As the President urged in his 2004 State of the Union Address: "After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got." Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 84 (Jan. 20, 2004). The President further warned that: "This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat. . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success." Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of Sept. 11, 2 PUB. PAPERS 1142 (Sept. 20, 2001) [hereinafter "Address on Response to Attacks of Sept. 11"].

42. Address on Response to Attacks of Sept. 11, *supra* note 41, at 1141.

43. *See* Ludecke v. Watkins, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

44. The Prize Cases, 67 U.S. (2 Black) 635 (1863).

45. *Id.* at 668.

straints. In relation to standards for interrogation during this "war on terror," the Bush Administration has claimed that "[i]n wartime, it is for the President alone to decide what methods to use to best prevail against the enemy."[46] This claim draws close to Schmitt's theory of the exception, for the Bush Administration has claimed both the power to decide the terms of the emergency and the power to declare, without check, who is the "enemy combatant."[47] By emphasizing the rhetoric of war, which invokes situations analogous to repelling an invasion or quelling an insurrection, the President has attempted to justify acting alone and unchecked, as the circumstances of necessity might require.

When we are at war, Presidential power expands, both politically and constitutionally. Politically, the President has the first-mover advantage—the ability to put troops in the field and take advantage of the "'rally round the flag' effect"—thereby making it very difficult to mobilize political opposition in Congress.[48] Moreover, in a state of war or emergency, courts are reluctant to intervene.[49] Although more recently the Supreme Court has made clear that "a state of war is not a blank check for the President,"[50] at least "when it comes to the rights of the Nation's citizens,"[51] precedent also provides that decisions made "by the President in the declared exercise of his powers as Commander-in-Chief of the Army in time of war and grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."[52] Thus, by deploying the rhetoric of war, the President gains political space to act as necessary, substantially, though not entirely free from interference by Congress or intervention by the courts.[53]

Constitutionally, the President, as Commander-in-Chief, has the power and duty to provide for the common defense and to prevent and repel attacks on the nation.[54] He has very wide latitude to conduct foreign

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46. Bybee Memo, *supra* note 24, at 38.

47. The Bush Administration argued that it had unilateral authority to declare persons enemy combatants. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); *see also* Rasul v. Bush, 542 U.S. 466, 470-71 (2004) (addressing the detention of two Australian and twelve Kuwaiti citizens as enemy combatants).

48. *See* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678 (2005) (noting further that first-mover advantage can also be effective in getting additional authorization from Congress).

49. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 (1952) (Jackson J., concurring) ("We should not use this occasion to circumscribe, much less contract, the lawful role of the President as Commander-in-Chief.").

50. *Hamdi*, 542 U.S. at 536.

51. *Id.*

52. *Ex Parte* Quirin, 317 U.S. 1, 25 (1942).

53. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."). The *Boumediene* Court, however, held that habeas applies to Guantanamo detainees, depriving the President of authority to act free from judicial review. *Id.* at 2262.

54. In its arguments to the Supreme Court, the Bush Administration asserted that "[t]he Framers appreciated the importance of giving the Executive unquestioned authority to defend against foreign attack. As Hamilton wrote in *The Federalist No. 70*, '[d]ecision, activity, secrecy, and dispatch' are characteristic of a unitary executive power and are 'es-

affairs. As the Supreme Court has made clear, with regard to authority over foreign affairs, the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."[55] Under war or threats from abroad, the President's inherent power under the Constitution to act as the sole agent of national policy is at its highest, and courts will be maximally deferential, and Congress least likely to intrude.[56]

The rhetoric of war, however, is not the same as the reality of war. Genuine existential threats provide the most compelling conditions for executive action controlled by claims to necessity. Extra-legal action is justified under this framework only when actions taken under normal conditions would be insufficient to address the existential threat. Not all threats are existential in nature, however, and thus not all emergencies invoke states of exception. It is debatable as to whether, and to what extent, the post-September 11 threat of terrorism is a situation that can be adequately addressed through normal criminal process or whether exceptional war powers are required.[57] The current threat of terrorism, however, cannot plausibly be described as "existential." Terrorist attacks can be catastrophic, traumatic, and searing, but there are no armies massing at the border, and no long-range nuclear weapons ready to launch, differentiating our situation from both traditional and "cold" wars. To recognize this fact is not to minimize the threat or the political pressures that emerge in relation to such a threat.[58] Caution, however, is in order.

In practice, necessity in time of war had its best precedent in the actions, and later justifications, of Abraham Lincoln. Justifying actions he took during the Civil War in an April 1864 letter to Senator Albert G. Hodges, Lincoln wrote: "I felt that measures, otherwise unconstitutional,

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sential to the protection of the community against foreign attacks.'" Brief for Respondents, *supra* note 40, at 13 n.4.

55. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936).

56. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 54-60 (1993); KOH, *supra* note 31, at 134; Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. MIAMI L. REV. 125 (2003).

57. *Compare* John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 574 (2006) ("The days when society considered terrorism merely a law enforcement problem and when our forces against terrorism were limited to the Federal Bureau of Investigation, federal prosecutors, and the criminal justice system will not return."), *with* David Luban, *The War on Terrorism and the End of Human Rights*, 22 PHIL. & PUB. POL'Y Q. 9, 14 (2002) (arguing that the war on terrorism "includes a new model of state action, the hybrid war-law model, which depresses human rights from their peace-time standard to the war-time standard"). Providing the most sustained analysis of the differences between reacting to terrorist attacks in terms of crime or war, Bruce Ackerman advocates a third way—what he calls the emergency constitution—"a way of expressing law and morality in a distinctive key, guided by special principles." BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 57 (2006).

58. As Bruce Ackerman discusses, terrorist attacks do undermine the "effective sovereignty" of the government, revealing the state's inability to provide for the security of the nation. *Id.* at 41-44.

might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."[59] These "otherwise unconstitutional" measures included suspending the writ of habeas corpus, raising an army, authorizing arrest and detention of persons suspected of disloyalty, emancipating the slaves, and generally acting as an effective dictator for the ten weeks from April 15 until July 4, 1861.[60] Indeed, Lincoln's actions exemplify, in practice, the theoretical power of the executive to declare a state of exception and to suspend the Constitution for purposes of preserving the nation.[61] Lincoln resisted the suggestion that the Constitution applies without alteration (or suspension) during times of war: "[T]he Constitution is not, in its application, in all respects the same, in cases of rebellion or invasion involving the public safety, as it is in time of profound peace and public security."[62] In response to Chief Justice Taney's ruling in *Ex Parte Merryman*,[63] which held that he lacked the power to suspend the writ of habeas corpus unilaterally, Lincoln responded by posing to Congress the famous rhetorical question: "[A]re all laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[64] The imagery of the government going to pieces highlights the appeal to necessity here in the context of a dire existential threat. To emphasize the dire existential crises in which he suspended the writ of habeas corpus, in the same message to Congress, Lincoln observed that "[t]he whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States."[65] Under the circumstances Lincoln faced, if he did not act outside of constitutional constraint, then the overriding existential threat might have resulted in there being no Constitution to uphold. Far from becoming a constitutional pariah for his extralegal actions, Lincoln received post hoc congressional approval.[66]

Like Lincoln, President Roosevelt also faced an existential threat to the nation in the immediate aftermath of the attacks on Pearl Harbor.

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59. Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 585 (Don E. Fehrenbacher ed., 1989) [hereinafter "Fehrenbacher"].

60. *See generally*, DANIEL FARBER, LINCOLN'S CONSTITUTION (2003); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 80-134 (2004); AMBAGEN, *supra* note 37, at 20.

61. *See* AGAMBEN, *supra* note 37, at 20-21 (detailing the ways that Lincoln's actions fall within Carl Schmitt's theory of the exception).

62. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, *supra* note 59, at 460.

63. 17 Fed. Cas. 144, 149 (C.C.D. Md. 1861) (No. 9,487).

64. Fehrenbacher, *supra* note 59, at 253.

65. *Id.* at 252-53.

66. Henry P. Managhan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 74 n.136 (1993). Bush Administration domestic surveillance practices that some have argued lacked sufficient legal authority were also given post hoc Congressional approval in recent legislation. Richard H. Seamon, *Domestic Surveillance for International Terrorists: Presidential Power and Fourth Amendment Limits*, HASTINGS CONST. L. Q. 449, 452 (2008) (noting enactment of the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007)).

Stating the wartime need to provide "every possible protection against espionage and against sabotage," Roosevelt issued Executive Order 9066 authorizing the exclusion of persons of Japanese ancestry from the West Coast.[67] When the constitutionality of this Order came before the Supreme Court, the President obtained judicial authorization for his constitutionally questionable actions. Because "authorities feared an invasion . . . and felt constrained to take proper security measures,"[68] the Court reasoned that "exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group."[69] The Court admitted that the President had no authority under the Constitution to exclude persons from their homes in this way, but for the fact that he acted "under circumstances of direst emergency and peril."[70] In this situation, constitutional constraints on presidential power are themselves limited by claims to necessity. If an emergency condition occurs, then the scope of the Constitution may be altered, or even suspended, in the name of existential preservation. The Supreme Court stated the principle at work in these terms: "But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[71] Under this principle of necessity, the circumstances determine the scope of presidential power, not the Constitution.

Genuine existential threats to the survival of the country provide the most justifiable occasions for extra-legal government action. Accordingly, Lincoln's wartime precedent exemplifies what Kevin Heller has labeled the "survival rule," a rule that allows extra-constitutional action only when absolutely indispensable to preserving the state.[72] Such an appeal to necessity, however, is exceedingly narrow in scope, much narrower than current claims of necessity made in pursuit of the war on terror.[73]

2. *Is There an Internal Principle of Necessity?*

Perhaps such a principle of necessity is not incompatible with normal constitutional constraints. James Madison indicated as much in the Federalist No. 41: "It is in vain to oppose constitutional barriers to the impulse of self-preservation. It is worse than in vain; because it plants in the Constitution itself necessary usurpations of power, every precedent of which is a germ of unnecessary and multiplied repetitions."[74] Madison

67. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).
68. Korematsu v. United States, 323 U.S. 214, 218, 223 (1944).
69. *Id.* at 218.
70. *Id.* at 220.
71. *Id.*
72. Kevin Jon Heller, *The Rhetoric of Necessity (Or, Sanford Levinson's Pinteresque Conversation)*, 40 GA. L. REV. 779, 785 (2006).
73. *See* ROSSITER, *supra* note 38, at 298 (noting that extra-legal actions are justified only if "it is necessary or even indispensable to the preservation of the state and its constitutional order").
74. THE FEDERALIST No. 41 at 257 (James Madison) [hereinafter FEDERALIST No. 41].

makes two claims here. First, a normative claim that it is vain to use constitutional constraints to limit executive power to take actions against existential threats. Second, if the Constitution were used to constrain such action, then it would create constitutional dissonance by inviting the executive to follow the "law of necessity" rather than the Constitution. As we have already observed, two primary methods exist for resolving this apparent incompatibility between necessity and the Constitution. We can either recognize that the law of necessity and the Constitution each operate in separate, mutually exclusive spheres, or we can find within the Constitution a principle of necessity itself.

Turning now to the second approach, if the Constitution contains within its structure a principle of necessity, then there would be no need for constitutional conflict. Under the appropriate circumstances, the constitutional principle of necessity would authorize executive action unfettered from other constraints.[75] On the basis of the Presidential Oath Clause, in which the President affirms his duty to "preserve, protect and defend the Constitution of the United States,"[76] Michael Paulsen argues that a constitutional principle of necessity gives the President power to act outside of "practically any other constitutional rule set forth in the document."[77] He argues that this principle does not entail exceptional powers or powers to suspend the Constitution; rather, it is itself a constitutional power to protect the nation.[78] Paulsen further contends that a constitutional law of necessity must exist to make it possible for the President to fulfill his oath, translating in the process the object of that oath—the "Constitution"—to "the nation."[79]

Construing the Presidential Oath Clause, the Supreme Court has also found, at least in dicta, presidential power to act as necessary in the face of an existential threat: "Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means."[80] Such an approach has the virtue of constitutionalizing necessity, thereby eliminating the apparent dissonance between constitutional principles and necessity. It has the vice, however, of find-

75. Paulsen, *supra* note 30, at 1260-63. He is not the first to attribute distinctive Presidential power to the oath. Stephen G. Calabresi and Saikirshna B. Prakash argue that the presidential oath provides the president with the "means of refusing to enforce laws that violate the supreme law of the Constitution, particularly where those laws usurp the constitutional prerogatives." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 621-22 (1994).

76. U.S. CONST. art. II, § 1, cl. 7.

77. Paulsen, *supra* note 30, at 1283.

78. *Id.*

79. *Id.*

80. United States v. United States Dist. Court (*Keith*), 407 U.S. 297, 310 (1972). In *Keith*, the Court balanced national security needs against the loss of privacy entailed by electronic surveillance, ultimately concluding that the Fourth Amendment placed limits on the President's authority to conduct surveillance free from any judicial oversight. Thus, the Court rejected a claim of presidential power to act under claims of national necessity, concluding that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch." *Id.* at 316-17.

ing at the core of the Constitution a consequentialist principle that gives the President power to act free from other constitutional limitations.

One could view this as a positive development. In times of emergency, we might want the President to have a free hand in charting the best course of action to respond to the situation.[81] Excess concern for civil liberties or other constitutional constraints may lead to actual harm to the nation. Eric Posner and Adrian Vermeule have affirmed this possibility, asserting that "it is clear, however, that sometimes tangible security harms do in fact occur when claims of civil liberties are respected."[82] Moreover they assert that "[c]onstitutional rules do no good, and some harm, if they block government's attempts to adjust the balance as threats wax and wane."[83] Proper response to emergencies requires the President to balance "a straightforward tradeoff between liberty and security."[84] On this view, under the Constitution of necessity, the President is justified in limiting civil liberties in order to promote security.[85] Because civil rights and liberties are not absolute, they cannot serve as principled barriers to effective government action aimed at protecting national security. Posner and Vermuele do not ground their argument for tradeoffs in the Presidential Oath Clause. Rather, they make empirical, institutional, and normative claims that the executive is best situated to decide security policy during emergencies; therefore, courts, Congress, and citizens should all defer to those decisions.[86] Paulsen takes the further step of grounding this balancing act in the Constitution itself.[87] Thus, if there is a principle of necessity at the core of the Constitution, there would be no need for officials to act in an extra-legal manner. Necessity becomes inseparable from the Constitution.

Under this Constitution of necessity, not only does the President have the power to act as necessary in appropriate circumstances; he is the officer charged with deciding the circumstances. Moreover, the circumstances need not be strictly necessary to provide for existential survival under a narrow "survival rule."[88] Exemplifying this power over the circumstances of necessity, President Bush justified the invasion of Iraq in 2003 as flowing from his constitutional duty based on his oath of office:

81. In a similar vein, Joel Goldstein states that "the President has a unique relationship to the Constitution, that in addition to his discrete Article II powers and duties, he has special responsibilities to make certain that the Constitution survives his watch." Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS U. L.J. 791, 829 (1999).

82. POSNER & VERMEULE, *supra* note 21, at 24.

83. *Id.* at 31.

84. *Id.* at 12. Richard Posner also notes that "[t]he challenge to constitutional decision making in the era of modern terrorism is to restrike the balance between the interest in liberty from government restraint or interference and the interest in public safety, in recognition of the grave threat that terrorism poses to the nation's security." RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 31 (2006).

85. POSNER & VERMEULE, *supra* note 21, at 15-16.

86. *Id.* at 158-59.

87. *See generally* Paulsen, *supra* note 30.

88. *See* Heller, *supra* note 72, at 790-91.

"The United States of America has the sovereign authority to use force in assuring its own national security. That duty falls to me, as Commander-in-Chief, by the oath I have sworn, by the oath I will keep."[89] In this case, the power to decide the exception, and to commit military forces in a foreign land, was not extra-constitutional in nature, especially since Congress provided authorization for the use of military force.[90] The President's language is, however, an affirmation of the principle of constitutional necessity based on the Presidential Oath to assure national security without reference to other legal constraints or imperatives.[91]

One troubling feature of this approach is that it proposes to defer to decisions made by the very officials who have the greatest interest in acting on necessity, thereby circumventing the ordinary constraints of civil liberties. The plebiscitary President, responding to public fears, will have an immense incentive to develop new policies and practices that at least have the appearance of increasing security by invoking national necessity, and far less incentive to promote civil liberties, especially if doing so makes providing security more costly. Justice Souter's concurrence in *Hamdi v. Rumsfeld*[92] makes a similar point in terms of separated powers:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.[93]

Even if Congress has concurrent power to check the worst examples of presidential abuse by passing legislation pursuant to the Necessary and Proper Clause, once the power for the President to act beyond normal

89. President George W. Bush, Address to the Nation, President Says Saddam Hussein Must Leave Iraq Within 48 Hours (Mar. 17, 2003), http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html.

90. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

91. This principle also bolsters the status of the President's rhetoric regarding necessity and national security. "In all these efforts, however, America's purpose is more than to follow a process—it is to achieve a result: the end of terrible threats to the civilized world . . . Whatever action is required, whenever action is necessary, I will defend the freedom and security of the American people." President George W. Bush, State of the Union Address (Jan. 28, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

92. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

93. *Id.* at 545 (Souter, J., concurring). Justice Jackson articulated the problem in this way: "[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

constitutional constraints is found at the center of the Constitution, conflict between the two branches takes on a new dimension.

Rather than deviating from constitutional design, the President would now be able to argue that his actions are pursuant to constitutional purpose and principle. Interestingly, in such a conflict, the President may violate an affirmative duty "to take Care that the Laws be faithfully executed."[94] His refusal to execute congressional statutes in the name of his implicit unilateral authority during time of hostilities may conflict with that textually explicit duty.

The possibility for conflict is not merely hypothetical. In the National Defense Authorization Act for Fiscal Year 2008, Congress provided additional funding for continued military operations in Iraq.[95] In that Act, Congress passed a provision which forbids the President from using the funds to establish permanent military bases in Iraq.[96] In his statement on signing the Act into law, President Bush claimed:

> Provisions of the Act . . . purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations . . . to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive Branch shall construe such provisions in a manner consistent with the constitutional authority of the President.[97]

President Bush has used signing statements more than any other President, and often with the dubious implication that he purports to rewrite or ignore provisions that he has signed into law.[98] In this case, the President asserts constitutional obligations that trump his constitutional obligation under the Take Care Clause, leaving open the possibility that the President might claim authority to establish military bases in contravention of the Act's explicit prohibition.

Nonetheless, somewhere in the midst of the Commander-in-Chief power, the Take Care Clause, and the Presidential Oath Clause, some argue that the President is constitutionally authorized to act according to necessity, unchecked and unconstrained by other constitutional principles, particularly in times of national emergency. Such a view is implicit in the President's signing statement regarding a prohibition against torturing detainees, in which he claimed to construe the Act "in a manner

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94. U.S. CONST. art. II, § 3. *But see* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261 (1994) (arguing that the Take Care Clause supplements and complements the presidential oath as a textual justification for the president's authority to interpret the laws independent of any other branch).

95. National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, 110th Cong. sec. 1222 (2008).

96. *Id.*

97. President's Statement on Signing of H.R. 4986, the "National Defense Authorization Act for Fiscal Year 2008" (Jan. 28, 2008), *available at* www.whitehouse.gov/news/releases/2008/01/20080128-10.html.

98. *See* American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander-in-Chief . . . which will assist in achieving the shared objective . . . of protecting the American people from further terrorist attacks."[99] The implication is that the President retains power to do what is necessary to protect against future terrorist attacks, unconstrained by the limitations imposed on that power by congressional statutes. The Bybee memo makes this argument, as a legal opinion binding on the executive branch, explicit: "As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants," and "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."[100] The memo further argues that the "President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces."[101] The Yoo Memo repeats these claims in the specific context of the President's power to order "harsh interrogations" or torture: "Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that would prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States."[102] According to the President, federal courts also lack authority to review and regulate the exercise of his discretion in this area.[103] On this view, Congress, courts, and citizens should all defer to unfettered executive action taken as necessary to protect national security.[104] Such "necessary" actions may include indefinite detentions as well as torture—actions justified by the power to act as circumstances require.[105] Thus, even if we find a principle of necessity at the heart of the President's

99. President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

100. Bybee Memo, *supra* note 24, at 31, 35.

101. *Id.* at 33.

102. Yoo Memo, *supra* note 3, at 19. The Memo also argues that "[a]ny effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." *Id.*

103. "However, the scope of judicial review that is available concerning the military's determination that an individual is an enemy combatant is necessarily limited by the fundamental separation-of-powers concerns raised by a court's review or second-guessing of such a core military judgment in wartime." Brief for Respondents, *supra* note 40, at 10.

104. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 580, 582 (2004) (Thomas, J., dissenting) ("The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations . . . . [I]t is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.").

105. A former head of the Office of Legal Counsel from which the Bybee Memo issued stated that the message was clear that "violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority." JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 144 (2007).

powers under Article II, we do not avoid legal conflict with constitutional constraints when executive action conflicts with executive duty under the Take Care Clause.[106]

3. *Is the Judiciary Necessary?*

When two political branches are in conflict, or when one of the branches deprives individuals of constitutionally protected rights, a role ordinarily exists for judicial review. Under the normal functioning of constitutional checks and balances, judicial review allows judges to monitor the outer limits of the political branches' enumerated powers in order to safeguard liberty. Necessity, however, does not arise during normal times, and the unilateral tendency of the necessity Constitution does not envision anything more than a minimal role for the judiciary during times of emergency. Indeed, some advocates of necessity argue on behalf of complete judicial deference to executive decisions, even when those decisions suppress other constitutional rights: "The deferential view is that judicial review of governmental action, in the name of the Constitution, should be relaxed or suspended during an emergency."[107] Moreover, advocates of the necessity Constitution such as Posner and Vermeule claim that federal judges "are amateurs playing at security policy, and there is no reason to expect that courts can improve upon the government's emergency policies in any systematic way."[108]

As a version of what Cass Sunstein calls "National Security Maximalism,"[109] this approach claims that when it comes to maintaining the optimal balance between security and liberty, the executive has the institutional prerogative. Although Sunstein rejects this approach, he does advocate for judicial minimalism, "representing a kind of Due Process Writ Large."[110] Minimalism requires that Congress provide clear statements authorizing executive action that intrudes on other constitutional interests, that some kind of a hearing is provided before persons are deprived of their liberty, and that courts should provide "narrow, incompletely theorized rulings."[111]

According to Sunstein, the Court has often employed minimalism when confronting challenges to executive authority during wartime. In *Ex parte Quirin*, the Court upheld the detention and trial before military commissions of six Nazi saboteurs as enemy combatants, one of whom, Herbert Haupt, was a U.S. citizen.[112] Avoiding the President's claim to inherent authority to detain and try the saboteurs as enemy combatants before military tribunals, the Court reasoned that the President was act-

106. This problem does not dissipate when presidential unilateralists defend executive action at a higher level of abstraction.
107. POSNER & VERMEULE, *supra* note 21, at 15 (emphasis omitted).
108. *Id.* at 31.
109. Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 56.
110. *Id.* at 109.
111. *Id.*
112. 317 U.S. 1, 20, 48 (1942).

ing within constitutional powers granted by Congress.[113] Seeing in *Quirin* a justification for detaining individuals, including citizens, as "enemy combatants," and trying them before military commissions, the Bush Administration argued that the Executive has the unchecked unilateral authority to detain individuals, including U.S. citizens, that he deems "enemy combatants" in the war on terror.[114] The *Hamdi* plurality found authority for executive action in the Authorization for Use Military Force, subjecting the detentions only to the limited judicial check of providing detainees the due process right to contest their status.[115] Sunstein approves of this approach because it provides a minimal, under-theorized holding that finds congressional authorization for executive action while subjecting executive authority to minimal judicial checks.[116]

The plurality in *Hamdi* made clear that executive unilateralism has limits, even in times of purported emergency. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[117] When holding that the President's actions were lawful in *Quirin*, the Court made clear that the "President, like the courts, possess[es] no power not derived from the Constitution."[118] One implication of these cautionary notes is that the President cannot balance security and liberty interests unmoored from congressional authorization *and* constitutional authority. Moreover, the Court in *Hamdi* emphasized that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[119] As the *Boumediene* Court explained, "[s]ecurity subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."[120]

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113. *Id.* at 30, 41–45. "We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged." *Id.* at 29.

114. Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

115. *Id.* at 536–38 (plurality opinion). The Administration had previously argued that the Court lacked jurisdiction to consider the habeas corpus challenges of Guantanamo detainees. The Court rejected this position, holding that federal courts had jurisdiction pursuant to 28 U.S.C. § 2241 to hear the detainees' claims. *See* Rasul v. Bush, 542 U.S. 466, 484 (2004) (plurality opinion).

116. Sunstein, *supra* note 109, at 101 (finding aspects of the opinion as reasoning "[i]in good minimalist fashion").

117. *Hamdi*, 542 U.S. at 536; *see also* Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[The war power] permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.").

118. *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

119. *Hamdi*, 542 U.S. at 536.

120. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008).

A significant problem with Sunstein's version of minimalism is that it is too minimal. Sunstein would require judges to endorse the actions of the political branches—even when significant constitutional commitments are at stake—checked only by the requirement that some minimal amount of due process accompany deprivations of liberty.[121] Presumably, judicial minimalism is consistent with upholding the detention of Ali Saleh Kahlah al-Marri, who was taken from his home in Peoria, Illinois, and has been held as an enemy combatant on the President's order since June 2003.[122] In this case, where there was an absence of any statement that al-Marri was connected in any way to the battlefield or that he had taken up arms against the United States, a panel of the Fourth Circuit held that "the President lacks power to order the military to seize and indefinitely detain al-Marri."[123] Perhaps more in line with Sunstein's view of judicial minimalism, the Fourth Circuit sitting en banc overturned the panel and held that Congress had in fact authorized the President to detain al-Marri.[124] If rights against indefinite detention and practices such as harsh interrogation are to be protected, something more than judicial minimalism is required, especially when the circumstances that give rise to executive assertions of power rely as much on the rhetoric of war as the reality. Even if Sunstein's model of minimalism at war appropriately captures the rule of the Supreme Court during wartime, it is poorly suited to the ongoing "war on terror," dependent as it is on the rhetorical manipulation of supposed wartime circumstances in peaceful Peoria, Illinois.[125]

More consistent with settled constitutional principles is the view that courts play a robust role in checking the constitutional excesses of the political branches, even under purported times of emergency. Perhaps the background situations of *Quirin* and *al-Marri* involve occasions in which executive authority is at its peak, but neither case presents emergencies in which the full government could not function normally.

Absent a truly extraordinary situation, our constitutional culture provides two significant checks against executive threats to liberty—judicial review and the political participation of citizens. Citizen monitoring of executive practices of torture and indefinite detention, as well as widespread refusal to consent to the dramatic changes in the constitutional culture urged by the Administration, suggests that this check continues to have some vitality.[126] Although the Supreme Court found jurisdiction

121. *See* David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2024 (2006) (arguing that Sunstein "permits the executive to claim that a system of arbitrary detention is one which operates under the rule of law, but also requires judges to endorse that claim").

122. Al-Marri v. Wright, 487 F.3d 160, 164 (4th Cir. 2007).

123. *Id.* at 164.

124. Al-Marri v. Pucciarelli, No. 06-7427, 2008 U.S. App. LEXIS 14979 (4th Cir. July 15, 2008) (en banc).

125. The Administration argued to the Fourth Circuit that Peoria is part of the newly defined battlefield in the war on terror. *Id.*

126. *See* Scott Shane, *Waterboarding Focus of Inquiry by Justice Department*, N.Y. TIMES, Feb. 23, 2008, at A1.

over Guantanamo detainees in *Rasul*,[127] extended to detainees procedural rights to contest their designation as "enemy combatants" in *Hamdi*,[128] and concluded that Common Article 3 of the Geneva Conventions applies to detainees in *Hamdan*,[129] the Court has not substantively ruled on any of the Bush Administration's contested practices in the "war on terrorism."[130] Indeed, the *Boumediene* Court underscored this fact when it observed with regard to Guantanamo detainees, "[s]ome of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention."[131] Even though judicial review is necessary, it may not always be a robust, or timely, participant in the ongoing conversation about the shape and direction of constitutional culture.

4. *Does the Oath Clause Require Constitutional Preservation?*

The problem with this Constitution of necessity is that it creates an entirely new constitutional order—one that changes the meaning and scope of constitutional constraints. Madison was concerned that the constitutional order would be undermined if it attempted to oppose a stronger and prior impulse to national preservation with constitutional barriers.[132] Solving this problem by finding within the Constitution a consequentialist principle of necessity creates an equally troubling problem: the Constitution turns out to be a balancing act, emptying of content the notion that constitutional provisions serve as principled constraints on government actions, no matter the costs. This approach redefines Madison's "necessary usurpations of power" as proper exercises of constitutional balancing.[133]

It is always easier to achieve "compelling" governmental purposes if one is permitted to act free from constitutional impediments. For example, police work would be much easier if exigent circumstances were always presumed to exist, eliminating any remaining vestiges of principled constraint in the face of claimed necessity.[134] Convenience, however, has never been thought to trump principle in our constitutional tradition. As the Supreme Court has noted, "the mere fact that law enforcement may

127. Rasul v. Bush, 542 U.S. 466, 485 (2004).
128. Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004).
129. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-2800 (2006).
130. *See generally* Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) (describing how the Supreme Court's rulings in three cases regarding detainment of individuals for years without charging them with a crime "badly compromised" basic constitutional principles).
131. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008).
132. FEDERALIST No. 41, *supra* note 74, at 257.
133. *Id.*
134. For example, in *City of Indianapolis v. Edmond*, the Court held that city roadblocks for narcotics searches were unconstitutional because the Fourth Amendment requires individualized suspicion under these circumstances, reasoning that "[w]e cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." 531 U.S. 32, 44 (2000).

be made more efficient can never by itself justify disregard of the Fourth Amendment."[135] Moreover, "the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."[136] Indeed, the very point of opposing the constitutional principle of necessity is to channel the exercise of state power within predetermined boundaries and preserve a domain of individual liberty free from state intrusion, even if in so doing government officials find that accomplishing their goals and fulfilling their duties is made more difficult.

By claiming that a constitutional principle of necessity exists in the Presidential Oath Clause, Paulsen too quickly and too easily equates preserving the Constitution with preserving the nation.[137] "We the People" ordained and established the Constitution, which the President has the duty to preserve. "We the People" formed a political bond, withholding particular powers and retaining particular rights from the terms of that bond.[138] To use a religious concept, the President's duty is to maintain the sanctity of that bond, which includes the duty to protect the conditions under which that bond was made possible.[139] Thus, a principle of necessity conflicts with the ideal of maintaining fidelity to the terms of this constitutional bond, because it purports to free the President from the very limitations that define the bond and the constitutional culture it fosters. The Constitution of necessity places protecting national security over preserving the legitimating terms of that political bond. As Christopher Kutz observed, "[t]he vulnerability of the people cannot be equated with the vulnerability of the nation itself. Instead, the *nation* is rendered insecure only when its identity and existence comes under siege."[140] Existence *as identity* of a constitutional culture, with a particular outlook and way of living in the political security of protected rights and constrained government, is precisely what cannot be preserved under a principle of necessity that supervenes over constitutional structure.

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135. Mincey v. Arizona, 437 U.S. 385, 393 (1978).

136. *Id.* Writing in dissent in *California v. Acevedo*, Justice Stevens reiterated this point: "Even if the warrant requirement does inconvenience the police to some extent, that fact does not distinguish this constitutional requirement from any other procedural protection secured by the Bill of Rights. It is merely a part of the price that our society must pay in order to preserve its freedom." 500 U.S. 565, 601 (Stevens, J., dissenting).

137. *See generally* Paulsen, *supra* note 30.

138. Both the Ninth and the Tenth Amendments make explicit this act of withholding. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

139. *See* Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 3 (1984) (noting that the U.S. Constitution "has been, virtually from the moment of its ratification, a sacred symbol, the most potent emblem . . . of the nation itself").

140. Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 273 (2007) (emphasis added).

Operationally, decisions about procedures of interrogation should take into account what it means to "preserve, protect and defend the Constitution of the United States,"[141] especially in a culture-preserving manner. It is not enough to protect national security in some abstract sense. The notion of "national security" is poorly matched as an object to balance against specific civil liberties such as freedom of speech, indefinite detention, or the protection of bodily integrity and dignity.[142] One wants to know what specific gains in security are to be matched against which specific losses of liberty in order to better understand in what sense a given action serves to protect the Constitution.

In order to determine how to preserve and protect the Constitution, we must take into account what specific decisions do to constitutional meaning. Moreover, given the ways in which constitutional meaning is imbricated with norms of international human rights law that also seek to protect human dignity and integrity, we must look to how well specific decisions pay "a decent respect to the opinions of mankind."[143] If the President's power is construed as being broad during times of emergency or exigency, his duty to protect these interconnected constitutional norms and interests is broad as well. To the extent that it is difficult for the President to both preserve and protect the Constitution and its defining commitments during real-world exigencies, there is a role for Congress and courts to engage the conversation about preserving and protecting the Constitution, its meaning, and the persons and culture it constitutes.

More than grounding a principle of necessity, the Oath Clause's language of "preserve and protect" implies a strong emphasis on preserving not a mere document or an abstract conception of the nation, but on preserving constitutional culture—ways of ordering social and political life which provide ways of seeing the world and enabling individuals to fulfill the promise of liberty and pursuit of happiness.[144] In order to vindicate this duty to preserve the Constitution and the culture it nurtures, executive actions cannot be the product of univalent, unconstrained choices about efficient ways to protect against physical threats to the nation. Rather, executive decisions must take account of the constitutional culture and the Constitution-preserving implications of official action. The Oath does not bind the President to preserve an abstract notion of "Nation" or national security, but rather the principles and values the Constitution articulates and the political culture of "We the People" it sustains.

The temptation, however, to privilege necessity gets expressed through the claim that the "Constitution is not a suicide pact,"[145] an expression

141. U.S. CONST., art. II, § 1, cl. 7.

142. *See* Crocker, *Torture with Apologies*, *supra* note 27, at 583-84.

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

144. *See generally* MICHAEL SULLIVAN, LEGAL PRAGMATISM: COMMUNITY, RIGHTS, AND DEMOCRACY (2007).

145. This statement originates in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide

widely circulated after September 11 to bolster the idea that constitutional constraints cannot stand in the way of national necessity. Under this logic, without a secure nation, there will be no civil liberties to protect. In the words of Chief Justice Hughes, "[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[146] While true, this claim does not support the proposition that necessity can trump principle, except perhaps in the most dire existential crisis. Even in such circumstances, if one maintains fidelity to the idea of the Constitution as principled constraint against encroachments on civil liberties, it would be better to maintain the extra-legal status of an act intended to respond to the truly extraordinary event.

To the extent that necessity overpowers principle, when we acknowledge the extra-legal status of actions unconstrained by constitutional principles, we retain the extraordinariness of the resort to necessity, if and when it is ever justified, and keep an appropriate distance between what is normal and what is exceptional.[147] Because a Constitution of necessity provides no clear guidance as to when the principle of necessity trumps normal principles, we at least maintain greater conceptual clarity by placing necessity outside the bounds of the Constitution. To do so is not to suggest that extra-legal actions taken in the name of necessity would be justified; it means that necessity cannot be justified within a constitutional framework itself. Alternatively, otherwise illegal actions could be given rule of law status by enacting quasi-constitutional statutes of the form Bruce Ackerman has recommended, authorizing the executive to have more expansive powers over detention in the immediate wake of a significant terrorist attack with a gradual return to normalcy over time.[148] This solution eschews the possibility of extra-legal action, thereby preserving core constitutional values while accommodating the emergency situation. What is clear from the range of analytic options—a constitutional principle of necessity, an extra-legal reliance on necessity, or a rule of law limitation on necessity—is that the content of constitu-

pact."). *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."). The phrase also forms the title of Judge Posner's most recent project explaining the necessity of balancing away civil liberties to promote national security. *See generally* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006); *but see* David Cole, *How to Skip the Constitution*, THE NEW YORK REVIEW OF BOOKS, Nov. 16, 2006 (criticizing Posner and arguing that "[c]onstitutional theory . . . demands more than mere ad hoc balancing").

146. Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

147. Others have explored the advantages of this approach. *See e.g.*, Lobel, *supra* note 28, at 1428 ("Emergency situations . . . are best addressed not by allowing broad executive discretion, even limited temporally, but by forcing the President to respond to such emergencies by openly acting unconstitutionally."); *see generally* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1487-89 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 YALE L.J. 1011 (2003).

148. ACKERMAN, *supra* note 57, at 57.

tional culture and official practice depend very much on which theoretical framework we adopt.

B. The Constitutional Practice of Necessity

If the Constitution of necessity is fraught with difficulty, what about the practice of necessity? The practice of necessity arises on a continuum between two separate situations. One is in response to genuine emergencies. The clearest examples would be cases of rebellion or invasion when habeas corpus could be suspended, or when a state is "actually invaded, or in such imminent Danger as will not admit of delay,"[149] such that the state is authorized to engage in war. The other way to practice necessity is to use rhetoric to transform ordinary problems into exigent or emergency situations. Executive discretion to act combined with enabling legislation and deferential courts have created environments in which indefinite detention, suspicionless searches, suppressed dissent, and "harsh" interrogation or torture are all practices justified by appeal to necessity. If an executive official can convert an ordinary, albeit significant, problem into an exigent circumstance, the official's actions can spin free from ordinary constitutional constraint. Given the freedom to act in light of a compelling need, there will always be incentives and pressures to convert problematic situations accordingly. As Justice Jackson suggests, "[e]mergency powers . . . tend to kindle emergencies."[150]

Because necessity may operate without principled limits, actions which it justifies are susceptible to repetition and normalization, often outside the bounds of the narrowly construed exigent circumstance. Normalization is particularly problematic when, for example, the war on terror—which is a significant basis for claims to unconstrained executive authority—"will not end until every terrorist group of global reach has been found, stopped and defeated."[151]

1. Criminal Procedure

One way of normalizing necessity within law is through the *creation* of exigent circumstances, where the shape of a protective constitutional right changes to fit the "special needs" of state officials. Exigency, no less than emergency, supports claims to act free from ordinary constitutional constraints. When state officials assert exigent circumstances, courts balance the asserted need against the liberty implicated by that need. This practice is most visible in the development of "exigent circumstance" exceptions to criminal procedure principles.[152]

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149. U.S. Const., art. I, § 10, cl. 3.

150. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

151. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

152. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 394 (1978).

Ordinarily, suspicionless searches of individuals are prohibited by the Fourth Amendment.[153] In order to have authority to conduct searches of persons or places, state officials must obtain a warrant from a neutral magistrate legitimated by the requisite individualized suspicion.[154] Exceptions abound for this requirement. One line of cases illustrates the way in which an assertion of exigent circumstances in one situation spreads to others, creating a constitutional climate in which the governing principle begins to look more like the exception. For example, the Supreme Court has carved out a "special needs" exception to the ordinary Fourth Amendment warrant backed by probable clause.[155] Responding to a perceived compelling state need, the Court authorized border patrol agents to conduct suspicionless searches of cars for illegal aliens near the Mexican border.[156] Having established the exception by accommodating claims of necessity, similar claims to a special need now include highway sobriety checkpoints,[157] checkpoints for information gathering,[158] drug testing of student athletes,[159] and, most recently, random searches of bags in the New York subway system.[160] In each case, the special need is justified by circumstances that purport to make necessary the searches and temporary seizures employed by state officials.

Judicial authorization for the New York Subway searches raises the most troubling questions. The Second Circuit engaged in a balancing test in which the liberty interest never made an appearance.[161] Rather, the court reasoned by analogy from existing practices of airport searches, accepting without question the assertions made by law enforcement officials concerning the need for random searches.[162] The court justified the program of random searches by noting that "[w]e have no doubt that concealed explosives are a hidden hazard, that the Program's purpose is prophylactic, and that the nation's busiest subway system implicates the public's safety. Accordingly, preventing a terrorist from bombing the subways constitutes a special need."[163] Here, officials asserted that the searches were necessary in order to prevent terrorist attacks. Using the threat of terrorism is like playing a necessity trump card. Combining the current climate of the "war on terror" with the availability of the "special need" exception, the Second Circuit was unwilling to oppose constitu-

153. U.S. CONST. amend. IV.

154. *Id.*

155. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

156. United States v. Martinez-Fuerte, 428 U.S. 543, 545, 551-53 (1976).

157. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

158. Illinois v. Lidster, 540 U.S. 419, 427-28 (2004).

159. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653-54 (1995).

160. MacWade v. Kelly, 460 F.3d 260, 263 (2d Cir. 2006).

161. *Id.* at 271-73.

162. *Id.* at 270.

163. *Id.* at 271.

tional principle to claims of state necessity.[164]

What is significant about this line of cases is the way in which a "special need" in one circumstance spreads to others. We move by accretive creep from a point of specific "special need" to a general "special need." What was special becomes normal. We thus begin to see the world in terms of terrorist threats and regular, suspicionless searches. The *Katz* doctrine provides that the Fourth Amendment protects expectations of privacy that society is willing to recognize as reasonable.[165] When the incremental growth of "special need" exceptions leads to suspicionless searches of pedestrians on sidewalks in urban centers, claims to a privacy right to be "left alone"[166] will merit constitutional protection only to the extent that citizens and courts are willing to recognize the right as reasonable in light of the circumstances. In this manner, necessity gives rise to "special needs" that alter official practices and produce different cultural expectations, which in turn transform the nature and scope of constitutional protections. As necessity becomes normal in some defined sphere, altered practices give rise to changed constitutional culture.

2. *War on Terror*

In the wake of new challenges posed by terrorist threats, states will be sorely tempted to normalize practices of necessity. In responding to the threats posed by the September 11 attacks, U.S. officials have detained and interrogated thousands of persons at home and abroad.[167] The U.S. has labeled detained captured Taliban fighters and suspected al Qaeda members "enemy combatants" and attempted to avoid legal obligations imposed by the Geneva Conventions for the treatment of detainees and to circumvent domestic judicial jurisdiction.[168] In so doing, officials have also sought to loosen, if not lift, the norm against engaging in torture.

The Department of Justice ("DOJ") operated under a binding legal opinion that severely limited what actions could count as torture under U.S. law to those that caused "intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in

164. *See id.*

165. Katz v. United States, 389 U.S. 347, 359 (1967).

166. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (arguing that the "makers of our Constitution," "conferred, as against the government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men.").

167. Edward Wong, *American Jails in Iraq Are Bursting with Detainees*, N.Y. TIMES, Mar. 4, 2005, at A1; *see also* Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantanamo*, N.Y. TIMES, Feb. 17, 2006, at A6 (reporting that "only 45 percent of the prisoners have committed a hostile act against the United States or its allies, and that only 8 percent have been classified as Qaeda fighters").

168. Amnesty International "believes in their totality [that these conditions of detainment] amount to cruel, inhuman and degrading treatment in violation of international standards." Press Release, Amnesty International, United States of America: International Standards for All 3-2 (Mar. 25, 2003), *available at* http://www.amnesty.org/en/library/asset/AMR51/045/2003/er/dom-AMR510452003en.html.

a loss of significant body function will likely result."[169] As a result of the culture created by this and other Bush Administration positions, it is likely that "harsh interrogation" or torture in violation of international and domestic law has not been confined to the extraordinary occasion.[170] Presenting a factual accounting of some of what is known about practices seemingly authorized by the DOJ is certainly a moving target, as new revelations arise regularly.

Troubling aspects of official culture surrounding questionable detention and interrogation practices began shortly after September 11. Reports of "stress and duress" techniques employed by U.S. officials and the statements by former detainees about the conditions of interrogation at the U.S. base at Bagram, Afghanistan indicate a consistent attempt to explore, if not exceed, the outer limits of what is legally permitted. Officials have described their techniques as "not quite torture, but about as close as you can get."[171] Porter Goss, director of the C.I.A., described "waterboarding" as an approach that falls within "an area of what I call professional interrogation techniques" and further defended these interrogation techniques as successful in preventing terrorist attacks.[172] Underscoring the role of necessity arguments, one official stated: "If you don't violate someone's human rights some of the time, you probably aren't doing your job."[173] Detainees have described some of the interrogation techniques as including being kept standing or kneeling for hours wearing black hoods, being kept in awkward or painful positions, and being deprived of sleep under twenty-four hour bright lights.[174] Abdul Jabar and Hakkim Shah report being forced to stand naked and immobile while being hooded and shackled.[175] Khalid Shaikh Mohammed, the alleged mastermind behind the 9/11 attacks, was repeatedly subjected to "waterboarding" during interrogation.[176] At least two deaths caused by "blunt force injuries" at Bagram Air Base in Afghanistan have been investigated and ruled as "homicides."[177] Interrogators withheld pain medication from Abu Zubaydah, a high-ranking al Qaeda leader, who was

169. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel to James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice 2 (Dec. 30, 2004) (regarding "Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A") (replacing the Bybee Memo, *supra* note 24) [hereinafter "Levin Memo"].

170. Tapes destroyed.

171. Don Van Natta, Jr., *Questioning Terror Suspects In a Dark and Surreal World*, NY TIMES, Mar. 9, 2003, at 14.

172. Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use*, N.Y. TIMES, Mar. 18, 2005, at A1.

173. Barton Gellman & Dana Priest, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

174. *Id.*

175. Carlotta Gall, *U.S. Military Investigating Death of Afghan in Custody*, NY TIMES, Mar. 4, 2003, at A14.

176. Mark Mazzetti & Margot Williams, *In Tribunal Statement, Confessed Plotter of September 11 Burnishes Image as a Soldier*. N.Y. TIMES, Mar. 16, 2007, at A15.

177. Tim Golden, *Years After 2 Afghans Died, Abuse Case Falters*, N.Y. TIMES, Feb. 13, 2006, at A1.

shot several times when he was captured.[178] And John Walker Lindh complained of not being treated for a gunshot wound and being kept naked and bound to a stretcher with duct tape—what his lawyer described as "torturous conditions."[179] In addition to the U.S. practices of interrogation at Bagram and elsewhere, the U.S. has reportedly been turning over suspects for interrogation in countries known for their use of torture, in violation of our obligations under the Convention Against Torture[180] which protects persons from being transported to other states to be tortured.[181] Finally, troubling U.S. practices became most visible through the photographs depicting abuses at the Abu Ghraib prison in Iraq.

The developed picture of official actions in Afghanistan, Iraq, and elsewhere is that the line has been crossed in official U.S. practice from coercive interrogation to torture. This move is largely motivated by the background argument of necessity: if we do not act aggressively, if we do not push the acceptable limits of interrogation and follow the letter and spirit of the norm against torture, we will not have sufficiently protected ourselves from possible future attacks. As one U.S. official commented when explaining the interrogation of Khalid Shaikh Mohammed, "keep in mind that this is a guy who was not only the mastermind of 9/11, but was also actively involved in plotting future and ongoing terrorist operations . . . . Everyone would understand the wisdom of finding out whatever information we can from him."[182] The implied "by any means necessary" in the voice of reason and normalcy challenges the full realization of the norm against torture in practice. In fact, reports make clear that in the face of claimed necessity, officials did not hesitate to resort to torture.[183] Remarks like the following from Vice President Cheney exemplify claims to act as necessary:

> Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose, that's in the eye of the beholder. But I believe, and we think it's important to remember, that we are in a war against a group of individuals and terrorist organizations that did, in fact, slaughter 3,000 innocent Americans on 9/11, that it's important for us to be able to have effective interrogation of these people when we capture

178. *Questioning Terror Suspects*, *supra*, note 171.

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

180. Convention Against Torture, *supra* note 11, at 3 ("No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.").

181. *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, at 106; *see also* Guy Dinmore, *Pressure Grows on US Rendition Policy in US Congress*, FINANCIAL TIMES (London), Nov. 21, 2006 (reporting "the case of Canadian citizen, Maher Arar, who was seized [as it turns out in error] by U.S. authorities and deported to his native Syria, where he was tortured").

182. Lichtblau & Liptak, *supra* note 179.

183. *See, e.g.*, Jane Mayer, *The Black Sites*, THE NEW YORKER, Aug. 13, 2007, at 46.

them.[184]

Claiming that the President had made "tough and courageous" decisions in the war on terrorism, Mr. Cheney asserted that detention and interrogation programs for high level detainees had yielded "information that has saved thousands of lives."[185] In other words, the goal of saving lives makes it necessary to employ extra-legal means, with no acknowledgment that even necessity might require a stronger justification, and no demonstration that other, legal means might have proven just as effective. Merely claiming a weak form of necessity suffices.

These arguments of executive unilateralism are not confined to practices of detention and interrogation, but also appear in the context of domestic surveillance programs. After September 11, the administration began intercepting communications of persons in the United States outside of the constitutional and statutory framework established to authorize and regulate such practices.[186] Necessity now operates not at the level of dire existential threat but at the level of electronic intelligence gathering.

Nonetheless, executive officials defend taking such actions first on the basis of the circumstances surrounding the aftermath of September 11, and second on the Executive's inherent constitutional authority. Building a case that relies on the President's authority to conduct foreign relations,[187] the power to protect the nation from foreign attacks,[188] and the power to gather foreign intelligence information, the DOJ issued a "white paper" which argued "that the President has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes."[189] Given the barrier that the standing doctrine creates for individuals challenging the constitutionality of the program, judicial review will be difficult to obtain, with the consequence that the political process and public pressure are the

184. *Nightline: Cheney Roars Back* (ABC television broadcast Dec. 19, 2005), *excerpt available at* http://abcnews.go.com/Nightline/IraqCoverage/story?id=1419206 (interview by Terry Moran with Vice President Dick Cheney); *see also* Dan Eggen, *Cheney's Remarks Fuel Torture Debate*, WASH. POST, Oct. 27, 2006, at A9 (discussing the Vice President's remarks that a "dunk in water" is a no-brainer).

185. Scott Shane, *C.I.A. Chief Doubts Tactic to Interrogate Is Still Legal*, N.Y. TIMES, Feb. 8, 2008, at A9.

186. *See* Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801-1862 (2000); *see also* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-315, 82 Stat. 211 (codified as amended at 18 U.S.C. §§ 2510-2521 (2000)). *See* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NY TIMES, Dec. 16, 2005, at A1.

187. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

188. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.").

189. U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 7 (2006) [hereinafter White Paper].

remaining checks on executive claims to necessity.[190] Without delving into the merits of the President's argument, it is enough to recognize that the same kinds of arguments purporting to find inherent authority to act as necessary in light of the circumstances continue to circulate as a competing vision of constitutional culture. This vision is one that would authorize actions taken free from normal constitutional constraint in the name of doing whatever is necessary to ensure national security, even at the expense of liberty or other cherished constitutional values.[191]

3. *Conflicting Constitutional Visions*

It seems clear that an alternative vision of constitutional structure and practice is being offered.[192] In federal court filings, DOJ memos, and papers, the executive branch has advanced a theory of unchecked unilateral authority to act as necessary in conducting the "war on terror." At stake is not only a revisionary view of the separation of powers, but also a revisionary view of the constitutional culture nurtured through protection of individual liberty and sustained through a particular practice of separated and balanced powers. The issue is not that we cannot adopt such a view, but whether we should. It seems that, under an attempt to embed an alternate vision of executive power, "[e]mergency has become its own purpose and justification."[193] Under purported conditions of emergency, circumstances have provided the occasion to implement a theory in practice.[194]

Once we embed certain practices within our governing institutions, we may alter our principles to accommodate the practice. Advocates of deference to executive action that balances security against liberty would argue that if these practices improve security, then there cannot be a problem. On this view, the goal of executive decision-making is to maintain an optimal balance between liberty and security, and sometimes rights have to be suppressed in the name of security. In response, it is important to note that changes in practice and principle can change our overall political and moral outlook. Whatever its content, this outlook is

190. After several academics, journalists, and lawyers, challenged the constitutionality of the NSA national surveillance program, a district court judge ruled that the program was unconstitutional based on violations of the First and Fourth Amendments. The Sixth Circuit reversed and held that the plaintiffs lacked standing because they could not demonstrate that they had actually been targets of the surveillance program. ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 687 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008).

191. The DOJ White Paper articulates the general point: "The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfill that solemn responsibility." *See* White Paper, *supra* note 189, at 1.

192. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Steven G. Calabresi & Kevin H,. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary* 105 HARV. L. REV. 1553 (1992).

193. William E. Scheuerman, *Time to Look Abroad? The Legal Regulation of Emergency Powers*, 40 GA. L. REV. 863, 874 (2006).

194. For example, it was revealed that the DOJ had model legislation, Patriot III, ready if circumstances were to change the political climate.

comprised of the things we value, as well as the ways in which we order our lives in light of what we value.

We are at risk of changing our culture, perhaps in dramatic ways, when we alter our principles to condone torture. Some amount of change is no doubt inevitable, and one would be unjustifiably inflexible to always insist on the status quo. There are some changes, however, that we should reject because they affront and disrupt the constitutional culture that we have striven to protect in light of the principles and practices that give it life. Moreover, some changes are problematic because they alter the scope and application of principles based on practices adopted in reaction to perceived circumstances. Changes such as the NSA surveillance program, indefinite detention of persons designated "enemy combatants," and torture or "harsh interrogation" practices are all changes wrought in response to the new "war on terror." The shape of constitutional constraint and practice can be changed through a broad national consensus; when we do so, however, we should expect the changes to be based on principle and to be the product of reflective reasoning.

Fundamental changes in constitutional practice should not be the product of unilateral ad hoc balancing decisions made in immediate response to perceived circumstances. As Justice Kennedy argued in concurrence in *Hamdan v. Rumsfeld*,[195] "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[196] Nor should fundamental changes be in immediate response to real or perceived threats, given the risk of making decisions based on fear or even hysteria. Instead, far-reaching changes in principle and practice should include as many institutional actors as possible who are all engaged in reflective deliberation. To the extent that executive officials feel the pull of necessity to act unilaterally outside of constitutional constraint, concerned publics must reinvigorate the conversation about our constitutional commitments and how they form and nurture our culture, providing a counterweight of principled constraint to aid officials in resisting temptation to act on necessity alone.[197] Necessity will nonetheless remain most tempting in extreme cases implicating either the existential survival of the state, or the prospect of massive numbers of casualties. The ticking bomb is the paradigm case used to justify necessity in these extreme cases.

195. 126 S. Ct. 2749 (2006).

196. *Id.* at 2799 (Kennedy, J., concurring).

197. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1047 (2004) (confronting the problem of emergencies by proposing a "supermajoritarian escalator," where continued executive emergency power requires increasingly greater support over time).

III. NECESSITY ARGUMENTS: JUSTIFICATION AND SCOPE

At the limit of constitutional principle and ordinary practice we confront the possibility of existential threats so dire that executive officials must make decisions in uncharted terrain. In order to explore this terrain, we must rely on our imagination, since genuine historical examples, as we have seen, are difficult to find. Imagination, as it turns out, has seemingly been more than adequate, weaving together any number of variations on a simple "ticking bomb" hypothetical.[198] As I shall argue, because of the inherent limitations on imagination in this context, there is no way to say hypothetically what should be done in a future emergency situation. Real emergencies don't come neatly emplotted in the form of the simple ticking bomb story. Because circumstances and consequences are so complex in the actual world, imagining the simple story fails to tell us much, ex ante, about what we should do in actual practice. The problem is not that we cannot imagine fantastical hypothetical situations, but that we cannot imagine the institutional and cultural consequences of acting in the everyday world. When we justify torture in the simple case, I argue that we also justify torture in more complex cases, though this fact remains hidden from our imagination.

A. SOMEWHERE A BOMB IS TICKING

The standard argument from necessity presupposes that harm may be done to a specific person when necessary to protect many people from death. We need not be concerned with the precise number of people, because the justification for perpetrating the harm does not turn on the size of the harm to be prevented, so long as the harm prevented would be greater than the harm perpetrated.[199] To be sure, the ticking bomb scenario works best when we imagine a whole city, with perhaps hundreds of thousands of potential victims. In each case, what is advanced is a justification for engaging in torture on consequentialist grounds. The undesirable consequences make the harm of torture both preventative and necessary. Officials torture because they must. Officials torture in order to prevent harm even greater than that perpetrated by the torture.

Notice three things: First, the *justification* for imposing the harm of torture is only incidentally related to a particular person. Second, the *scope* of the harm imposed is not bound to a particular person. Third, the hypothetical requires an imaginative commitment to the logic of necessity and a suspension of normal rules.

First, as to the justification for torture in the ticking bomb case, if P is the person believed to have planted the bomb or is otherwise believed to know where the bomb is located, and if there were no other means within

198. *See, e.g.*, ALAN DERSHOWITZ, WHY TERRORISM WORKS 140 (2002); BOB BRECHER, TORTURE AND THE TICKING BOMB 1 (2007); Henry Shue, *Torture*, 7 PHIL. & PUB. AFFAIRS 124, 142-43 (1978).

199. *See* Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280, 332 (1989).

the temporal limitations of the potentially catastrophic situation to obtain the information, then officials would be justified in torturing P—not for purposes of punishment, official terror, or sadism, but merely for informational purposes. It is the information that officials seek, not the suffering of P. Officials are not attempting to mete out just punishment to adjudged guilt. To justify the suffering of P in itself, by torture or other means, we would have to provide reasons based on retribution, restitution, rehabilitation, or some other justification for punishing P in particular in light of other normative commitments. But in the present scenario, we are not interested in punishment or the suffering of P, but the revelation of information that officials think is hidden in the mind of P. The location of the information necessary to save the lives of thousands is only *contingently* related to P.[200] As such, if there were other means of compelling P to reveal the information, those means would be equally justified. Moreover, if there were other means to obtain the information that did not involve harm to P, officials would no longer be justified in resorting to torture.

As others have noted, the power of the justificatory intuition relies on the art and asceticism of the standard hypothetical—a bomb and a suspect who knows where it is.[201] Imagine the standard ticking bomb scenario, but add to the scenario a suspect who has an unusually high tolerance for pain. Remember, the bomb is ticking, and we do not have a lot of time to wear down his defenses. Officials do know, however, that he is particularly fond of his two daughters, aged nine and ten.[202] In their desperation to prevent catastrophe, officials have detained the suspect's family. "Waterboarding" does not immediately work, and officials do not want to push the limits, lest they accidentally drown the suspect. Needles under the fingernails do not immediately work, nor does the blowtorch (a sadistic device apparently employed by Saddam Hussein).[203] Then the loathsome idea arises—after failing to respond to the usual methods, would the suspect respond to the threatened or actual torture of one or

200. By contrast, when we make judgments of guilt, it is highly relevant that the person judged guilty be the same person on whom we impose punishment.

201. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440-44 (2005).

202. *See* JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE 92 (2000) (describing practices of torturing children to get relatives to talk).

203. Hussein's torture methods included: "branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons, and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives." *See* White House, A Decade of Deception and Defiance (2002), http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf (*quoted in* Harold Hongju Koh, *Can the President be Torturer in Chief*, 81 IND. L.J. 1145, 1150 (2006)). The blowtorch is not alien in American usage either, but was used in a widely reported lynching in Duck Hill, Mississippi in 1936. *See Lynchers Torture, Burn Two Negroes; Mississippi Mob Takes the Prisoners From Officers Outside of Court House*, N.Y. TIMES, Apr. 14, 1937, at 52.

both of his daughters?[204] Would officials be justified in perpetrating such harm? Under the standard justification relying on necessity arguments, the answer must be "yes."[205]

Recall, first, that the justification for torture is only incidentally related to the particular person. We want the information to prevent the catastrophe, we do not desire the torture of the particular person in and of itself for ends such as criminal justice or projecting state power. Moreover, the justificatory intuition depends on the proposition that a "little" loathsome harm is justified by the greater good achieved. This proposition combines the intuitions of both the "lesser evil"[206] and the "dirty hands" arguments.[207] Thus, if obtaining information from P requires the harm of another person, then that harm would also be justified.[208] Imagine then a scenario in which P is made to talk because agents torture his ten-year-old daughter. However repulsive it may be, the torture of his daughter would be justified under the standard argument. Many lives would be saved, it was always within P's power to prevent the harm by simply talking, and the justification for torture as a means to obtaining information is not person-specific. The same justificatory logic applies to torturing the suspect's daughters as it does in the standard case, because in neither case is the torture connected to P in any particular way other than as a means of obtaining the desired information that P can provide.

As the torture of additional family members also illustrates, the scope of the harm justified is not necessarily narrowly circumscribed. Thus, the second point to observe is that just as torture justified by necessity need not be person specific, it need not be narrowly circumscribed. The standard justification need not impose clearly bounded constraints on the scope of the harm or the number of individuals tortured in order to ob-

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204. Such a possibility is all the more realistic when we confront the reality that torturers are ends-driven and obedient to authority. *See* Jessica Wolfendale, *Training Torturers: A Critique of the "Ticking Bomb" Argument*, 32 SOC. THEORY & PRAC. 269, 287 (2006) ("The ticking bomb scenario requires a torturer desensitized to the infliction and endurance of suffering, trained to dehumanize the victims of torture, and who will obey orders without question.").

205. *See* POSNER & VERMEULE, *supra* note 21, at 191 ("The legal system should authorize coercive interrogation in some narrow range of circumstances, suitably defined and regulated ex ante."). *See also Introduction* to CONSEQUENTIALISM AND ITS CRITICS 3 (Samuel Scheffler ed., 1988) (considering such a scenario of torturing a child, and concluding that "utilitarianism seems to imply not only that you may but that you *must* torture the child").

206. *See* MICHAEL IGNATIEFF, THE LESSER EVIL 140-41 (2004).

207. Michael Walzer, *The Problem of Dirty Hands*, *in* TORTURE: A COLLECTION 61 (Sanford Levinson ed., 2005). *See also* John T. Parry and Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?* 63 U. PITT. L. REV. 743, 763-65 (2002) (arguing for the availability of necessity defense when torture provides the last remaining chance to save lives in imminent danger).

208. Notice that the Convention Against Torture contemplates in its definition of torture action taken against third persons. Torture includes "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. . . ." Convention Against Torture, *supra* note 11, art. 2(1)-(2).

tain the required information. Imagine a variation of the standard case, a variation that may even be more realistic. Instead of having in custody a single individual whom officials have good reason to believe knows where the bomb is located, officials have one hundred individuals (the example works just as well if we imagine several hundred). They know that one, and only one, of the individuals can identify where the bomb is located, but they do not know which person among the one hundred knows. If the clock is ticking, then officials would claim that it is necessary to torture all of them simultaneously. Would they be justified in torturing all one hundred, or more, persons? Under the logic of the standard justification, the answer must be "yes."[209]

The logic of the ticking bomb scenario tempts us to confuse punishment and desert with justifications for torture. The scenario presupposes that the person to be interrogated is already suspicious, and, if not actually guilty of participating in acts intended to bring harm to us, is at least knowledgeable about such acts or the planning of such acts by others. Therefore, the individual is guilty by association with other persons who do actually intend us harm, and, therefore, we need not lose any sleep over this individual's torture.[210] He deserves it.

This story makes moral comfort with torture too easy. Thus, it is important to recognize that there is nothing about the claim of necessity that distinguishes the easy from the more complex story. We can easily imagine a more robust version of the hypothetical involving the torture of many persons that would more readily induce moral discomfort.[211] Under the logic of necessity, surely a "little" harm, torture of a group of people with later apologies, is justified to avert a much greater catastrophe—the deaths of many thousands, or even millions. After all, the clock is ticking. Because the necessity argument relies for its justification on

209. Having introduced the ticking bomb hypothetical, the variations multiply. *See, e.g.*, Philippa Foot, *The Problem of Abortion and the Doctrine of Double Effect*, 5 OXFORD REV. 15 (1967), *reprinted in* MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 63 (James Rachels ed., Harper & Row 1971) (1967); *see also* Judith Thompson, *The Trolley Problem*, 94 YALE L.J. 1395, 1395-1401 (1985); Bernard Williams, *A Critique of Utilitarianism*, *in* J.J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 75, 93 (1973) (noting that when we do consequentialist counting, we "will have something to say even on the difference between massacring seven million, and massacring seven million and one"); Moore, *supra* note 199, at 332. I do not seek to resolve moral debates between consequentialists and their critics through refinement of the hypothetical. My purpose is to examine the structure of justification, the logic of necessity, employed in both hypothetical and real-world circumstances. For other uses of the hypothetical, *see* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1440 (2005); Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 892 (2005).

210. Penalizing "guilt by association" through laws prohibiting "material support" for terrorists has become a new strategy in the "war on terror." *See* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 10 (2003) ("The material support law is a classic instance of guilt by association. It imposes liability regardless of an individual's own intentions or purposes, based solely on the individual's connection to others who have committed illegal acts.").

211. For example, imagine a story in which officials knew that someone attending a large wedding knew the location of the bomb. Disrupting the wedding and resorting to torture of attendees of the party would be justified as necessity required.

weighing the harm to be prevented against the harm perpetrated, the possibility of torturing large numbers of individuals to find the one person who can provide the necessary information is justified. The scope of the harm imposed is therefore not merely limited to the person thought to have information, but extends outwards to groups of individuals in which there is a high probability that one of them has the desired information.

B. The Role of Imagination

What is interesting about the scope of harm justified by necessity is that it affirms a situation frequently cited as a reason against allowing torture in the first place. Critics of torture argue that abuses, such as those perpetrated against prisoners at Abu Ghraib, are examples of why, as a practice, we should not engage in torture.[212] Once permitted, torture is not easily controlled, and it will quickly spread, creating a more pervasive practice of official torture.[213] Consequentialists respond to this point by observing that such arguments are about the negative consequences of the practice of torture, not any principled limitations.[214] If the scope of harm must increase, that is only because the scope of potential catastrophe has increased. In the consequentialist's hands, torture will be practiced more or less widely as circumstances prescribe.[215] According to critics, the problem is that circumstances are malleable, and, as in the case of Abu Ghraib, torture will be practiced in situations far removed from the "ticking bomb." In this exchange, however, consequentialists and critics agree that under the logic of necessity, the scope of harm perpetrated is not tethered to the particularity of the person thought to have the needed information.

The third aspect of necessity derived from the ticking bomb hypothetical, and its real-world counterparts, is that if we rely on our imagination to say that we would justify torture in the simple case, then we commit ourselves to torture in the more complex cases. When we imagine the one case, we commit ourselves to the others, though perhaps, as with other kinds of tragic choices, we hide this commitment from ourselves. What we seek to imagine is a world free from torture and other barbarity, except perhaps in the emergency situation in which the greater barbarity would be to *not* torture. Imagination only partially illuminates, for we do not contemplate the institutional and cultural consequences of embedding a justification of torture. When we do so, we shift principled and constitutional meanings that frame the relations between persons and

212. *See e.g.*, Marcy Strauss, *The Lessons of Abu Ghraib*, 66 Ohio St. L.J. 1269, 1271 (2005); Danner, *supra* note 5, at 23-24.

213. "Any judgment that torture could be sanctioned in an isolated case without seriously weakening existing inhibitions against the more general use of torture rests on empirical hypotheses about the psychology and politics of torture. There *is* considerable evidence of all torture's metastatic tendency." Shue, *supra* note 5, at 142-43.

214. Posner & Vermuele, *supra* note 21, at 200-03.

215. Posner & Vermeule argue on consequentialist grounds that torture should be allowed. "[T]he best presumption is that coercive interrogation . . . will be used, or not used, as circumstances warrant." *Id.* at 203.

government power in ways that our imaginations do not make readily apparent.

As soon as we announce in advance the justifying principle of necessity based on the ticking bomb hypothetical, every official with a terrorist-suspect in custody will have to ask himself whether he *ought* to torture.[216] After all, when the suspect is in custody, it may be the case that the suspect has information about an impending attack in which thousands of lives may be at stake. Thus, once officials rely on imagination to justify the practice, at least in emergency situations, officials are bound by their imagination in all situations. The gap between what they imagine might be possible, and what they actually know will always require them to consider the question of torture in any given case. Imagination therefore has perverse impacts in practice. Following their imagination, officials must now consider the question of torture, not as a hypothetical, but as an omnipresent, pressing question.

I do not seek to wring ever more subtle and competing moral intuitions from further hypothetical refinements of imagined ticking bomb scenarios. By exploring the tenor of such hypothetical considerations, I mean to contrast, on the one hand, the monstrosity of commitment to principle in the face of extreme consequences with the monstrosity of commitment to consequences, no matter how terrible the act, on the other.[217] Rather than engage our moral intuitions, I am suggesting that the "official" justifications, which start small, know no boundaries, precisely because necessity is unbounded by the rule of law. Richard Posner explains necessity's status in relation to presidential suspension of habeas corpus: "justification for it must be sought in a 'law of necessity' understood not as law but as the trumping of law by necessity."[218] The "trumping" function of necessity is one that removes the justification for action outside the ordinary constraints of law.[219] By speaking of this exceptional situation as itself the "law of necessity," one contemplates the "logic of necessity." That is, actions unconstrained by considerations of law or morality, but fully determined by perceived circumstances, and justified by appeal to necessity.

What the necessity Constitution and the ticking bomb hypothetical show is the fragility of goodness.[220] We can imagine circumstances in which our identity-constitutive, deeply-held beliefs come into conflict

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216. *See, e.g.*, Martha Minow, *Which Question? Which Lie? Reflections on the Physician-Assisted Suicide Cases*, 1997 SUP. CT. REV. 1, 29-30.

217. There may be no morally acceptable common frame in which to resolve this dilemma. *See* Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123, 143-44 (1972).

218. POSNER, *supra* note 84, at 158.

219. Posner suggests: "Even torture may sometimes be justified in the struggle against terrorism, but it should not be considered *legally* justified. A recurrent theme . . . is that a nonlegal law of necessity that would furnish a moral and political but not legal justification for acting in contravention of the Constitution may trump constitutional rights in extreme circumstances." *Id.* at 12.

220. *See generally* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (1986).

with basic existential necessity.[221] Then we must choose. We can choose death over slavery, or we can choose to forego cherished principles for survival. But what we should not do is to efface the tragedy of the choice. We lose something in making the choice, but unlike other "tragic choices"[222] we lose even more if we normalize the choice, blinding ourselves to its tragic character.

IV. NECESSITY AND CONSTITUTIONAL CULTURE

Necessity justifies too much. Once we are outside the bounds of ordinary legal and constitutional constraints—in the domain of "necessity's law"—if the torture of an indefinite number of individuals is permissible, then it would seem that anything and everything is licensed by the emergency situation. Necessity requires only that officials act to achieve security ends; the means depend only upon their effectiveness in bringing about what necessity requires.

A problem here is that we create a culture circumstantially committed to its principles. One need not be so committed to the rule of law that one rigidly adheres to the principle, *fiat justitia, ruat coelum* ("let justice be done, though the heavens fall"), in order to recognize the way in which the argument from necessity demonstrates the utter contingency of liberalism's deepest commitments. No doubt, in the United States many constitutional rights are subject to state derogations on an appropriate showing of sufficient need. One safeguard of judicially recognized derogations from constitutional rights is that the government must justify its specific need along a continuum from rational to compelling reasons, and it must justify its means on a continuum from reasonably related to narrowly tailored. Even if constitutional law has a specifically "dynamic character," as thorough-going consequentialists, such as Judge Richard Posner, suggest,[223] especially on the margins or in the "penumbra" of a constitutional right, it does not follow that there are not fixed points of reference—core meanings—regarding the scope of constitutional rights. Military conscription and aggressive questioning are one thing, slavery and torture are quite another.

At this point, Jeremy Waldron has argued that the prohibition against torture operates as what he calls a "legal archetype."[224] The prohibition against torture "sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law,"[225] in which we express our funda-

221. In such situations, "[i]n theory, we can admit an exception to an otherwise universal prohibition without undermining the values that gave rise to that prohibition." John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, *in* TORTURE: A COLLECTION 160 (Sanford Levinson ed., 2005).

222. *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-18 (1978).

223. *See generally* POSNER, *supra* note 84; RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003).

224. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1722-23 (2005).

225. *Id.* at 1723.

mental belief that "[l]aw is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts."[226] Waldron's point illustrates how one legal rule can be so centrally embedded within a larger system of law that to derogate from that rule calls into question the operation of many others. As another legal archetype, *Brown v. Board of Education*[227] stands as "an icon of the law's commitment to demolish the structures of de jure (and perhaps also de facto) segregation."[228] The civil rights movement and continuing claims seeking to obtain racial redress and eliminate the last vestiges of segregation in society all seek to fulfill the promise of *Brown*. To call *Brown* into question would be to call into question the entire trajectory of this social movement and body of law.[229]

Likewise, to permit the practice of torture would call into question many other rules against forms of state-sanctioned cruelty. To put the point in due process language, for the state to engage in torture is "to violate a principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."[230] To arrive at this conclusion regarding the fundamental nature of the prohibition against official torture, the Supreme Court has confronted a plethora of abuses by state officials against human dignity and decency. For example, in due process cases such as *Brown v. Mississippi*[231] and *Moore v. Dempsey*,[232] the Supreme Court addressed systematic denials of basic human dignity to African-American criminal suspects through state use of torture and mob-dominated trials. Through a sustained effort over a number of cases and across a spectrum of constitutional protections, the Court has articulated basic principles of human dignity, integrity, and autonomy tied to the avoidance of state-imposed cruelty.[233] For example, regarding the Fifth Amendment privilege against self-incrimination, the Supreme Court explained:

> It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a

226. *Id.* at 1726.

227. 347 U.S. 483 (1954).

228. Waldron, *supra* note 224, at 1725; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 111 (1977) (noting that precedents also work when "the earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit").

229. *But see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2760 (2007) ("Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools.").

230. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (internal citations omitted).

231. 297 U.S. 278 (1936).

232. 262 U.S. 86 (1923).

233. In the Eighth Amendment context of cruel punishment, "in regard to 'handcuffing inmates to the fence and to cells for long periods of time' and other such punishments," Justice Stevens emphasized "that 'we have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." Hope v. Pelzer, 536 U.S. 730, 737 n.6 (2002).

> plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law.[234]

Similarly, regarding the purposes of the Eighth Amendment, the Court explained that the Framers "feared the imposition of torture and other cruel punishments."[235] Through these and other articulations of the importance of human dignity free from state abuse, the Court places the prohibition against torture at the foundation of our constitutional culture. To erode these constitutional commitments under the guise of state necessity is to loosen deeply embedded limitations on state power over individuals. These limitations are essential to preserving not just liberty, but also human dignity and decency, which are all key components of our constitutional culture.

As I have suggested, necessity justifies too much. Waldron is correct to argue that certain laws, such as the prohibition against torture, are emblematic of how we see the world.[236] Likewise, due process values make clear that some actions, such as torture, undermine fundamental rules that lie at the base of all civilization, a violation of which is to undermine "the very essence of a scheme of ordered liberty.[237] Necessity exceeds the values of our prevailing constitutional culture in two additional ways. Necessity fails to recognize the existence of a limited number of nonderogable rights, and undermines the relation between the state and persons, upon which the legitimacy of the state relies.

A. Non-Derogation and Dignity

One point is that the necessity argument unravels the tension between rights from which derogations are permitted and those rights from which none are allowed. For example, the state can justify restrictions on speech by showing a substantial government need and narrow tailoring of the means to fulfill that need.[238] This confines any attempt by the state to justify regulations of speech into an existing script, a public narrative in which particular kinds of reasons must be provided and particular kinds of public acceptances become possible.[239] We understand that in order to

234. United States v. White, 322 U.S. 694, 698 (1944).
235. Ingraham v. Wright, 430 U.S. 651, 665 (1977).
236. Waldron, *supra* note 1, at 1683.
237. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
238. Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994) (applying intermediate scrutiny to content-neutral restrictions on speech).
239. Justifications for regulating speech also depend on the circumstances, as the Supreme Court has regularly been more solicitous during times of emergency. Justice Holmes made this point clear. "When a nation is at war many things that might be said in

avoid cacophony in the public sphere, the state can regulate the time and place of speech by appealing to the need to maintain public order, not by appealing to disapproval of message and viewpoint.[240] Under such circumstances, a court reviewing competing claims by the individual and the state engages in a process of balancing state need against individual liberty. Balancing has the ring of familiarity.[241] Courts frequently employ "balancing tests" when there are competing interests construed as a conflict between individual right and state need.[242] In the context of the "war on terror," the Court in *Hamdi* turned to this familiar test to establish limits to the President's unilateral power to detain individuals declared to be enemy combatants.[243]

In contrast to those rights and liberties properly subject to constitutional balance, no amount of compelling need can justify derogations from some rights. For example, an individual cannot be drawn and quartered, no matter how compelling the state's argument in support of imposing such punishment. Nor can the state violate bodily integrity in particular ways. As Justice Frankfurter said regarding the forcible removal of evidence from a suspect's stomach, "[n]othing would be more calculated to discredit law and thereby to brutalize the temper of a society."[244] "They are methods too close to the rack and the screw."[245] If a punishment is cruel and unusual under the Eighth Amendment, that is the end of the story.[246] A state can punish under due process, but there is no "compelling need" exception that would permit cruel punishments.

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time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." Schenck v. United States, 249 U.S. 47, 52 (1919).

240. *See e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasizing that regulation of the time, place, and manner of speech must be narrowly tailored to serve legitimate government interest).

241. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004 (1987) (discussing the history and theory behind balancing, and concluding that "[s]evere problems beset balancing approaches to constitutional law").

242. For example, in upholding the Minnesota Mortgage Moratorium Law, the Court noted that "there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 393, 442 (1934).

243. The Court simply assumed the need to balance interests. "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004). It remains utterly unclear, however, what "our calculus" is or how to employ it.

244. Rochin v. California, 342 U.S. 165, 173-74 (1952).

245. *Id.* at 172.

246. *See* Hope v. Pelzer, 536 U.S. 730, 737 (2002) (holding unconstitutional the shackling of a person to a "hitching post" because "the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment"); Hudson v. McMillian, 503 U.S. 1, 9 (1992) ("Proscribing torture and barbarous punishment was the primary concern of the drafters of the Eighth Amendment.") (internal citations omitted).

Using the human body in some ways and for some state purposes is simply impermissible, no matter the supposed compelling need.

After the ratification of the Thirteenth Amendment, the imposition of slavery is another right against which no derogations are permitted. The prohibition against slavery is a kind of right that, if intruded upon, produces irremediable harms. To enslave someone is to destroy the underlying dignity of and respect for that person on whom all constitutional rights are grounded. To regulate speech, by contrast, is not to eliminate it; but to enslave someone is to destroy the value of human dignity as well as the underlying purpose of the state.[247] Thus, while the right to free speech is capable of incremental intrusion by important state purposes, slavery is not a right amenable to partial protection. Accordingly, the right to be free from slavery is a non-derogable right.[248] So, too, is torture, and for similar reasons. Torture undermines the very conditions of human dignity and bodily integrity. To be sure, the Convention Against Torture, to which the United States is a signatory, makes clear that the prohibition against torture is non-derogable: "No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."[249] But the expression of and commitment to non-derogation has not deterred the Executive from acting on necessity in ways that call into question that commitment.

Moreover, even among those rights subject to balance, there are core features of those rights which cannot be traded away on behalf of state interests.[250] Even when the state may limit avenues of speech, it may not mandate what will be orthodox in our belief.[251] If the state shuts down the presses, it would be difficult not to conclude that a fundamental right has been infringed, no matter the state's justification. So where the state may be able to circumscribe press freedom in some ways, in some contexts, and for some compelling purposes, no balancing test would suggest

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247. In her famous study of torture and the vulnerability of the human body, Elaine Scarry suggests that "[i]ntense pain is world-destroying. In compelling confession, the torturers compel the prisoner to record and objectify the fact that intense pain is world-destroying." ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 29 (1985). Scarry further observes that "[b]rutal, savage, and barbaric, torture (even if unconsciously) self-consciously and explicitly announces its own nature as an undoing of civilization. . . ." *Id.* at 38.

248. *See* Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights*, 12 EUR. J. INT'L L. 917, 927 (2001). Other non-derogable rights include the right to life, the right to be free from ex post facto punishments, and the right to be free from torture.

249. Convention Against Torture, *supra* note 11, art. 2.

250. *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1422-23 (2002) (noting that "certain rights, such as the right to life and the right to be free from torture, are expressly non-derogable, and other rights, even if not expressly non-derogable, may nonetheless be non-derogable if they serve to protect expressly non-derogable rights").

251. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

that the state can simply eliminate the press. Thus, even when rights are subject to balance against state interests, core aspects of those rights remain immune to claims of purported state need.

What distinguishes derogable and non-derogable rights? Why do we contemplate the derogation of some rights but not others? When we focus on the kinds of considerations that are relevant to justifying state intrusions on the absolute protection of the right, we notice that these intrusions often function to preserve something very important about the right in the very act of limiting it. When a court upholds a governmental regulation of campaign finance, free speech values are protected in the very act of limiting the channels of communication.[252] Free speech is on both sides of the equation—we limit the speech of some so that others might be heard.[253] The overriding value is to provide political debate with wide participation, while avoiding corrupting influences of unconstrained monetary contributions in the campaign process. Similarly, in the equal protection context, government officials may employ racial classifications when redressing the subordinating effects of other uses of racial classifications.[254] Although a countervailing consideration runs through Supreme Court opinions and dissents which hold that the Constitution is inherently color-blind, the proposition has been generally settled in precedent and practice that officials may cognize race under situations designed to promote, not detract from, equality.[255] In these ways, constitutional rights are protected in the very act of intrusion, not as absolutes, but in light of the very values they serve.

In other cases, officials intrude on the exercise of a protected right in order to advance dissimilar values the state seeks to protect. Some rights lose protection as necessity emerges in order to advance other values such as security. When the Court licenses particular situations of police interrogation, for example, it does so because either the intrusion on the protected right is minimal, or because there is no genuine intrusion. Even if there is a clash of values—the state seeks to maintain order and public security through criminal process, the individual wishes to preserve privacy and dignity—the state's interest is balanced against the severity of the intrusion. So long as the intrusion is sufficiently minimal, a significant, legitimate state interest will often override pure protection of a right within narrowly prescribed circumstances. In criminal procedure, the circumstances of criminal investigations sometimes create exigencies, so that rigorous respect for privacy, consent, and dignity are no longer required. Even under exigencies, constitutional permissiveness always recognizes

252. *See, e.g.*, McConnell v. FCC, 540 U.S. 93 (2003).

253. We do this in many speech contexts, despite the admonishment in *Buckley v. Valeo*, that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." 424 U.S. 1, 48-49 (1976).

254. Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

255. *See* Grutter v. Bollinger, 539 U.S. 306, 323-24 (2003); *but see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007).

the values at stake, and in the Fourth Amendment context the constitutional imperative of reasonableness always applies.[256] Indeed, the fact that exigency must always be negotiated through the filter of constitutional criminal procedures suggests that principle, and not naked necessity, governs.

This structure is important because compelling state interests must always contain a countervailing value, the promotion of which justifies the right's derogation. The fact that the government's purpose is compelling is a consideration that places all the initial emphasis on the purpose and the means chosen to achieve that purpose, not merely on the fact that it is compelling. A judgment that the purpose is compelling is a judgment about the relative importance of the value being promoted. A presidential duty to provide national security is no doubt compelling. The fact that it is compelling means that the President has a strong motivation to achieve the purpose, but motivation alone is insufficient for justification. We might be highly motivated to apply any means that seem necessary at the time to protect national security, without being justified in employing the means chosen. Motivation is situation specific, but justification relies on general principles applicable regardless of the particular circumstance. Justification is found in the value (such as national security) to be promoted, and the means available to promote that value depend on other background values and constraints. When motivation driven by perceived necessity pushes in one direction, justification, driven by law and internalized norms, should sometimes pull in another direction to ground and guide officials' actions.

Necessity changes the nature of the relations among persons and states in ways that may undermine key features of that relation. Although it is standard practice to allow the state to intrude on some protected rights if the interest is substantial, not all rights permit such deviations. Necessity, as a justification for rights derogation, entails no recognition of this distinction. Necessity arguments differ both in method and consequences from the typical way of derogating from a constitutional right. They are equally applicable to justify exceptional practices that occur outside the ordinary rule of law as they are to justify ordinary exceptions within the rule of law. Derogations recognized within constitutional practice are ones that either promote the value at stake, or promote another, equally important value within ordinary constitutional constraints. Necessity, however, is as much at home outside the rule of law, and therefore need not respect the values at stake in the rights infringed.

Even when derogating from the strict protection of a constitutional

256. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 108-109 (1977) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"); Brigham City v. Stuart, 126 S. Ct. 1943, 1947 (2006) ("[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions.").

right, the necessity Constitution must preserve basic personal dignity.[257] Returning to the domestic sphere of exigent needs in law enforcement, the Supreme Court in *Miranda* recognized that even when considering the balance between the police need for information and a personal right against self-incrimination, "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[258] As the Court suggests, respecting human dignity goes to the very heart of constitutional limitations on the state's exercise of power over individual humans.[259] This is a fragile relationship between the sovereign people, the autonomous person, and the state, whose legitimacy rests on each and whose purpose is the protection of both. Torture radically disrupts this fragile balance.

By way of summary of the argument, it is not just the prohibition against torture that is emblematic of the spirit of a whole body of laws, as Waldron suggests. It is also the fact that the arguments used to justify the use of torture know no legal boundaries—they are equally applicable to justify the derogation of any number of other rights, emblematic or not. If torture is necessary, then how much easier it would be to justify indefinite detention of individuals, suspicionless surveillance, or the suppression of dissent. After all, no one gets physically harmed under suspicionless electronic surveillance. Moreover, if contingent circumstances give rise to "states of exception"[260] permitting the use of torture, other circumstances might also justify a host of other derogations from fundamental rights.

History has already shown that such derogations are possible on a large scale—also justified by appeals to national necessity on behalf of state security (including, in the United States, such actions as Japanese internment).[261] It is entirely unclear what principle would hold the line against the growth of necessity, especially once the additional topics—mass detention, widespread suspicionless surveillance, etc.—get introduced as legitimate topics of debate under the rubric of national necessity. This is Slavoj Žižek's point about torture. It is a topic which we should not legitimate by talking about it as if it were in fact an acceptable practice in some circumstances.[262] One need not posit the inevitability of dangerous ratchets whereby one derogation of a fundamental right leads to others in order to see that a principle that erodes the distinction between dero-

257. Miranda v. Arizona, 384 U.S. 436, 537 (1966).
258. *Id.* at 460.
259. *Id.*
260. *See generally* AGAMBEN, *supra* note 37.
261. Korematsu v. United States, 323 U.S. 214, 219-20 (1944) ("Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.").
262. Žižek argues that commentaries "which do not advocate torture outright, simply introduce it as a legitimate topic of debate, are even more dangerous than an explicit endorsement of torture." SLOVOJ ZIZEK, WELCOME TO THE DESERT OF THE REAL! 103 (2002).

gable and non-derogable rights changes fundamental features of our constitutional culture.

B. Two Concepts of Persons

The practice of state-sanctioned torture produces an unsustainable tension between two different conceptions of the "person" protected by constitutional constraints. One conception of the person is the source of political legitimacy for the state, the other conception of the person is the object of state power. Torture undermines the first conception, and thus undermines the legitimacy of the constitutional state.

First, the person, as construed within the liberal tradition, is the individual human who possesses a realm of private choice and dignity and who is free to create and pursue her own ends, however they might be defined. In an act of founding, this individual provides political legitimacy for the state, reserving certain powers to control her bodily integrity and to direct autonomously the course of her life free from state intrusion. In short, this political conception of the person is embodied as a member of "the people" who, under the Constitution's Ninth Amendment, possess retained rights which shall not be denied or disparaged.[263] Persons so understood are the foundation upon which state power rests, an inversion of older systems of political legitimacy under which the person existed by leave of state authority.

This liberal person is the subject of First Amendment protections, both in pursuit of the values of autonomy and democratic deliberation. The Supreme Court has articulated a core value in personal political expression, stating that

> [t]he constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.[264]

To underscore the fact of political legitimacy grounded in this conception of the person, free expression is protected "in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[265] This political system not only countenances, but embraces dissent and discord—the sounds of cacophony—out of which consensus emerges from the shared participation of persons committed to a common enterprise. In this endeavor to ground politics in persons, the Court has made clear that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, relig-

263. U.S. Const. amend. IX.
264. Cohen v. California, 403 U.S. 15, 24 (1971).
265. *Id.*

ion, or other matters of opinion."[266]

The second conception of the human is the individual who exists only in relation to the state, on whom the state regularly acts to compel behavior and impose constraint, and whose identity under the first conception of the person is always subject to annihilation by the state. These are the normalized docile bodies, who, at the extreme, when stripped of everything else, make their appearance as what Giorgio Agamben calls "Homo Sacer."[267] What is so emblematic about the prohibition against torture is that it has this power to strip individuals of everything but their bare humanity. As Elaine Scarry powerfully argues, torture has the capacity to unmake a world, the world in which we maintain narrative coherence and separateness from the state.[268] In seeking to compel the information from the tortured suspect, the state configures the individual, not as a source of dignity and integrity, but as another source of information vital to the performance of state power.[269] At the extreme, of course, when the state faces an existential threat, that information will be vital to the persistence of state power. But threats from terrorism, while they challenge the state's monopoly on violence, do not create existential threats—though they do create informational needs in furtherance of state power.

But if the body is merely a vessel for information, if the need for information no longer operates within limits as to place or person, then the state, too, no longer acts within grounded sources of legitimacy and authority. The state is limited by the boundary of bodies and persons, acting by leave of the sovereignty of the people. It merely acts. Resistance is not allowed, and thus, a whole conception of human personhood, as beings who are capable of saying "no," vanishes. The *Barnette* Court articulated the dangers that exist when the state allows power to suppress dissent: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[270] What makes assertions of national necessity so problematic in this arena is that they would seem to undermine this bedrock principle that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all. . . . The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[271]

266. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

267. GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 8 (1998).

268. "Intense pain is world-destroying. In compelling confession, the torturers compel the prisoner to record and objectivity the fact that intense pain is world-destroying." SCARRY, *supra* note 247, at 29.

269. Louis Michael Siedman argues that torture's truth is that it reminds us that we are merely bodies. *Torture's Truth*, 72 U. CHI. L. REV. 881, 886 (2005). My suggestion is that with tortures we vanish as narratively-ordered persons with histories and become the bearers of state-required information.

270. *Barnette*, 319 U.S. at 641.

271. Wooley v. Maynard, 430 U.S. 705, 714 (1977).

Yet there is something perverse about an assertion of the right to refrain from speaking when such resistance would constitute a "clear and present danger" of depriving authorities of information necessary to save lives.[272] Violation of constitutionally authorized state censorship, however, subjects the speaker to punishment under due process of law, but does not deprive the speaker of his or her dignity or autonomy. Compulsion to speak under torture can only occur outside of ordinary constitutional constraints, where "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[273]

More than an issue of political resistance, the conception of the human on which political legitimacy rests disappears in the configuration by the state of the individual without a privilege against speaking, even if in the act of invoking that privilege the person is subject to punishment. Punishment under due process acknowledges a limit to the exercise of state power and recognizes a separate realm of individual autonomy and dignity. If the state does not respect this fundamental boundary constituted by the person and her body, then, in an important respect, the body disappears, and information is all that is seen and heard. In so doing, the body politic also disappears. We all become subject to the all-knowing needs of state necessity.

In this manner, conflict between the two conceptions of the person produces an unsustainable tension in which the body upon whom the state acts displaces the person by leave of whom the state exists. Torture takes away the ability to resist state power and to reserve the privacy of the "inner realm" of human consciousness from state intrusion. Under the normalized argument from necessity—the ticking bomb scenario and its justifications—such a consequence may seem unexceptional. That is, we might think the idea of preserving a conception of essentially private autonomy perverse given the potential catastrophic consequences that might otherwise follow. But notice again, the normalized argument for necessity is not well-bounded in justification or scope. Accordingly, as the use of that argument spreads, the space in which the one conception of humanity operates shrinks.

To be clear, I am not advancing a slippery-slope argument that to accept torture in situation A will lead to all the consequences through situation Z. I am suggesting that the normalized necessity argument produces both a rhetorical and political space in which a particular form of constitutional culture sustained by one conception of the human gives way to another. The liberal person has space to flourish only within the contingent practice of constitutional culture in which state officials respect human dignity and liberty. As a matter of constitutional culture—a no-

272. "Censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish." *Barnette*, 319 U.S. at 633. One could argue that the compulsion to speak is tolerated by our Constitution only when silence presents a clear and present danger.

273. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

tion which I understand includes persons and citizens whose lives are shaped through the law, in addition to the usual suspects such as lawyers, judges, politicians and public officials[274]—the stakes could not be greater. As we have noticed, under the operation of necessity arguments, many supposed "bedrock" liberal principles are exposed to a particular form of contingency.

When necessity is used to justify the practice of torture, it undermines the liberal conception of the person that grounds political legitimacy. This conception views persons as constituted through "[l]iberty [which] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[275] Torture is inconsistent with the liberal democratic conception of human dignity. When tortured, it is not the person who speaks, but the body, stripped of its humanity, which speaks.[276] Torture is, accordingly, the ultimate manifestation of a legal culture ruled by necessity. The necessity Constitution envisions a new ordering of fundamental values. When necessity is the ultimate authority for official action, circumstances, not constitutional constraint and commitment, dictate what actions are appropriate.

C. The State of Constitutional Culture

Rather than requiring principles to shape responses to crises, the normalization of necessity permits circumstances to shape the scope of principles. This inversion has implications for how we see our relation to many other constitutional principles, from the protection of political dissent to the protection of more inchoate liberties, all of which may become subject to more robust forms of derogation in the face of claims of national necessity.

One of the issues at stake here is our identity as a people, as well as our affective relations. Do we want to be identified as torturers? Or, is there some principle associated with constitutionalism and the life of liberty that is inconsistent with engaging in torture? If we want freedom to torture, then we have to accept a change in character that will alter the nature of our affective relations with others. We will figure persons as sources of information in ways that alter our understanding of the dignity and autonomy of persons. Such a refiguring of persons as information resources would undermine the very reason why the resort to torture was thought necessary in the first place. It will also change national character, as we fear each other as potential victims of torture and ourselves as tor-

274. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("We can identify, for example, a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution. I shall call this subset constitutional culture.").

275. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

276. "For what the process of torture does is to split the human being into two, to make emphatic the ever present but, except in the extremity of sickness and death, only latent distinction between a self and a body, between a 'me' and 'my body.'" SCARRY, *supra* note 247, at 48-49.

turers. We cannot practice and justify torture as something that does not have far-ranging, unpredictable effects on our constitutional culture. Reva Siegel argues that "constitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society's defining commitments—as well as resources to resist those proposals."[277] If we come to adopt the necessity Constitution or the practice of necessity with regard to torture, we alter our defining commitments. Torture has developed as the paragon of pre-enlightenment, barbaric practices.[278] "Torture is abhorrent both to American law and values and to international norms."[279] The spirit of this abhorrence, however, extends beyond the legalistic construction of specific acts as violating a statutory prohibition against torture. The spirit of this abhorrence expresses our defining commitment to human solidarity and dignity, our commitment to preventing state-sponsored cruelty.

If necessity countenances torture as required by circumstances, it is not simply that the derogation knows no principled boundaries within United States legal practice, nor that it undermines a concept of persons on which political legitimacy relies, but also that it knows no principled boundaries in unraveling an entire trend in international human rights law nurtured by a rights-protecting constitutional culture. Conducting what Harold Koh calls "norm entrepreneurship," human rights advocates and constitutional democracies have led the world through a series of multilateral treaties to recognize and legally protect certain basic human rights, including the right against torture.[280] The norm against torture has been enunciated in several multi-lateral treaties, regional treaties, and in regional and domestic courts. Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[281] The Convention Against Torture defines "torture" as "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."[282] The Convention Against Torture also directly confronts the linchpin of the necessity argument with a provision stating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[283] Thus, there is no exception to

277. Siegel, *supra* note 29, at 1327.

278. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 4 (1978)

279. Levin Memo, *supra* note 169, at 1.

280. *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 316 (2003).

281. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR. 3d Sess., 1st Plen. Mtg. U.N. Doc. A/810 at 71 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR 21st Sess. Supp. No. 16 U.N. Doc. A/6316 (Dec. 19, 1966) (U.S. ratified June 8, 1992).

282. Convention Against Torture, *supra* note 11, art. 1.

283. *Id.* art. 2.

situations of perceived necessity, no ticking time bomb exception that will permit the use of torture. In addition to the U.N. system, regional treaties such as the European Convention, the African Charter, and the American Convention, have all institutionalized the norm against torture.[284]

In a series of rulings, the European Commission and the European Court of Human Rights ("ECHR") have operationalized the norm, clearly delineating the limits of official action. Practices similar to those U.S. officials have been reported to use, including forcing detainees to stand in uncomfortable positions for long periods of time and keeping black hoods on their heads—practices employed by the British in interrogating Irish Republican Army suspects—were ruled illegal under Article 3 of the European Convention as inhuman and degrading treatment.[285] The ECHR has ruled that the norm against torture has a central place in democratic society, such that "[e]ven in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."[286] Such declarations intend to foreclose the possibility of using the necessity argument to justify torture.

These international legal fora underscore both the breadth and the consistency of the commitment to and acceptance of the norm against torture, so much so that at least one U.S. court has recognized the norm against torture as a *jus cogens* norm: "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[287] The Ninth Circuit reasoned in *Siderman v. Republic of Argentina*[288] that because of the unanimous view of international and regional treaties and domestic rulings, "we conclude that the right to be free from official torture is fundamental and universal, a right

284. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 (enunciating the norm in the same language as the U.N. Convention: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); African Charter on Human and People's Rights art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 ("All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to have his physical, mental, and moral integrity respected" and "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."). *See also*, Inter-American Convention to Prevent and Punish Torture art. 2, Dec. 9, 1985, O.A.S.T.S. No. 67 ("Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.").

285. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65-67 (1978) (The court reserved the term "torture" to "attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.").

286. Selmouni v. France, 1999-V Eur. Ct. H.R. 149.

287. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 332.

288. 965 F.2d 699 (9th Cir. 1992).

deserving of the highest status under international law, a norm of *jus cogens*."[289] Although there may remain controversy over the norm's status as *jus cogens*,[290] the norm is undoubtedly one of the most widely enunciated, institutionalized, operationalized, and internalized norms of customary international law.

If our practices do not reflect an internal commitment to the norm against torture, then the future vitality of that norm at home and abroad is weakened. Just as transnational legal process operates by spreading human rights norms, as Harold Koh advocates,[291] domestic legal practice can work in the opposite direction to unhinge national commitments to the norm against torture. Through contested constitutional visions, changes in both constitutional practice and principle can lead to changes in both international commitments abroad and constitutional practice at home. Ordinarily, we consider changes in constitutional principle to follow the political contestation of social movements, as individuals and groups mobilize to expand the application of the principle.[292]

Such bottom-up contestation over the content and commitments of constitutional culture is not the only source of changes in constitutional meaning. As we have seen, top-down approaches can seek to entrench a new constitutional vision that gives primacy to claims of necessity, free from judicial review and unconstrained by other constitutional rights. Even as the United States engages in extra-legal detention and interrogation in opposition to both international and constitutional limitations, political and social contestation continues over whether our commitments to human rights norms should be destabilized through such practices.[293] Changed practices create the conditions for a changed world, not only in terms of the vision we bring to the world order, but in terms of normative culture. In changing our constitutional cultural outlook, we risk changing the international human rights outlook, shifting attention to actions taken on behalf of national necessity even at the expense of protecting human rights.

Torture justified by necessity alters the structure of justification for legitimate action, granting power to executive officials over circumstances and their consequences without principled limitation. When necessity produces extra-legal actions, the norms comprising a broader constitu-

289. *Id.* at 717.

290. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 796 (D.C. Cir. 1984).

291. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1508 (2003); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

292. "When movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate." Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006).

293. *See* Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2355 (2006) (noting that the "Bush Administration rejects human rights universalism in favor of executive efforts to create law-free zones"). By contrast, former Administration officials defend practices of unfettered executive action. *See* John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 799 (2004).

tional culture remain available as tools with which to criticize the aberrant practice. Thus, resistance to extra-legal practices originates in the values and principles that define and nourish a constitutional culture's defining vision. Under the guise of necessity, the ready resort to extra-legal measures can become normalized, however, as officials find it easier and easier simply to act beyond the law, or courts find it more compelling to find exceptions within the law of constitutional constraints. This is the point Justice Kennedy makes in relation to abusive police practices: "A Constitution survives over time because the people share a common, historic commitment to certain simple but fundamental principles."[294] Commitment to a particular vision of constitutional culture is what creates the possibility of resisting alternative visions of a world under the necessity Constitution. By maintaining an opposition between the normal and the necessary, we sustain the ability to use law and morality to criticize and limit the exceptional practice.

We oppose norms to necessity. When we allow necessity to alter our practices, we risk altering our norms. Our norms are maintained through our practices, and when we change what we do, we may change who we are. When we change our practices, we may change core features of our constitutional culture. Although some changes in norms may be inevitable, we should ensure that changes follow from a robust constitutional conversation about who we are, what we value, and what the world should look like when engaging in particular practices.

V. LAW, MORALITY, AND NECESSITY

Moral intuitions seem to allow, if not require, torture in the exceptional situation. Some have gone so far as to assert that "[f]ar greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person."[295] Moreover, regarding the expectation that officials are required to do whatever is necessary to ensure national security, Judge Posner stridently asserts "that if the stakes are high enough torture is permissible. No one who doubts that should be in a position of responsibility."[296]

The justifications for imposing the harms of torture to achieve desired consequences, however, are not well bounded regarding the particularity of the person or the scope of the harm. Accordingly, consequentialist moral arguments fail to provide guides to right action by state actors. At this point one may attempt a revival of deontological commitment to principles. Perhaps the deontologist was too easily embarrassed into admitting that she would torture the suspect to save the city. The ticking

294. Chavez v. Martinez, 123 S. Ct. 1994, 2015 (2003) (Kennedy, J., concurring in part and dissenting in part).

295. Jean Bethke Elshtain, *Reflection on the Problem of Dirty Hands*, *in* TORTURE: A COLLECTION, 77, 87 (Sanford Levinson ed., 2004).

296. Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION, 291, 295 (Sanford Levinson ed., 2004).

bomb justification for torture relies on the acceptance that at some threshold, even ardent civil libertarians are willing to forego their commitments for the sake of avoiding dire consequences.[297] According to the consequentialist, having admitted that, all that remains is to quibble over the details.[298] Once one admits that there is a situation in which one would agree that torture would be justified, then one stands accused of abandoning principle in favor of consequences. In response, perhaps one should not take the first step, but rather stand on principle. Even better, one might argue that exceptions for ticking bomb situations are already embedded in the principle in the first place.[299] However these refinements in moral theory play out, I argue that they are irrelevant to consideration of state torture in relation to constitutional constraints.

Principle is imperative here, not simply because it is justified by a moral argument, but rather because it is required by a legal one. Principled constraints on government power are a necessary feature of constitutional government. Without them, we do not have a government of laws, but rather one of men. To the extent that we remain committed to constrained government, charged with securing the blessings of liberty, and answerable to the people as sovereign, then consequentialist moral arguments are misplaced. Even if government may be morally justified in engaging in torture under consequentialist arguments from necessity, it would not be constitutionally justified, and thus would not exercise legitimate authority.

Here is where the divergence of law and morality, as the positivists would have it, produces a result that vindicates principle over consequences. As H.L.A. Hart argued, one normative reason for preferring positivism is that by maintaining a separation between law and morality, we are able to use morality as a way of criticizing law (and vice versa).[300] Moreover, the divergence highlights the questions of whose morality and which values plague non-positivist legal thinking. The question of torture produces embarrassing monstrosities for both deontologists and consequentialists, leaving us with no criterion for judging which monstrosity is worse and whose morality is better. Here is where a turn to constitutional tradition and culture provides principles answerable in both law and morality to guide official action. Of course these principles are as much moral as they are legal, but they are fully grounded in constitutional cultural practice. Constitutional principles of human dignity and liberty, backed by international human rights laws and norms and imple-

297. Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 896 (2000).

298. Luban, *supra* note 201, at 1440 (regarding a ticking bomb, "[t]he idea is to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation . . . Now that the prohibitionist has admitted that her moral principles can be breached, all that is left is haggling about the price. No longer can the prohibitionist claim the moral high ground . . . [s]he is down in the mud with them, and the only question left is how much further down she will go.").

299. *See* Moore, *supra* note 199, at 331-32.

300. H.L.A. HART, THE CONCEPT OF LAW 181-82 (1961).

mented through congressional statutes, provide a bevy of legal tools by which to limit and regulate claims of necessity and the temptation to torture. Morality may provide us with the temptation to torture under conditions of necessity, but law provides us with reasons to resist.

VI. CONCLUSION

Constitutional culture is fragile because it depends on the continuing commitments of citizens, courts, and government officials to create and sustain shared values and vision. There is nothing necessary about the present constitutional order, and history has shown that dramatic shifts in focus have accompanied very different ways of envisioning constitutional culture. For example, the constitutional order prior to the New Deal is dramatically different than the one that followed, not only for Congressional power, but also for judicial protection of individual rights and for executive prerogatives in foreign affairs and national security.[301] In time, we may realize that after the events of September 11, 2001, we occupy a different constitutional culture, one that is perhaps organized around a necessity Constitution. Significantly, President Bush claims that "[f]or America, 9/11 was more than a tragedy—it changed the way we look at the world."[302] In the wake of September 11, executive officials have argued before courts, Congress, and citizens that they have the authority to do whatever is necessary to protect national security, even if that sometimes requires engaging in activities outside of national and international legal constraints. Civil liberties, it is said, must give way to national necessity. Executive practices under this new way of looking at the world, as it turns out, have also likely included interrogational torture of terrorist suspects.

Torture, however, stands like a signpost, demarcating what lies beyond the limit of practices recognizable from within a constitutional culture committed to the dignity, liberty, and autonomy of persons, continuing respect for whom the political legitimacy of the state relies. Justifications for resorting to torture, if only in emergency situations, rely on necessity. As we have seen, necessity can function either as a permissive principle within the Constitution, freeing executive action from ordinary constraints, or as an extra-legal principle licensing unfettered lawless emergency action. Under the necessity Constitution, rights-protecting constraints no longer operate *as* principled constraints against official practice. Principles that constrain only when convenient are no constraints at all. Under conditions of extra-legal necessity, executive prac-

301. *See generally*, BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

302. President's Address to the Nation on the War on Terror, 42 Weekly Comp. Pres. Doc 1597 (Sept. 18, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060911-3.html. Such remarks have been almost commonplace in official rhetoric. For example, Vice President Cheney opines that, "The attacks of September 11th, 2001, signaled the arrival of an entirely different era." Vice President Richard B. Cheney, Remarks by the Vice President at the Ronald Reagan Presidential Library and Museum (Mar. 17, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/03/20040317-3.html.

tices retain the suspicion that attends lawless action. Here, however, whether the Constitution serves to constrain depends on citizens, courts, and Congress withholding their respective institutional consent to lawless practices. Consenting to extra-legal practices, no less than finding a principle of necessity at the heart of the Constitution, changes the character of constitutional culture in indeterminate and problematic ways.

When we rely on necessity to override principled commitments, such as the prohibition against torture, we change our practice and principles, creating the conditions for changing fundamental aspects of our constitutional culture. A fundamental feature of our constitutional culture is its profound respect for personal dignity, integrity, and autonomy, as well as its recognition that some rights are to be protected against derogation, even against compelling state need. If we make necessity the structuring principle of our constitutional culture, we risk undermining the very Constitution it is meant to preserve and protect. Necessity normalized into official practice unravels the distinction between derogable and non-derogable rights and creates unsustainable tension between the person who is subject to state power and the person who sustains state legitimacy.

By reckoning with the arguments employed to justify practices such as indefinite detention and torture, this Article illustrates the celerity with which a legal practice structured according to necessity will exceed the constraints and shared meanings that define our constitutional culture. Moreover, necessity licenses much more than we imagine when we justify actions based on simple stories of ticking bombs. Despite the domestic and international prohibitions against the practice, talk of torture has become pervasive in our political lives, suggesting that something fundamental is at stake in the contestation over executive practices and their purported justifications in the "war on terror." The question of torture creates an opposition between norms and necessity, presenting transformative practices that make possible contentious changes in constitutional culture. We must confront questions about who we are, what we value, and what world we envision when we are tempted to adopt the practice of necessity. When we do so, we must recognize that attempts at constitutional perfection, both at home and with respect to "the opinions of mankind" abroad reflected in international human rights commitments, all rebel against the practice of torture even under circumstances of perceived necessity. If "We the People" are to hold true to our best ideals in securing the blessings of liberty and protecting human rights, then we must reject grounding official action on necessity, whether within or outside the rule of law, and must thereby resist the temptation to torture. Our norms and traditions provide ample reason to overcome temptation to live under a Constitution of necessity in order to continue our lives under a Constitution of constraint.