


4-2006

# Beyond Absolutism: Legal Institutions in the War on Terror

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## Recommended Citation

Peter Margulies, Beyond Absolutism: Legal Institutions in the War on Terror, 60 U. Miami L. Rev. 309, 332 (2006)

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Citation: 60 U. Miami L. Rev. 309 2005-2006

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## ESSAY

### Beyond Absolutism: Legal Institutions in the War on Terror

PETER MARGULIES\*

TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet ed., 2004).

JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY (2005).

#### I. INTRODUCTION

Absolutism is a tempting stance for the left and right wing in surveying the post-September 11th legal landscape. Ideologies that allow for no exceptions attract true believers.<sup>1</sup> But, as three recent books on the role of law and lawyers in times of crisis demonstrate, an absolutist stance produces little useful guidance. Even when normative prescriptions echo the absolutist line, such norms emerge most effectively from an institutional viewpoint that considers how legal actors preserve fairness, deliberation, and what Justice Jackson in the *Steel Seizure* case called a “workable government.”<sup>2</sup>

The three books considered here seek to move beyond absolutism on three compelling issues in national security. *Torture: A Collection*,<sup>3</sup>

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1. See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 121-23 (2003) (discussing why extremist views, which typically do not allow exceptions, can mobilize support).

2. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

a provocative anthology edited by Sanford Levinson, features a range of progressive commentators challenging an absolutist view of torture, which would bar recourse to the practice under any circumstances, and even prohibit talking about it.<sup>4</sup> These commentators also reject the position taken in legal memos by Bush Administration lawyers (since disavowed),<sup>5</sup> recognizing few, if any, constraints on presidential power to order interrogation techniques that arguably constitute torture.<sup>6</sup> A new volume edited by Mark Tushnet, *The Constitution in Wartime*,<sup>7</sup> seeks alternatives to a similar contest of absolutists in the left and right wing who take opposing positions on issues involving executive power to detain individuals after September 11th—either absolutely prohibiting the exercise of presidential power without express congressional authorization or allowing the Executive unfettered discretion.<sup>8</sup>

Similarly, Jean Stefancic's and Richard Delgado's *How Lawyers Lose Their Way*,<sup>9</sup> focuses on the professional example provided by lawyer and poet Archibald MacLeish, who worked to secure the release of the literary genius and World War II Fascist collaborator Ezra Pound during the Cold War. The book offers crucial lessons on a third issue where absolutism appeals to the right wing: the punishment of those, such as the so-called "American Taliban," John Walker Lindh, convicted of offenses involving aid to terrorist groups. Here, the right wing's absolutism can lead to harsh results, while the absolutism of the left wing has produced a general silence on the issue, as the left's focus

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4. Ariel Dorfman, *The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?*, in TORTURE: A COLLECTION, *supra* note 3, at 3, 17 ("I can only hope and plead and pray that a day will come when the very question of torture will have been forever abolished from our midst."); Sanford Levinson, *Contemplating Torture*, in TORTURE: A COLLECTION, *supra* note 3, at 23, 30 (asserting that "some critics have condemned any . . . discussions" addressing "what methods of interrogation, by stopping 'short' of banned practices, are therefore defined as acceptable").

5. See R. Jeffrey Smith & Dan Eggen, *Justice Expands "Torture" Definition*, WASH. POST, Dec. 31, 2004, at A1 (quoting new Department of Justice opinion that superseded "torture" memo).

6. Compare Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR 115, 145 (2004) [hereinafter Memo for Alberto Gonzales] (arguing that federal statute criminalizing practice of torture "must be construed as not applying to interrogations undertaken pursuant to [the President's] Commander-in-Chief authority"), with Levinson, *supra* note 4, at 28-30 (expressing skepticism about memo's assertions).

7. THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY (Mark Tushnet, ed., 2005).

8. Mark Tushnet, *Introduction* to THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY, *supra* note 7, at 1 (distinguishing between "alarmists" who oppose presidential power and "shills" who act as apologists for the current Administration).

9. JEAN STEFANCIC & RICHARD DELGADO, *HOW LAWYERS LOSE THEIR WAY* (2005).

on broad legal principles in the torture and detention realms obscures the human costs of harsh sentencing in individual cases such as Lindh's.

Instead of the sloganeering of absolutism, the legal system needs a careful look at how institutions and rules function under uncertainty. Taken together, these books suggest that *ex ante* (before the fact) rules dealing with issues such as torture, war powers regarding detention, and punishment for terrorism and national security crimes are inadequate. Absolute *ex ante* rules of prohibition fail to capture the subtleties of context, including the elusive but impossible to ignore "ticking bomb" scenario in the torture debate.<sup>10</sup> By the same token, express *ex ante* authorizations, of the kind that Alan Dershowitz suggests in his proposal for "torture warrants,"<sup>11</sup> threaten to make torture routine. Giving a greater role to *ex post* (after the fact) decision makers, such as courts and juries, provides the flexibility that the law needs to adjust to changing circumstances. However, as the volumes reviewed here suggest, *ex post* measures pose difficult, and even tragic choices, such as the issue of whether a necessity defense should be available for persons accused of practicing torture or other coercive conduct that "comes right up to the line,"<sup>12</sup> when the information thus acquired has averted catastrophe.

Part I of this essay considers the dilemmas surrounding torture, and how they reveal the poverty of absolutist visions of executive power or outright prohibition. Part II applies a similar analysis to the question of executive power in wartime. Part III examines the interaction of time and emergency, making a case for modifying the sentences of individuals whose illegal acts do not include specific crimes of violence, and who are caught up in the shift of paradigms between normality and crisis.

## II. TORTURE AND TERROR

The issue of torture, perpetrated or facilitated by the United States, has received renewed attention after the revelations of abuse at Abu Ghraib prison. The landscape of debate here seems made for a contest of absolutes. One view, articulated by Elaine Scarry in *Torture: A Collection*, posits an "unconditional prohibition" on torture.<sup>13</sup> The contrasting absolutist view, articulated by the authors of the Bush Administration's memos on interrogation methods, contemplates the use

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10. Alan Dershowitz, *Tortured Reasoning*, in *TORTURE: A COLLECTION*, *supra* note 3, at 257, 259.

11. *Id.*

12. Levinson, *supra* note 4, at 39.

13. Elaine Scarry, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE: A COLLECTION*, *supra* note 3, at 281, 284.

of executive discretion, and accepts no external constraints on the exercise of that discretion.<sup>14</sup> It is easier to dismiss the absolutist view that privileges executive power, because that model rejects the checks and balances that are essential to constitutionalism.<sup>15</sup> However, as the essays in *Torture: A Collection* make clear, absolutist arguments *against* torture have their own problems. Most importantly, closer examination of the absolutist arguments against torture reveals that those arguments typically permit exceptions in exigent situations.<sup>16</sup> The real question, obscured by absolutist rhetoric, involves the institutional means for recognizing those exceptions.

Even debating torture, as the writers in *Torture: A Collection* do, would seem to lead us down a dangerous road. As Ariel Dorfman notes, the prohibition against torture emerges from our most profound moral intuitions and experience.<sup>17</sup> Debate about the possibility of torture, including institutional devices such as the "torture warrants" proposed by Alan Dershowitz may erode those moral intuitions, making torture merely one point on a spectrum of policy choices. Viewed as a whole, however, the writers in the Levinson volume respond that debate is healthy, allowing us to develop a deeper understanding that will serve us well when exigency calls those moral intuitions into question.<sup>18</sup>

Henry Shue, in his pioneering essay reprinted in the Levinson volume, is most helpful in unpacking those moral intuitions.<sup>19</sup> Shue points out that prohibitions against torture, reflected today in international agreements such as the Convention Against Torture<sup>20</sup> and in the international law of armed conflict, embody the idea that the willful infliction of pain on an individual who is helpless seems fundamentally unfair.<sup>21</sup> In war, armed individuals have a fair chance of inflicting or escaping harm.<sup>22</sup> Individuals who are in the custody of another power lack this

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14. See, e.g., Memo for Alberto Gonzales, *supra* note 6.

15. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

16. See, e.g., Scarry, *supra* note 13, at 282 ("Anyone, we are told, who had the choice between . . . torturing and saving-the-city and . . . not torturing and not saving-the-city would . . . choose the first.").

17. Dorfman, *supra* note 4, at 7-15 (recounting experiences of torture victims in Chile).

18. See Levinson, *supra* note 4, at 31 ("One must, therefore, wrestle with the response of the legal system to the almost inevitable *public* aspect of torture.").

19. Henry Shue, *Torture*, in *TORTURE: A COLLECTION*, *supra* note 3, at 47.

20. United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/51 (Dec. 10, 1984). For more debate about torture, see Rosa Brooks, *Ticking Bombs and Catastrophes*, 8 GREEN BAG 2d 311 (2005) (book review); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005); and Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005).

21. Shue, *supra* note 19, at 51.

22. *Id.*

chance.

Torture also has dire institutional consequences. First, it dulls both the moral and practical judgment of the perpetrators.<sup>23</sup> John Langbein's chilling essay on the history of torture in Western jurisprudence suggests that the routine use of torture to extract confessions until the Enlightenment obscured the value of inferences about guilt contained in circumstantial evidence.<sup>24</sup> Routine infliction of pain, authorized by the state, also provokes a race to the bottom, in which custodians or prosecutors compete to produce the most pain, while instrumental goals such as information about past or future crimes recede into the background.<sup>25</sup> Moreover, the decision by higher-ups to countenance torture or loosen *ex ante* restraints on its use readily communicates itself to subordinates, who will use such practices for sport, for release, or for vengeance, without regard to any tailored instrumental purposes detailed in the original policy.<sup>26</sup> Additionally, if torture is the tool of choice, it is very difficult to avoid mistakes. When the government tortures an individual to obtain information, for example, the government's lack of information makes it likely that it will often torture the wrong person—one who has no information to give<sup>27</sup>—and that the selection of victims may hinge on invidious factors such as race, religion, and nationality.

In addition, torture is incompatible with our modern conception of criminal procedure. It is inherently *unreliable*, since people will say anything to get the torture to stop.<sup>28</sup> Moreover, torture fatally undermines the privilege against self-incrimination.<sup>29</sup> Some might argue that one can address these issues of process and institutional integrity by merely providing that statements obtained through torture cannot be used at trial. However, this argument poses an even greater threat to the rule of law, by encouraging what the Bush Administration has from time

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23. See Brooks, *supra* note 20, at 315 (arguing that "if the thought of torture leaves us uniquely chilled, it is not primarily because of what it does to victims . . . but because of what it does to perpetrators").

24. John H. Langbein, *The Legal History of Torture*, in TORTURE: A COLLECTION, *supra* note 3, at 93.

25. See Louis M. Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 893 (2005) ("Moral aversions, once overcome, are not easily reestablished. Moreover, once torture is legalized, there will be torture bureaucracies whose existence will depend upon frequent use of the practice.").

26. See Final Report of the Independent Panel to Review DoD Detention Operations (The Schlesinger Report) (August 2004), in TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR, *supra* note 6, at 329, 366-67 (2004).

27. See Scarry, *supra* note 13, at 284 (warning of torturers' "lack of omniscience").

28. Cf. Shue, *supra* note 19, at 54 (describing the predicament of a torture victim who "would be perfectly willing to provide the information sought in order to escape the torture but does not have the information").

29. See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE: A COLLECTION, *supra* note 3, at 145, 151-52 (discussing the current state of the law on the Fifth Amendment right against self-incrimination and coercive interrogations).

to time hinted at—a system of detention created without express statutory authorization that may supplant the established systems of civil and military justice.<sup>30</sup>

These institutional reasons, most contributors to *Torture: A Collection* agree, weigh decisively against ex ante authorizations for torture,<sup>31</sup> such as Alan Dershowitz's controversial proposal for "torture warrants" approved by the judiciary.<sup>32</sup> Dershowitz's point is that torture will be used, and that before-the-fact authorization promotes transparency, accountability, and consistency.<sup>33</sup> Yet the torture warrant framework has grave institutional problems. First, it involves the courts in the premeditated infliction of pain on individuals in government custody.<sup>34</sup> Such involvement could erode the courts' ability to be objective and serve as a check on government power regarding other uses of government authority, such as wire-taps and search warrants. Second, a mechanism for ex ante authorization may well increase the incidence of torture, and subtly discourage other approaches that involve more thorough investigation.<sup>35</sup>

Moreover, there are practical reasons why the warrant process may not be the pillar of integrity that Dershowitz touts. Even in obtaining those warrants that are already required in terrorism cases, law enforcement authorities are highly selective in the evidence that they present to

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30. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 525-27 (2004) (describing and rejecting the government's position).

31. See Parry, *supra* note 29, at 159 ("[E]ven where the purpose of . . . interrogation[ ] is to prevent future attacks, physical mistreatment [should] not receive a blanket justification.").

32. Dershowitz, *supra* note 10.

33. *Id.* at 270-71.

34. See Levinson, *supra* note 4, at 37 (discussing consequences of "[m]aking the judge complicit in torture").

35. As political scientists note, governmental solutions often go in search of problems. When government can more readily promote certain policies, as with the public support for building prisons and lengthening sentences, policy often moves in that direction. See JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* 13 (1989) (noting that a "solution [in public policy terms] . . . is an answer actively looking for a question"); cf. Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111 (2000) (discussing how law enforcement approaches, which author terms "governing through crime," exclude other policy choices). Dershowitz himself says, claiming Mark Twain as an ally, "[t]o a man with a hammer, everything looks like a nail." Dershowitz, *supra* note 10, at 271. Dershowitz cites Twain to demonstrate that the necessity of judicial approval will reduce the incidence of torture. However, the key question here is the location of the baseline. If the alternative is unfettered administrative discretion, Dershowitz may be right. However, if the alternative is a prohibition that officials disregard at their peril, Dershowitz's point seems less persuasive. Cf. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 3, at 291, 296 ("If legal rules are promulgated permitting torture in defined circumstances, officials are bound to want to explore the outer bounds of the rules; and the practice, once it were thus regularized, would be likely to become regular.").



judges, for example, to justify detention of material witnesses.<sup>36</sup> One could reasonably expect that officials would be at least as cagey in presenting evidence to judges in the torture warrant scenario, thus making the process far less transparent than the rule of law should require. Moreover, it is precisely in the most compelling case—one involving prevention of a catastrophic attack—that judicial decision making is least suitable for the inquiry at hand. In most settings, determining the governmental response to a strategic threat is the province of the political branches.<sup>37</sup> If an individual or group at large posed an imminent threat of harm to residents of the United States, we would not expect government officials to seek a court's permission to act in self-defense.<sup>38</sup> Having one such individual in custody, while his confederates remain at large, does not expand the court's competence. A bright-line rule against *ex ante* judicial authorizations for torture seems to be the best approach to avoiding such severe institutional problems.<sup>39</sup>

Ruling out *ex ante* authorization leaves open the question of whether *ex post* authorization of torture is ever appropriate. The "ticking bomb" scenario poses this problem of *ex post* authorization in a pointed fashion. Suppose law enforcement authorities have become aware through a reliable source that terrorists in a major United States city held a meeting last week to give final approval for explosion of a large explosive device in the city's municipal rail system. The authorities have now apprehended the individual who presided over the meeting. Law enforcement agents have tried the usual menu of trickery, ego massage, and threats of criminal charges to secure cooperation, but the

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36. See, e.g., *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003) (rejecting defendant's claim that the material witness warrant authorizing his detention was improperly obtained where defendant conceded knowing two of the September 11th hijackers and where defendant's claim was based, in part, on the government's failure to inform the judicial officer issuing the warrant that the defendant had a United States citizen relative, and was therefore arguably less of a flight risk); see also Peter Margulies, *Above Contempt? Regulating Government Overreaching in Terrorism Cases*, 34 Sw. U. L. REV. 449 (2005) (criticizing *Awadallah*); Posner, *supra* note 35, at 296 (arguing that "[t]he requirement of a warrant [in torture cases] would . . . make the officers a little more careful, but perhaps not much more truthful or candid").

37. See generally THE CONSTITUTION PROJECT, *DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES* (2005), available at [http://www.constitutionproject.org/pdf/War\\_Powers\\_Deciding\\_To\\_Use\\_Force\\_Abroad1.pdf](http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf) (discussing role of political branches); cf. Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 27-48 (2002) (discussing self-defense under international law).

38. See, e.g., *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 671-72 (1863) (upholding Lincoln's blockade of the Confederacy as an appropriate exercise of presidential authority given the necessity of the situation and Congress's later ratification of the blockade).

39. Congress recently passed a statute championed by Senator John McCain and others that prohibits "cruel, inhuman, or degrading treatment" of detainees. See 42 U.S.C.A. § 2000dd (2005).

suspect denies any involvement and requests a lawyer. Having used other methods to no avail, officials believe that resort to torture or “torture-lite” (including sleep deprivation, exposure to heat or cold, mind-altering drugs, and rough treatment such as slapping or shaking)<sup>40</sup> is their last and best strategy for saving the lives of thousands of civilians.

Michael Walzer addresses this scenario as it is played out at the highest levels of political power.<sup>41</sup> Invoking theorists from Machiavelli to Max Weber, he argues that in particularly charged situations, a political leader must learn “how not to be good.”<sup>42</sup> For Walzer, a leader who failed to order use of “torture-lite”—if not torture—in such a situation would be following an unduly narrow conception of his or her role. If the bomb explodes, and large numbers of civilians are killed, the leader has “clean hands,” but has failed to fulfill his or her responsibility to the residents of the polity, who—like the individual in custody—lack the present ability to defend themselves.<sup>43</sup> We might wish that a leader wrestle with this decision and seek plausible alternatives. However, many would hope that if those alternatives appear unsure of success, the leader would decide that more coercive measures of some sort were appropriate.<sup>44</sup>

Most of the commentators in the Levinson volume agree, to their credit, that a person who authorizes or commits “torture-lite” in such an exigent situation should be able to invoke a defense in a subsequent

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40. Jean Bethke Elshtain, *Reflection on the Problem of “Dirty Hands”*, in *TORTURE: A COLLECTION*, *supra* note 3, at 77, 85-86. As Fionnuala Ni Aolain notes, the European Convention on Human Rights prohibits torture, as well as treatment that is either inhuman or degrading. Fionnuala Ni Aolain, *The European Convention on Human Rights and Its Prohibition on Torture*, in *TORTURE: A COLLECTION*, *supra* note 3, at 213, 214-17. The analysis propounded in the text would distinguish between time-limited application of the torture-lite techniques mentioned and more protracted application of such techniques, or use of techniques calculated to produce intense pain, such as “beating the feet with a wooden or metal stick” (a practice called “falanga” that was perfected by the Greek military government of the late 1960’s). *Id.* at 215.

41. See Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *TORTURE: A COLLECTION*, *supra* note 3, at 61-75.

42. *Id.* at 63.

43. I assume the only options at this point are torture or death of civilians because less drastic preventative measures, such as evacuation, are insufficient to deal with the problem, since, as Hurricane Katrina demonstrated, inequities within the system will often result in some persons being left behind.

44. See Oren Gross, *The Prohibition on Torture and the Limits of the Law*, in *TORTURE: A COLLECTION*, *supra* note 3, at 229, 238 (arguing that, in the ticking bomb scenario, “[a] moral official would do the right thing to save innocent lives, while openly acknowledging and recognizing that such actions are (morally) wrong”). As the next section illustrates, the dilemma of dirty hands also applies to a leader such as President Lincoln, who asserted an obligation to violate the law in order to save the entire legal system. See *infra* notes 75-79 and accompanying text.

proceeding.<sup>45</sup> The commentators recognize that, if how we handle torture helps mediate between individuals and institutions, there are important reasons for allowing alleged perpetrators some avenue of defense.<sup>46</sup> In some cases, perpetrators will be able to demonstrate that their methods actually saved large numbers of innocents. In particular, use of “torture-lite” should be justifiable when the alternative is accepting a large number of civilian deaths.<sup>47</sup>

Moreover, permitting a defense actually promotes the cause of transparency in government. Without a defense, many cases will simply result in an exercise of discretion not to prosecute. The result will be a larger cloak on governmental decisions and practices. Allowing a defense will provide some opportunity to understand the government’s practices, while still allowing a jury to determine whether a defendant has met his burden of justification.<sup>48</sup> The availability of a defense also minimizes inequities within an institution that develop when line-level or field-level employees are held accountable, but “big fish” escape accountability.<sup>49</sup>

Ex post authorizations, such as an acquittal by a jury based on a justification defense, do not have the same institutional consequences as ex ante authorizations. They do not allow governments to plan as smugly the details of a torture regime. Moreover, careful jury instructions can limit the sweep of a justification defense, by informing a jury that the alleged perpetrator can be acquitted only if he demonstrates he averted an imminent attack<sup>50</sup> and used methods reasonably calculated to intimidate, such as torture-lite techniques, but did not use methods likely

45. See, e.g., Parry, *supra* note 29, at 158-59 (discussing necessity defense); Scarry, *supra* note 13, at 282 (same).

46. In some cases, particularly those concerning transitions to democracy, governments may provide amnesty to perpetrators—at least those lower down in the chain of command—in order to avoid galvanizing constituencies that may frustrate transition efforts. However, victims should have an opportunity to seek acknowledgment for their suffering and identify their accusers.

47. Gross, *supra* note 44, at 236-39; Supreme Court of Israel, *Judgment Concerning the Legality of the General Security Service’s Interrogation Methods*, in *TORTURE: A COLLECTION*, *supra* note 3, at 165, 177-78 (holding that both torture and related coercive practices, such as shaking and placing of detainees in “stress positions” for protracted periods, are impermissible, but acknowledging that a necessity defense may be available to perpetrators of torture); see also Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, in *TORTURE: A COLLECTION*, *supra* note 3, at 183.

48. See Scarry, *supra* note 13, at 282.

49. Line-level employees may, in appropriate situations, plausibly point to “signals” from higher-ups that adherence to the prohibition against coercive practices is not desired. However, tracing this institutional atmosphere to the higher-ups in terms of legal accountability is challenging under existing legal standards. The result, absent the availability of a defense, would be an unfair situation in which line-level personnel bear the brunt of the punishment for policies made at a higher level.

50. See Parry, *supra* note 29, at 159.

to inflict severe and prolonged physical or mental pain, such as actual torture.

It should be clear, however, that most cases will get to a jury under this standard, and that acquittal is always a possibility, further expanding the scope of the justification defense. Furthermore, the availability of a defense may lead prosecutors to refrain from initiating prosecutions, for fear of disclosing national security information. In addition, acquittals of alleged torturers, who operate from a variety of motives,<sup>51</sup> would inevitably form a common law of conduct that may normalize the incidence of torture-lite or torture, just as defenses such as extreme emotional disturbance and "heat of passion" helped create and reinforce norms of male supremacy. Absolutists should recognize that even the provision of defenses is a tragic choice.<sup>52</sup>

Ultimately, so-called absolutists for prohibition, whatever their rhetoric, are analyzing the best institutional arrangements for coping with torture, not seriously contending that they wish to categorically bar the practice. As such, absolutist rhetoric is a distraction from the careful institutional discussion that is necessary to counter arguments for sweeping executive power.<sup>53</sup> Casting the debate squarely in terms of democratic principles, such as accountability and transparency,<sup>54</sup> may be a less resonant strategy from the standpoint of rhetoric, but, as the Levinson book demonstrates, such an approach may be more fruitful for scholarly debate and policy analysis.

### III. ABSOLUTISM AND WAR POWERS

If absolutism is a dubious strategy for dealing with torture, it is also problematic for dealing with the difficult topic of integrating national security and constitutionalism. Here, executive unilateralists<sup>55</sup> argue

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51. See, e.g., Mark Osiel, *The Mental State of Torturers: Argentina's Dirty War*, in TORTURE: A COLLECTION, *supra* note 3, at 129 (discussing the range of motives of Argentinean security forces who engaged in torture).

52. Lawyers will inevitably become expert at rationalizing such choices. See Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in TORTURE: A COLLECTION, *supra* note 3, at 299-305 (discussing French lawyers' justification for the practices of the Vichy regime in collaborating with Nazis during World War II).

53. The Levinson book would have benefited from a contribution by a defender of the "executive power" perspective, whose presence could have sharpened the institutional discussion even further.

54. In a particularly insightful piece, Oona Hathaway suggests that the presence in a nation's legal and political system of institutional mechanisms that promote accountability, rather than the mere signing of the Torture Convention, is the best predictor of a consistent anti-torture regime. See Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION, *supra* note 3, at 199, 209-10.

55. For a definition of executive unilateralism, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to*

that just as the Executive has virtually plenary authority to order coercive interrogation methods without assent from Congress or the courts, the Executive has inherent authority in all national security matters.<sup>56</sup> Opponents of this view argue that virtually any new measure to accommodate exigencies based on the risk of terrorism is suspect, and that assumption of wartime power by the Executive requires a legislative authorization that can be conveyed only through a formal declaration of war.<sup>57</sup> Just as commentators on torture address the necessity defense and other justifications for coercive interrogation or torture, commentators who struggle to find some space between absolutist visions of constitutionalism in wartime, like those in Mark Tushnet's invaluable anthology, *The Constitution in Wartime*, grapple with the legitimacy of "exceptions" to the rule of law such as Lincoln's suspension of habeas corpus.<sup>58</sup>

If one values constitutionalism, the normative failure of the executive unilateralist position is clear. Actions by the Executive—sometimes abetted by the Congress—have endangered liberty and equality. Wilson's suppression of dissent during World War I,<sup>59</sup> the internment of Japanese-Americans after Pearl Harbor,<sup>60</sup> and the hounding of suspected dissidents during the Cold War<sup>61</sup> illustrate the risks of measures taken on national security grounds.<sup>62</sup> Viewed together, these challenges to the rule of law create a stark descriptive model of constitutionalism endangered by emergency measures. As Posner and Vermeule point out, this descriptive model depicts the rule of law as a kind of ratchet: when courts or the public tolerate emergency measures in wartime, the ratchet

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*Rights during Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 161, 162.

56. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1654 (2002) (arguing that presidential power in war is limited only by Congress's power of the purse).

57. Cf. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the presidential order establishing military commissions is invalid because of the absence of a declaration of war).

58. See, e.g., Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 39.

59. See PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 75 (1979).

60. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 88-100 (2003); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1591 (2002); see also Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L. REV. 481, 495-99 (criticizing detention of undocumented immigrants from South Asia and the Middle East after September 11th).

61. See Michael E. Parrish, *Revisited: The Rosenberg "Atom Spy" Case*, 68 UMKC L. REV. 601 (2000) (discussing the espionage case against Julius and Ethel Rosenberg).

62. Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 124, 126-27.

expands and resists efforts to limit executive power once the threat has passed.<sup>63</sup> In response, an equal and opposed absolutism, premised on resistance to executive discretion, seems advisable. However, as commentators in the Tushnet volume demonstrate, the stark descriptive model of the emergency ratchet is badly flawed.<sup>64</sup> This in turn suggests normative flaws in an absolutist response to the executive unilateralist position.

As Mark Graber demonstrates in his insightful essay, the salient examples of the decline of liberty and equality in wartime mask a more complex picture, characterized by compelling counter-examples of *increases* in liberty and equality prompted by national security concerns.<sup>65</sup> For example, during World War II, the Roosevelt Administration, eventually supported by the Supreme Court, intervened vigorously to safeguard the rights of Jehovah's Witnesses to refuse to salute the flag, fearing rightly that persecution of a religious minority would obscure the differences between the United States and Nazi Germany.<sup>66</sup> Similarly, the pressure for racial justice increased markedly during World War II and its aftermath, in part because of the government's need to appear legitimate in the eyes of its allies and of the world.<sup>67</sup> World War II also saw a huge surge in economic opportunities for women, stifled only by peace and the return of men from the front.<sup>68</sup>

Other examples, not mentioned by Graber, also illustrate this proposition. American democracy, with Congress at its center, began with the American Revolution. Our greatest achievement in liberty was arguably not the original Bill of Rights, ratified almost a decade after the Revolution's end, but the Fourteenth Amendment, which the Civil War made possible. Indeed, civic republican thought itself, which powerfully influenced the framers' views of popular participation in governance, does not posit the dichotomy between liberty and war that Mark Brandon asserts in his essay on republican freedoms.<sup>69</sup> Instead, republican thought from the classical age through Machiavelli has viewed wars

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63. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 55.

64. *See, e.g., id.*

65. *See* Mark Graber, *Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 95.

66. *Id.* at 103-06 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

67. *Id.* at 100; *see also* Mark E. Brandon, *War and the American Constitutional Order*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 11, 19-20 (discussing the role of global legitimacy in the federal government's position on school desegregation during the Cold War).

68. Graber, *supra* note 65, at 102-03.

69. Brandon, *supra* note 67, at 20-22.

required by national interests, involving masses of citizens mobilized for struggle and sacrifice, as necessary for maintenance of the positive liberty;<sup>70</sup> it is this participation and collective effort that makes republics possible. Peace, in contrast, may generate apathy among the electorate that is ultimately more corrosive of democracy and constitutionalism than any wartime fervor.

The flaws of the descriptive model in which civil liberties decline during wartime suggest that a normative model premised on resistance to the Executive is also unduly simplistic. While the Executive should clearly not receive a "blank check"<sup>71</sup> from courts, prohibiting the Executive from taking action related to the effective defense of the nation would undermine legitimate security interests. Based on this view, Lincoln's ordering of a naval blockade of the Confederacy was an appropriate exercise of presidential power, while his suspension of habeas corpus without congressional approval is a more troubling challenge to constitutionalism. However, the difficulty for would-be absolutists is that Lincoln's suspension of habeas was arguably necessary to prevent a Confederate victory.<sup>72</sup>

Scholars seeking a more nuanced course than absolutism have generally offered two approaches. One posits a suspension of legality, or what Carl Schmitt called an "exception."<sup>73</sup> The other is a clear statement requirement premised on congressional consent.<sup>74</sup> Both models have significant problems.

The exception view takes as its guide Lincoln's suspension of habeas corpus in the early days of the Civil War.<sup>75</sup> For advocates of this approach, there are some situations in which an unwavering dedication

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70. See Michael Mallett, *The Theory and Practice of Warfare in Machiavelli's Republic*, in *MACHIAVELLI AND REPUBLICANISM* 173-74, 177 (Gisela Bock, Quentin Skinner & Maurizio Viroli eds., 1993) (analyzing Machiavelli's argument that a military draft initiated in response to serious external threats enhances the "universal strengthening of the moral and collective virtue of the citizenry," while implying that standing armies at the disposal of executive officials, although efficient, pose dangers to liberty and virtue).

71. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

72. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 16-17 (2003) (describing the destruction of bridges and telegraph lines in Maryland and the breakdown of civil authority in that state, which could have resulted in the isolation of Washington, D.C. and Baltimore from the North).

73. See, e.g., Tushnet, *supra* note 62, at 48-49; see generally Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011 (2003); Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 *GA. L. REV.* (forthcoming 2006); 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 (2004) (critiquing prosecutorial policies after September 11th as short-sighted and lacking in transparency and accountability).

74. See Issacharoff & Pildes, *supra* note 55.

75. Cf. Sotirios A. Barber & James E. Fleming, *War, Crisis, and the Constitution*, in *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY*, *supra* note 7, at 232, 236-37 (discussing constitutional dilemmas faced by Lincoln); Brandon, *supra* note 67, at 24-25

to the rule of law will, in fact, undermine the long-term survival of the Republic.<sup>76</sup> In these situations, scholars argue, the best course is to recognize an exception to the general rule of law, in order to avoid long-term erosion of the rule of law.<sup>77</sup> Advocates of this approach argue that clearly recognizing such broad acts of presidential power as exceptions will limit the long-term damage that may result from straining to accommodate the President's actions within the existing legal regime.

There are a couple of problems with this approach, which mirror the problems of the "necessity" rationales for sanctioning or justifying torture. First, any regime of exception will naturally expand, as the Executive finds more and more occasions to suspend legality, or to ignore events that counsel a return to legality. This happened with Lincoln, as the Supreme Court noted in *Ex Parte Milligan*,<sup>78</sup> in which it held that a non-belligerent could not be tried before a military commission after the end of the Civil War, when federal courts were again functioning.<sup>79</sup> Lincoln's actions also became a precedent, in an informal sense, for later, less justifiable actions in wartime, such as Wilson's suppression of civil liberties and the World War II internment of Japanese-Americans. In this fashion, an exception becomes not a creature outside of law, but instead an action that generates its own common law, similar to the necessity defense in a torture case.

The exception model is also vague about the transition from the "normal" rule of law to the domain of the exception, as well as the transition back. This vagueness is particularly troubling with regards to the role of courts. The exception model posits some agreed-upon interlude when courts will decline to intervene, or when the Executive is justified in defying the courts' pronouncements. *Ex post*, one can argue that Lincoln acted appropriately in the early days of the Civil War when he disregarded Chief Justice Taney's ruling in *Ex Parte Merryman*<sup>80</sup> that Lincoln's unilateral suspension of habeas corpus was unconstitutional.<sup>81</sup> However, agreeing to such conduct *ex ante* would surely make bad con-

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(discussing Lincoln's blockade of the South, upheld in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)); Tushnet, *supra* note 62, at 125-26.

76. See, e.g., Barber & Fleming, *supra* note 75, at 237 (arguing that Lincoln confronted a "conflict between ends and means such that following the prescribed means would have defeated the very ends for which the means were ordained as law . . . [o]n these occasions . . . fully constitutional conduct is impossible"); FARBER, *supra* note 72, at 158 (quoting Lincoln's special message to Congress on July 4, 1862 in which he asked "whether 'all the laws *but one*' [access to habeas corpus] were to go unexecuted, 'and the government itself go to pieces, lest that one be violated?").

77. See, e.g., Tushnet, *supra* note 58, at 49-50.

78. 71 U.S. 2 (1866).

79. *Id.*

80. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487).

81. *Id.* at 149.



stitutional law, to the same degree as a regime of "torture warrants" would. If courts agree in advance, they could then issue an advisory opinion about matters that involve strategy and politics on the deepest level. Courts should not undertake this course, particularly without the benefit of seeing the specific costs of presidential actions, which may only reveal themselves over time, as the implementation of Lincoln's policies gradually moved from curbing armed insurrection to curtailing dissent.

The exception model responds to these concerns by requiring ex post "ratification" of presidential action by Congress.<sup>82</sup> This move parallels the arguments of exponents of the congressional-consent model, outlined by Issacharoff and Pildes in their discerning essay.<sup>83</sup> As Justice Jackson noted famously in his *Youngstown* concurrence, courts are more likely to defer to the Executive when evidence suggests that the Executive has received the consent of Congress.<sup>84</sup> By requiring some demonstration of congressional consent, courts are able to force some degree of deliberation on the part of the political branches, as well as assign some accountability to the Executive.<sup>85</sup> Congressional consent also adds Congress's authority to wage war and enact legislation, expressly granted in Article I, to the authority granted the President.<sup>86</sup> Yet while this response to absolutism is helpful in its focus on inter-branch deliberation and consensus, it has normative flaws that illustrate, as in the torture context, the difficulty of developing alternatives to absolutism.

The central normative problem with the model of congressional consent is its over and under-inclusive character. It is over-inclusive because the authors' focus on clear statements from Congress seems to permit substantial impairments of both liberty and equality, as long as Congress approves such measures.<sup>87</sup> Consider, for example, the significant diminution in the Court's procedural integrity occasioned by the Supreme Court decision in *Ex Parte McCardle*.<sup>88</sup> In *McCardle*, the Court dismissed the habeas petition of a Maryland editor who had vigorously advocated pro-Confederacy positions and whose case was to be

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82. See Gross, *supra* note 44, at 1099-1109. But see Tushnet, *supra* note 58, at 47-48 (critiquing reliance on ex post ratification as imposing merely "procedural obligations on officials who suspend legality").

83. See Issacharoff & Pildes, *supra* note 55.

84. See Sarah H. Cleveland, *Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants"*, 68 ALB. L. REV. 1127, 1137 (2005).

85. See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 54.

86. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635-36 (1952) (Jackson, J. concurring).

87. See Cleveland, *supra* note 84, at 1135 ("The downside of this approach is . . . that it runs the risk of inviting Congress and the executive to collude in the violation of individual rights.").

88. 74 U.S. (7 Wall.) 506 (1868).

tried before a military commission on the ground that Congress, in the wake of *Milligan*, had expressly stripped the federal courts of jurisdiction.<sup>89</sup> The Court's decision gave the political branches apparently wide authority to insulate from judicial review actions that would otherwise collide head-on with constitutional guarantees. It deprived the courts of the ability to do what their tradition, training, and habits equip them to do best—recognize and remedy unfair procedures.

It is telling, also, that the worst abuses, including targeting confederate sympathizers on the basis of their political opinion, *followed* congressional authorization of Lincoln's actions during the Civil War.<sup>90</sup> Similarly, a congressional-consent model would presumably require the Court to uphold the Japanese internment policy at issue in *Korematsu*, since there, too, Congress expressly authorized some form of government-sponsored relocation of Japanese-American citizens from "sensitive" areas on the West Coast.<sup>91</sup> A model that would echo *Korematsu* clearly has some normative gaps, despite its descriptive elegance.

At the same time, the insistence of the congressional-consent model on *express* delegations from the legislature is under-inclusive. While it may be reasonable to insist on express authorization *ex post*, after the dimensions of the problem and the President's response are clear, requiring an express authorization *ex ante* creates problems, particularly when dealing with "crises the nature of which Congress can hardly have been expected to anticipate in any detail."<sup>92</sup> Congress should be free to delegate in a more open-ended way in such contexts.<sup>93</sup> The congressional-consent model's insistence on express delegations leaves little room for the President to order a blockade, as President Lincoln did against the Confederacy. Precluding presidential action without congressional authorization leaves troubling gaps in national security, and needlessly impedes efforts to ensure what Jackson called a "workable government."<sup>94</sup>

The best approach to the problems of absolutism may not be a grand theory, as in the exception or congressional-consent models.

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89. *Id.* at 515.

90. See FARBER, *supra* note 72, at 170-75 (discussing First Amendment concerns raised by actions, such as arrests of newspaper editors, during the Civil War).

91. See *Ex Parte Endo*, 323 U.S. 283, 287 (1944) (acknowledging congressional authorization, but limiting scope of delegation in light of constitutional concerns). Congress has also recently addressed the subject of judicial review of detentions of suspected Al Qaeda members at the Guantanamo Bay Naval Base. See Detainee Treatment Act of 2005, Pub. L. No. 109-48, §§ 1001-16, 119 Stat. 2680, 2739-44 (limiting habeas jurisdiction).

92. *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

93. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring) (approving "implied" delegations).

94. *Id.* at 635.

Instead, a more modest approach, centering where possible on statutory interpretation, that seeks to nurture "soft" values such as procedural fairness, can play a vital role by allowing the courts to develop overarching principles, while avoiding the rigidity that sometimes accompanies constitutional adjudication. Such an approach would permit implied delegations from Congress, but construe the scope of such delegations to be consistent with constitutional and international norms.<sup>95</sup> One example is the Court's decision in *Ex Parte Endo*, holding that the president lacked statutory authority to detain concededly loyal Japanese-Americans during World War II.<sup>96</sup> *Endo* effectively ended the Japanese internment program,<sup>97</sup> and served as a harbinger of the more proactive role in protecting fairness and equality that the Court was to play in the future. Post-September 11th decisions like *Hamdi*, with its clear rejection of a "blank check" for executive action,<sup>98</sup> and *Rasul v. Bush*,<sup>99</sup> with its pragmatic holding that the federal habeas statute, informed by centuries of judicial regard for procedural fairness, conferred jurisdiction on the courts to hear petitions by detainees at the Guantanamo Naval Base,<sup>100</sup> demonstrate the merits of this harmonization approach. Through harmonization, courts can grant the Executive the flexibility required in exigent circumstances, while simultaneously preserving the rule of law.

#### IV. ABSOLUTISM AND MERCY AFTER SEPTEMBER 11TH

A third example of the tension between *ex ante* and *ex post* decisions in law and terrorism cases involves the post-conviction exercise of mercy.<sup>101</sup> Mercy is discussed here in the context of individuals convicted of crimes involving intangible aid to a group, rather than direct participation in violence. While prosecution is often appropriate in such cases, conviction may result in a sentence that is unduly harsh. In such

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95. See Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure after September 11*, 84 B.U. L. REV. 383, 405 (2004) (arguing that courts should interpret statutes authorizing force as being consistent with international humanitarian law).

96. 323 U.S. 283 (1944). *But see* *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (holding that the systematic exclusion of Japanese-Americans in the aftermath of Pearl Harbor was within "the war power of Congress and the Executive").

97. See Issacharoff & Pildes, *supra* note 55, at 175; Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003); *see also* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 201-02 (1998) (discussing *Endo*); Cass R. Sunstein, *supra* note 85, at 92-93 (analyzing *Endo* in conjunction with *Hirabayashi* and *Korematsu* to illustrate how the Court has rejected "Liberty Maximalism").

98. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

99. 542 U.S. 466 (2004).

100. *Id.* at 483-84.

101. *Cf.* Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2252 (2001) (discussing norms of mercy in the context of prosecution for racially-motivated crimes).

cases, the modification of sentences in light of experience is most consistent with justice. Moreover, openness to such revisions can help mobilize allies in the struggle against terror.

When embracing the respective absolutist philosophies, pundits on both the left and right ignore or discount concerns about mercy. On the right, the key phrase is, “[o]nce a terrorist, always a terrorist.”<sup>102</sup> The nature of the offense, and its timing—whether it occurred yesterday, or during the period prior to September 11th—is irrelevant. By the same token, absolutists on the left are skeptical of criminalizing acts that involve even tangible assistance, such as the provision of funds, to a group that is hostile to the United States, unless that support takes the form of specific violent activity.<sup>103</sup> This skepticism ignores the role that financial contributions to terrorist groups play in facilitating violence, given the ease with which such organizations can transfer funds between activities.<sup>104</sup> In addition, absolutists on the left have focused on broad legal concerns, such as the President’s power to detain alleged “enemy combatants,” instead of on the details of individual stories implicated by the post-conviction exercise of mercy.

The focus on mercy leads to Stefancic and Delgado’s book on the efforts of Archibald MacLeish, a celebrated poet, playwright, essayist, Harvard-educated lawyer, and above all decent man with impeccable “establishment” credentials, to secure the release of Ezra Pound during the Cold War.<sup>105</sup> Pound, a brilliant poet, had been a guiding spirit of the entire modernist movement from T.S. Eliot to Ernest Hemingway.<sup>106</sup> Sadly, Pound’s political beliefs became steadily more absolutist, Fascist, and anti-Semitic, with none of the eye for texture and detail that distinguished his poetry.<sup>107</sup> Pursuing these political views, Pound ended up a

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102. See Jane Mayer, *Lost in the Jihad: Why Did the Government’s Case Against John Walker Lindh Collapse?*, THE NEW YORKER, Mar. 10, 2003, at 50 (reporting statements affirming Lindh’s guilt by Paul McNulty, the United States Attorney whose office prosecuted the case).

103. See, e.g., COLE, *supra* note 60, at 75-79 (critiquing statute, 18 U.S.C. § 2339B, that prohibits “material support” of groups designated by the Secretary of State as foreign terrorist organizations); cf. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty By Association Critique*, 101 MICH. L. REV. 1408, 1432-52 (2003) (book review) (supporting policy behind material support statute, but pointing out legal and policy concerns); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 200-08 (2003) (discussing appropriate scope of material support provisions); Nina J. Crimm, *High Alert: The Government’s War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341, 1409-14 (2004) (discussing ramifications of statute for best practices in charitable giving).

104. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000).

105. See STEFANCIC & DELGADO, *supra* note 9, at 22-30.

106. See THE DIALOGUES OF ARCHIBALD MACLEISH AND MARK VAN DOREN 148-49 (Warren V. Bush ed., 1964) (hereinafter MACLEISH DIALOGUES).

107. STEFANCIC & DELGADO, *supra* note 9, at 9-10.

skill for the Axis Powers during World War II, spewing anti-Semitic and pro-Fascist rhetoric over the airwaves in a failed effort to demoralize the Allies.<sup>108</sup> After the war, Pound was found not guilty of treason, but was committed indefinitely to St. Elizabeth's Hospital in Washington, D.C., where he languished for ten years.<sup>109</sup>

MacLeish, who had excoriated the left wing in the years before World War II for taking an absolutist anti-war position that discounted the threat from fascism, was initially as outraged as anyone by Pound's embrace of the role of high-culture apologist for Fascism in wartime.<sup>110</sup> Eventually, however, MacLeish took up Pound's case, and persuaded other American power players, including Robert Frost, to aid his cause.<sup>111</sup> Part of MacLeish's motivation was certainly a *sui generis* reaction to the plight of Pound, who had earlier counseled MacLeish on his poetry during his time in Paris. However, one can also read MacLeish's commitment to Pound's release as an acknowledgment that experience should trump absolutist ideas about punishment.

An absolutist would believe that punishment is not merely permitted, but required, in a case such as Pound's to preserve the fabric of accountability that binds society. However, for MacLeish this conception of punishment was far too abstract. Instead of dwelling in abstractions, MacLeish saw in Pound a deeply confused human being, whose transgressions, while worthy of condemnation, caused no direct harm, and whose continued confinement did not promote the public safety. Rejecting absolutism, MacLeish argued successfully<sup>112</sup> for Pound's release, even invoking world opinion as a rationale for mercy.<sup>113</sup> In his efforts, MacLeish emulated the example of Lincoln, who, in his Second Inaugural Address, urged "malice toward none . . . charity toward all

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108. *Id.* at 10-11.

109. *Id.* at 11.

110. *Id.* at 19, 21.

111. *Id.* at 25-26.

112. In rejecting absolutism, MacLeish separated himself from the mechanical formalism that Stefancic and Delgado critique elsewhere in their book. *Id.* at 34. In contrast, the Justice Department lawyers who endorsed a categorical, absolutist view of the primacy of executive authority would probably fit within the authors' definition of formalism. However, the authors' critique of formalism begins to break down with their argument that another flaw of formalism is its preference for "regularity and predictability." *Id.* The Department of Justice lawyers who drafted the torture memos shared this lack of regard for precedent, which is why the Department of Justice opinion failed to mention core precedents such as the *Youngstown* decision. See Stephen Gillers, *Legal Ethics: A Debate*, in *THE TORTURE DEBATE IN AMERICA* 236, 237-38 (Karen J. Greenberg ed., 2006) (criticizing Department of Justice Lawyers for ignoring Supreme Court's holding limiting executive power in *Youngstown*). Some regard for precedent on the part of the Justice Department lawyers may have spared the country the damage caused by the Bush Administration's wrong turn on torture.

113. STEFANCIC & DELGADO, *supra* note 9, at 25 (noting MacLeish's meetings with diplomats, including then-United Nations Secretary General Dag Hammarskjöld, on Pound's behalf).

...’”<sup>114</sup> This view could have allowed Lincoln, if he had lived, to guide Reconstruction with firmness<sup>115</sup> and vision, but without vindictiveness; thus crafting, in the face of great odds, a consensus for broad participation in America’s future.<sup>116</sup> America has a similar opportunity today on the global stage, but it is squandering this chance.<sup>117</sup>

To seize the day, the United States should show mercy to individuals like the so-called “American Taliban,” John Walker Lindh. Lindh pled guilty to charges of aiding the enemy, and is now serving a twenty-year prison term.<sup>118</sup> However, Lindh, and others such as the attorney Lynne Stewart,<sup>119</sup> engaged in no direct violence against Americans. Their commitments led them to make wrong decisions that appropriately triggered prosecution, yet they suffered, particularly in Lindh’s case, from the raw feelings that overflowed in the immediate aftermath of September 11th. The story of the “American Taliban” provides a compelling set of images that drove Lindh’s prosecution, despite the ample evidence of Lindh’s relative insignificance. Lindh became a symbol of Al Qaeda, when it is not even clear that he shared Al Qaeda’s views, or worked on Al Qaeda’s behalf. Indeed, evidence suggests that Lindh turned down express requests from Osama bin Laden himself to engage in missions that targeted Americans.<sup>120</sup> Clearly, Lindh seems to present little danger of violence in the future.

Against this backdrop, the exercise of mercy—a venerable *ex post* remedy—counters the tendency of absolutist thinking to overwhelm the particular cases and extinguish humanity. *Ex post* measures such as par-

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114. Jerry J. Philips, *Uncommon Predicates: Notes on Lincoln’s Second Inaugural Address*, 72 TENN. L. REV. 807, 809 (2005).

115. In his second Inaugural, Lincoln urged “‘firmness in the right.’” *See id.* at 809.

116. Lincoln also wished for “‘a just and a lasting peace, among ourselves, and with all nations.’” *Id.*

117. *Cf.* Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. “War on Terrorism”*, 5 THEORETICAL INQUIRIES L. 47, 72 (2004) (discussing dialogue between transnational nongovernmental organizations and United States on human rights issues).

118. *See* Katherine Q. Seelye, *Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1.

119. *See* Margulies, *supra* note 103 (discussing Stewart’s case). Stewart was convicted of material support of a terrorist organization arising from her repeated violations of conditions the government placed on her communication with her client, Sheik Abdel Rahman, who had been convicted of conspiracy to blow up New York City landmarks. *Id.* at 194-96. She is currently awaiting sentencing. *See* Julia Preston, *Lawyer is Guilty of Aiding Terrorists*, N.Y. TIMES, Feb. 11, 2005, at A1. Other defendants in this category include the Buffalo defendants who pled guilty to material support arising from their participation in an Al Qaeda training camp prior to September 11th. *See generally* Susan Sachs et al., *Murky Lives, Fateful Trip in Buffalo Terrorism Case*, N.Y. TIMES, Sept. 20, 2002, at A1.

120. Mayer, *supra* note 102, at 54. It is true that Lindh was at the prison in Afghanistan where a CIA agent died during a prisoners’ rebellion. *Id.* at 55. However, the government could not prove that Lindh participated in the rebellion, or had any role in the death of the CIA agent. *Id.*

dons and commutation allow the legal system to sort out cases involving continued dangerousness from those such as Lindh's in which punishment for the crime was, in part, a function of having a scapegoat available—a crucible for our rage. Commutation of Lindh's sentence within the next ten years, like Pound's release from St. Elizabeth's after MacLeish's intervention, would reflect the merciful tempering of this anger over time.<sup>121</sup>

The exercise of mercy and discretion should not be reserved for Lindh alone, or for that matter, for suspected terrorists. Prosecution of perpetrators of government abuse—particularly line-level personnel—should also reflect the social imperatives of a state in transition, including the costs of complete punishment of all participants in a discredited government or organization. Mobilizing support for transitions may require giving up on the ideal of absolute justice, and tempering justice with reconciliation.<sup>122</sup> In the organizational context, terrorist groups that renounce terrorism and seek to contribute to peaceful transitions should be entitled to what I call elsewhere “transition relief,” involving the easing of restrictions that may hinder the process of change.<sup>123</sup>

This policy of reconciliation and pragmatic adjustment should also hold true for countries that have been enemies or adversaries. In a pragmatic world, institutional interests in cooperation often should outweigh past enmities. Taking the United States' relations with Iran as an example, although there is no question that Iran has engaged in conduct that caused substantial harm to America and to American interests, including

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121. Comparable *ex post* consideration is appropriate in the case of Jesselyn Radack, a Justice Department lawyer who went public after Lindh's indictment with concerns about his earlier interrogation. *Id.* at 58-59. Radack may well have violated that centerpiece of legal ethics, the duty of confidentiality. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004). An absolutist view of professional responsibility would hold that Radack is subject to discipline, since her conduct does not fall into the recognized exceptions to the duty of confidentiality. See *id.* (detailing exceptions for prevention of death or substantial bodily harm); cf. STEFANCIC & DELGADO, *supra* note 9, at 34 (analyzing “categorical” approach central to what authors describe as “legal formalism”). In retrospect, however, Radack's disclosures almost certainly benefited the legal system, by opening a window on profoundly troubling interrogation practices. Perhaps recognizing this fact, authorities in Maryland have declined to prosecute Radack. A comparable exercise of discretion would also be appropriate in the District of Columbia, where Radack also faces disciplinary proceedings.

122. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000). Institutionally, however, more effort should be made to apprehend, prosecute, convict, and punish higher-up human-rights violators. Failure to punish such prime actors will chill the citizenry, discouraging meaningful reform efforts. See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violators of a Prior Regime*, 100 YALE L.J. 2537 (1991); Peter Margulies, *Making “Regime Change” Multilateral: The War on Terror and Transitions to Democracy*, 32 DENVER J. INT'L L. & POL'Y 389, 404-08 (2004) (discussing relationship between transitions to democracy and anti-terror measures).

123. See Margulies, *supra* note 95, at 410.

the hostage-taking at the American Embassy, and encouragement of global terrorism,<sup>124</sup> this conduct is not a valid *permanent* rationale for a policy of diplomatic isolation. MacLeish understood this dynamic forty years ago. Consider his thoughts on the experience time yields in dealing with nations, in connection with the United States' policy toward Cuba: presciently, he criticized the CIA for putting assumptions before experience in the failed Bay of Pigs effort to destabilize Castro during the Kennedy Administration. MacLeish commented:

I think the CIA has proved that it's frequently badly informed, on a purely factual basis [b]ut . . . the real difficulty was that what the CIA thought it knew had no relation to the real situation in Cuba, in terms of the feelings, the commitments, the passions, the anguishes, and the whole internal turmoil of the Cuban people.<sup>125</sup>

The ability to modify a policy or judgment, out of mercy or prudence, allows a state to avoid the most severe penalty of absolutism: endless repetition of the mistakes of the past.

## V. CONCLUSION

Absolutism makes for effective rhetoric, even when it fails in dealing with particular cases. As the books reviewed here demonstrate, absolutism is not a convincing answer to the complex issues of torture, war powers, or confinement of persons who have committed criminal acts of disloyalty. While moral intuitions are valuable, a sound normative and descriptive framework for any of these issues requires a hard look at institutions. At the institutional level as well, however, choices range from difficult to tragic.

A central issue for institutions is the nature and scope of responses to exigent circumstances. In the torture context, specific *ex ante* authorizations, such as Dershowitz's torture warrant proposal, risk licensing abuse. A more appropriate path would entail the availability of *ex post* procedures, such as a necessity defense for the practice of coercive interrogation where the defendant could demonstrate that his efforts had saved lives and there was no less intrusive means of obtaining the information. Such a defense would promote transparency and avoid scapegoating low-level personnel. However, allowing *ex post* mechanisms in this setting is the product of a tragic choice. While allowing a necessity defense may save lives, it also creates its own common law,

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124. Cf. JOHN ESPOSITO, *UNHOLY WAR: TERROR IN THE NAME OF ISLAM* (2002) (discussing the history of Iran's current regime, while arguing that the West has a distorted conception of Iran's foreign policy).

125. See MACLEISH *DIALOGUES*, *supra* note 106, at 117-18.



which may work subtly to encourage coercive interrogation or torture, despite efforts to limit the defense's applicability.

In the war powers setting, express *ex ante* authorizations from Congress for all conceivable exercises of executive power are also problematic. Some responses to exigency, such as the wholesale round-up of entire communities, should be impermissible regardless of congressional consent, as the negative example of *Korematsu* demonstrates. In other situations, however, requiring express authorization may impair the efficiency of responses to risk, as the Court recognized in *Dames & Moore* and *Hamdi*. The courts' response here should be two-fold. First, courts should permit implied delegations, as Justice Jackson recognized in *Youngstown*, but harmonize those implied delegations with overarching legal norms. Second, courts should stand ready to strike down express delegations, such as that allowing the Japanese internment, that violate core guarantees of fairness and equality. Here, too, very difficult choices will be necessary *ex post*, such as the choice facing the Court that recognized the necessity for Lincoln's suspension of habeas corpus in order to cope with insurrection in Maryland.

Modification of sentences and policies is an *ex post* remedy that is both necessary and problematic. The well-connected, such as Pound, receive it disproportionately, while those without such allies languish. Nevertheless, a commitment to mercy is vital, particularly when time can change views about the necessity of confinement, as it did for Pound, and should eventually do for John Walker Lindh. Similarly, experience over time should modify failed policies, such as the diplomatic isolation of Iran.

Ultimately, the great flaw of absolutism is that it masks difficult choices, and obscures the analysis of institutions necessary for determining legal rules. Rhetoric is no substitute for reflection about the difficult choices the legal system faces in the arenas of terrorism and national security. The volumes reviewed here provide fresh perspectives on those choices, and plausible visions for building better political and legal institutions.

