



Visibility, Accountability and Discourse as Essential to Democracy: The Underlying Theme of Alan Dershowitz's Writing and Teaching

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ARTICLES

VISIBILITY, ACCOUNTABILITY AND DISCOURSE AS ESSENTIAL TO DEMOCRACY: THE UNDERLYING THEME OF ALAN DERSHOWITZ'S WRITING AND TEACHING

*Alan M. Dershowitz**

I have been writing about the law and justice for half a century. My first published law review piece appeared in 1960 as a student note in the *Yale Law Journal*.¹ Since that time, I have published nearly thirty books and hundreds of articles covering a wide range of legal, philosophical, historical, psychological, biblical, military, educational, and political issues. Until I listened to the excellent papers presented at this conference on my work, I had never realized—at least on a conscious level—that a single, underlying theme, with multiple variations, runs through nearly all of my writings. As a response to those papers, I will seek to articulate that theme, show how it pervades my writing and teaching, identify some of its roots in the teachings of my own mentors, try to defend its fundamental correctness, and point to several weaknesses and limitations that remain to be considered before I complete my life's work.

The theme is not obvious, and no single speaker at the conference identified it fully, though most touched on elements of it. It is not obvious because, on the surface, it is difficult to see one single-colored thread running through a tapestry that appears to weave together so many different subjects. After all, I have written, *inter alia*, about the crimes of attempt and conspiracy; the commitment of the mentally ill; the defense of insanity and other legal excuses and justifications, such as "necessity," "self-defense," and "provocation"; sentencing and plea bargains; corporate and group crime; legal codification; freedom of speech; pornography; search and seizure; wiretapping; entrapment; coercive interrogation and torture; bail

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¹ Note, *Why Do Criminal Attempts Fail? A New Defense*, 70 YALE L.J. 160 (1960).

and preventive detention; the causes of terrorism; preemptive and preventive wars and other anticipatory measures; affirmative action; the Israeli-Arab conflict; freedom of and from religion; biblical interpretation; the sources of rights and morality; the Declaration of Independence; Jefferson's views regarding religion, speech, and terrorism; judicial selection; legal ethics; and the appropriate criteria for interpreting the Constitution.

I. THE OVERT TEXTUAL MESSAGE OF MOST OF MY WRITING

One theme that has been common to many, but not all, of my writings has been the prevention of harmful conduct, as contrasted with the after-the-fact punishment of completed crimes. My first published note began by adumbrating this issue:

Legal folklore includes the notions that the criminal process is invoked only against acts which cause demonstrable injury, and that sanctions are applied in rough proportion to the actual harm inflicted upon society. But concern for the safety of society often provokes use of the criminal law to protect its citizens from potentially dangerous behavior patterns. Thus, when some harmful acts indicate a propensity in the actor to cause even greater harm, the criminal law frequently measures the sanction to be imposed, not merely by the actual injury done, but also by the potential injury implicit in the actor's conduct. Simple assault and assault with intent to kill may produce the same quantum of injury, but the sentence prescribed for the latter offense is more severe, probably because it includes consideration of the propensity to kill. This concern for potentially dangerous behavior has led to the imposition of criminal sanctions for certain acts which result in no injury at all—so-called inchoate crimes. The law of "attempts" is one category of such crimes. When a person attempts to commit a crime such as murder, but fails for some reason to achieve his intended result, he may be guilty of an attempt. Because injury is not an *essential* element of a criminal attempt, the only rational function of the law of attempts must be the identification of individuals whose overt behavior manifests dangerous criminal propensities.²

² *Id.* at 160 (footnotes omitted).

This theme of prevention has been reflected in much of my work, culminating in my 2006 book *Preemption: A Knife That Cuts Both Ways*, which proposes the articulation of a new jurisprudence for what I call the “preventive state” that is in the process of emerging in response, most particularly, to the threat of non-deterable suicide terrorism. I began that book with the following description:

The democratic world is experiencing a fundamental shift in its approach to controlling harmful conduct. We are moving away from our traditional reliance on deterrent and reactive approaches and toward more preventive and proactive approaches. This shift has enormous implications for civil liberties, human rights, criminal justice, national security, foreign policy, and international law—implications that are not being sufficiently considered. It is a conceptual shift in emphasis from a theory of deterrence to a theory of prevention, a shift that carries enormous implications for the actions a society may take to control dangerous human behavior, ranging from targeted killings of terrorists, to preemptive attacks against nuclear and other weapons of mass destruction, to preventive warfare, to proactive crime prevention techniques (stings, informers, wiretaps), to psychiatric or chemical methods of preventing sexual predation, to racial, ethnic, or other forms of profiling, to inoculation or quarantine for infectious diseases (whether transmitted “naturally” or by “weaponization”), to prior restraints on dangerous or offensive speech, to the use of torture (or other extraordinary measures) as a means of gathering intelligence deemed necessary to prevent imminent acts of terrorism.³

We are doing all this and more without a firm basis in law, jurisprudence, or morality, though there certainly are historical precedents—many questionable—for preventive actions.

I ended it with a proposal:

There is a desperate need in the world for a coherent and widely accepted jurisprudence of preemption and prevention, in the context of both self-defense and defense of others. There is also a pressing need for a neutral body or other fair mechanism to apply any such jurisprudence. Today both

³ ALAN M. DERSHOWITZ, *PREEMPTION: A KNIFE THAT CUTS BOTH WAYS* 2–3 (2006) [hereinafter *PREEMPTION*].

needs are lacking. In the absence of a jurisprudence and jurismechanism, ad hoc decisions become the de facto rules.⁴

In my most recent academic book, *Is There A Right To Remain Silent? Coercive Interrogation and the Fifth Amendment After 9/11*, I issued a challenge to future generations:

We need to develop a jurisprudence for the emerging preventive state. This jurisprudence should contain both substantive and procedural rules governing *all* actions . . . taken by government officials to prevent harmful conduct, such as terrorism. Black holes in the law are anathema to democracy, accountability, human rights, and the rule of law. I urge citizens, legislators, judges, and scholars to take up this important agenda.⁵

Between my 1960 article on the law of attempts and my 2008 book on preventive interrogation, I wrote dozens of articles and books relating to the prediction and prevention of harmful conduct, and taught numerous classes about that and related issues. The writings ranged from the preemption and prevention of harmful conduct by the mentally ill to the effort to predict which kinds of speeches and writings might lead to violence. They included preventive detention of suspected terrorists; preventive interrogation; and surveillance methods designed to secure real-time intelligence information necessary to prevent terrorism, preemptive military actions, pre-trial detention of ordinary criminals, preventive genetic testing and inoculation, preventive character testing, and preventive profiling. As to all of these issues, I have sought to balance the imperatives of due process, liberty, and decency against the legitimate needs of national security and crime prevention.⁶

The *overt text* of many of my books, articles and classes dealt in large part with the substantive and procedural issues growing out of the prediction and prevention of harmful conduct—the movement

⁴ *Id.* at 237.

⁵ ALAN M. DERSHOWITZ, *IS THERE A RIGHT TO REMAIN SILENT? COERCIVE INTERROGATION AND THE FIFTH AMENDMENT AFTER 9/11*, at 176 (2008) [hereinafter *COERCIVE INTERROGATION*].

⁶ *See, e.g.*, ALAN DERSHOWITZ, *FINDING JEFFERSON: A LOST LETTER, A REMARKABLE DISCOVERY, AND THE FIRST AMENDMENT IN AN AGE OF TERRORISM* 30–32 (2008) [hereinafter *FINDING JEFFERSON*]; Alan M. Dershowitz, *Preventive Disbarment: The Numbers Are Against It*, 58 A.B.A. J. 815, 815–16 (1972). *See generally*, PREEMPTION, *supra* note 3 (discussing preventive action in the contexts of individual crime, Arab-Israeli conflict, terrorism, and the war in Iraq).

we are experiencing toward the “preventive state”—and the jurisprudential problems associated with this movement.⁷ There is, however, a more subtle *subtext* that runs through not only the writings about prevention but virtually all my other writings as well. The overt text has been obvious to readers, reviewers, commentators, and those who presented papers at this symposium. The subtext has been less obvious, though in my view, of equal importance. It is that subtext that I wish to identify and explore in this Article.

II. THE MORE SUBTLE SUBTEXT OF ALL MY WRITINGS

The subtext that runs through all of my writing and teaching is the need in a democracy for *openly articulated criteria and standards* whenever states (or state-like institutions) take actions that affect the rights of individuals. This need may seem obvious, since democracy cannot operate in the absence of visibility and accountability. Yet, in virtually all of the areas about which I have chosen to write and teach, the criteria and standards for government action have been unarticulated or hidden from public view. Moreover, there have been some who have argued that it is wiser, even in a democracy, to sometimes hide from public view (and hence public scrutiny) what the government is doing.⁸

It cannot reasonably be disputed that some governmental decisions and actions must be kept secret, at least for a time. Espionage activities, weapon development, military planning and the like must, by their very nature, be kept under wraps if they are to succeed. But broad policy decisions should, in a democracy, be subjected to the checks and balances not only of the other branches of government but of non-governmental organizations such as the media, the academy, and, most importantly, the citizenry. As I wrote in *Rights from Wrongs*:

⁷ See, e.g., Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 277–78 (2004).

⁸ As I write in *Why Terrorism Works*:

In my debates with two prominent civil libertarians, Floyd Abrams and Harvey Silverglate, both have acknowledged that they would want nonlethal torture to be used if it could prevent thousands of deaths, but they did not want torture to be officially recognized by our legal system. As Abrams put it: “In a democracy sometimes it is necessary to do things off the books and below the radar screen.”

ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 151 (2002) [hereinafter *WHY TERRORISM WORKS*]; see *infra* note 48 and accompanying text (quoting Richard Posner).

This balance is part of our dynamic system of governing, which eschews too much concentration of power. American sovereignty, unlike that of most other Western democracies, does not reside in one branch of government or even in the majority of the people. Our sovereignty is a process, reflected in governmental concepts such as checks and balances, separation of powers, and judicial review. More broadly, it is reflected in freedom of the press, separation of church from state, academic freedom, the free-market economy, antitrust laws, and other structural and judicial mechanisms that make concentration of power difficult.⁹

These checks on abuse cannot operate effectively in the absence of visibility, accountability, and public discourse. What is needed, and what is sorely lacking, is a theory of when governmental actions may appropriately be kept secret (and for how long) and when they must be subject to open debate and accountability. I have been seeking to contribute to the development and articulation of that theory by writing and teaching about areas of law in which the criteria and standards for state action are either hidden from public view or so vague that they invite the exercise of untrammelled discretion not subject to the rule of law.

Perhaps it is my interest in this issue of standards and accountability that is one of the reasons why I chose to focus my academic career around areas such as the prediction and prevention of harmful conduct, where there are few articulated standards and little public accountability. Or perhaps it was my focus on prediction and prevention that sensitized me to the more subtle issue of lack of visible standards and criteria. Whichever was the chicken and whichever the egg, these two paramount areas of my interest have worked symbiotically to generate my body of scholarship.

III. THE INFLUENCE OF MY PROFESSORS AND PEERS ON MY LIFE WORK

During my student days at Yale Law School, three of my mentors—Professors Joseph Goldstein, Alexander Bickel, and Guido Calabresi—all emphasized (in somewhat different ways) the need for visible decisions and democratic accountability. Professor

⁹ ALAN DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGINS OF RIGHTS* 157 (2004) [hereinafter *RIGHTS FROM WRONGS*].

Goldstein published a brilliant and influential article during my first year as a student entitled *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*.¹⁰ The thesis of this article was that democratic accountability required that police and prosecutorial decisions be subjected to democratic scrutiny and review.¹¹ Professor Bickel wrote and taught about the need for democratic accountability in Supreme Court decision-making. He too focused on low visibility decisions such as the denial and grant of certiorari.¹² Professor Calabresi introduced economic thinking into legal analysis, in part to increase the precision and visibility of difficult, even tragic, choices.¹³ These three professors had enormous influence on my thinking and that of my dear friend and colleague, the late John Hart Ely. Both my student law journal notes and comments, as well as Ely's student work, reflected the influence of our professors with regard to democratic accountability. It was no accident, therefore, that John Hart Ely asked me to collaborate with him, by editing his masterful student comment on the Bill of Attainder clause, in which he argued that

separating policy making from application has the . . . virtue of requiring relatively clear and candid articulation of the legislative purpose. By requiring the legislature to expose its purpose for observation, the political processes are given a fuller opportunity to react to it. And the judiciary is better able to judge the validity of the purpose and to assure that it violates no constitutional restrictions.¹⁴

¹⁰ Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

¹¹ *Id.* at 543–44.

¹² See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale Univ. Press, 2d ed. 1986) (1962) [hereinafter *THE LEAST DANGEROUS BRANCH*]; ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* (1975); Alan M. Dershowitz, *The Morality of Consent*, N.Y. TIMES, Sept. 21, 1975, at BR1 (book review). Following my graduation, I served as a law clerk to Chief Judge David Bazelon and Justice Arthur Goldberg. During that time, I drafted several opinions justifying the Exclusionary Rule. The reason that I was so interested in the Exclusionary Rule is not that I think it necessarily works to deter police misconduct but because it requires the articulation of standards. See *infra* Part XIX.

¹³ Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 534–53 (1961). (I was Professor Calabresi's research assistant for this article.)

¹⁴ Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 346–47 (1962) (footnote omitted) [hereinafter *Legislative Specification*]. (I worked closely with Ely on this comment during the summer following my graduation from law school. The *Yale Law Journal* acknowledged my role in editing the comment.) As a law student, I worked on two additional student articles, each of which dealt

We subsequently collaborated on another article challenging the Supreme Court's candor in deliberately misreading the records of cases and deliberately misciting precedents in ways that were not visible to the average reader of Supreme Court decisions.¹⁵ We acknowledged that

[r]easonable [people] can and do differ about the proper role of the Supreme Court, as they can and do about the balance to be struck between "liberty" and "order." But there is little room for disagreement about the desirability in Supreme Court adjudication of reasoned argument as opposed to arrogant *pronunciamento*.¹⁶

Even before I got to law school, however, I was thinking about some of these issues. My high school and college years coincided with McCarthyism, and I experienced the firing of teachers on the basis of standardless and ad hoc criteria that were often hidden from public view and accountability. In college, I took several courses on low visibility decisions that lacked accountability. These included a course on lobbying with Professor Belle Zeller, a course on police work from Professor Georgia H. Wilson, and a series of courses by Professor Martin Landau which dealt with democratic accountability. In college, I wrote several papers on low visibility decision-making and the lack of standards in the regulation of lobbying, police actions, and constitutional adjudication.¹⁷ I chose Yale Law School largely because I was interested in the relationship between law and social sciences. So, it was natural that upon entering law school I would gravitate toward those professors who continued to guide me in this general direction of focusing on important decisions that were made with little articulation of standards and little or no accountability.

with the need for articulated criteria and public accountability. I wrote a comment on corporate crime in which I proposed a new system of sanctions for corporations, suggesting criteria that were more explicit and more targeted at those who made policy for the corporations. Comment, *Increasing Community Control Over Corporate Crime—A Problem in the Law of Sanctions*, 71 YALE L.J. 280, 297–305 (1961). I then edited a comprehensive draft of a penal code in which Professor George Dession attempted to find, as I stated it, "the proper role of a law of crimes in a society which postulates maximum toleration of nonconforming behavior while seeking to preserve its preferred form of public order." Comment, *Professor George H. Dession's Final Draft of the Code of Correction for Puerto Rico*, 71 YALE L.J. 1050, 1050 (1962).

¹⁵ Alan M. Dershowitz & John Hart Ely, Comment, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1198–1218 (1971).

¹⁶ *Id.* at 1199 (footnote omitted).

¹⁷ Some of these papers are among my papers in the archives of Brooklyn College.

Again, there is the chicken-egg problem: Was I so influenced by professors who wrote and taught about these issues because I was already thinking about them? Or, did I continue to think about them because of the influence of these professors? I am relatively certain that the answer contains elements of both. What I know for sure is that without the influence of these great teachers and scholars, I could not have written or taught in the manner that I have over the past half century. My goal, as a teacher, has been to have comparable influence over the thinking of some of the thousands of students whom I have helped to educate over the past forty-five years. Nothing pleases me more than to receive a letter from a former student, containing a law review article, brief, or op-ed piece that they say reflects what they learned in one of my classes. That is the awesome power and responsibility of the teacher: to transmit thinking from generation to generation to generation.¹⁸ “L’dor v. dor,” as the Hebrew expression goes.¹⁹

IV. THE LAW OF ATTEMPTS

My initial foray into criminal law was as a first year law student writing a law journal note about the arcane law of criminal attempts. I complained about the lack of substantive criteria for deciding when non-criminal preparation to commit a crime should be deemed to have ripened into a criminal attempt. I worried that vague criteria, such as “dangerousness,” though relevant to the law, might empower social scientists to make policy judgments that in a democracy are more appropriately left to other institutions:

[B]ehavioral science can do no more than indicate the attempter’s degree of dangerousness. It cannot determine whether a given degree of dangerousness demands incarceration. The varying degrees of internal control revealed by the suicide studies indicate that “harmless” and “dangerous” are not separable categories, but are rather the terminal concepts of a continuum containing innumerable shades of relative dangerousness. In deciding at which point in this continuum criminal sanctions ought to be imposed,

¹⁸ It is a power that is often abused today by professors who see their role as a propagandist for a particular ideology or political result, who seek to close their students’ minds to alternative viewpoints, and who challenge those who seek to open their students’ minds to views different from their own.

¹⁹ Literally, “from generation to generation.”

courts and juries must make a policy decision, balancing society's need for protection against the undesirability of imprisoning persons because of their possible dangerousness.²⁰

V. THE COMMITMENT OF THE MENTALLY ILL

This concern about abdicating the responsibility for articulating criteria to private psychiatrists or other professionals soon became a dominant theme in my writing about the commitment of the mentally ill. In my first article on that widely neglected subject, I criticized the criteria for confining the mentally ill as being "so vague that courts sit—when they sit at all—merely to review decisions made by psychiatrists. Indeed, the typical criteria are so meaningless as even to preclude effective review."²¹

I pointed out that:

Some psychiatrists are perfectly willing to provide their own personal opinions—often falsely disguised as expert opinions—about which harms are sufficiently serious. One psychiatrist recently told a meeting of the American Psychiatric Association that "you"—the psychiatrist—"have to define for yourself the word danger, and then having decided that in your mind, . . . look for it with every conceivable means. . . ."

. . . As one would expect, some psychiatrists are political conservatives while others are liberals; some place a greater premium on safety, others on liberty. Their opinions about which harms do, and which do not, justify confinement probably cover the range of opinions one would expect to encounter in any educated segment of the public. But they are opinions about matters which each of us is as qualified to make as they are. Thus, this most fundamental

²⁰ Note, *supra* note 1, at 169.

²¹ Alan M. Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways"*, 51 JUDICATURE 370, 372 (1968).

In Connecticut, for example, the court is supposed to commit any person whom a doctor reasonably finds is "mentally ill and a fit subject for treatment in a hospital for mental illness, or that he ought to be confined." This circularity is typical of the criteria—or lack thereof—in about half of our states. Even in those jurisdictions with legal sounding criteria—such as the District of Columbia where the committed person must be mentally ill and likely to injure himself or others—the operative phrases are so vague that courts rarely upset psychiatric determinations.

Id.

decision . . . is almost never made by the legislature or the courts; often it is never explicitly made by anybody; and when it is explicitly made, it is by an unelected and unappointed expert operating outside the area of his expertise.²²

I ended my article by highlighting the dangers to democratic accountability of this pervasive problem:

What, then, have been the effects of virtually turning over to the psychiatrists the civil commitment process? We have accepted a legal policy—never approved by an authorized decisionmaker—which permits significant overprediction; in effect a rule that it is better to confine ten men who would not assault than to let free one man who would. We have defined danger to include all sorts of minor social disruptions. We have equated harm to self with harm to others without recognizing the debatable nature of that question.

Now it may well be that if we substitute functional legal criteria for the medical model, we would still accept many of the answers we accept today. Perhaps our society is willing to tolerate significant overprediction. Perhaps we do want incarceration to prevent minor social harms. Perhaps we do want to protect people from themselves as much as from others. But we will never learn the answers to these questions unless they are exposed and openly debated. And such open debate is discouraged—indeed made impossible—when the questions are disguised in medical jargon against which the lawyer—and the citizen—feels helpless.²³

I concluded that an important lesson to be learned from this experience is that

no legal rule should ever be phrased in medical terms; that no legal decision should ever be turned over to the psychiatrist; that there is no such thing as a legal problem which can not—and should not—be phrased in terms familiar to lawyers. And civil commitment of the mentally ill is a legal problem; whenever compulsion is used or freedom denied—whether by the state, the church, the union, the university, or the psychiatrist—the issue becomes a legal

²² *Id.* at 374 (some alteration in original).

²³ *Id.* at 377.

one; and lawyers must be quick to immerse themselves in it.²⁴

VI. BAIL AND PREVENTIVE DETENTION

Over the next several years, I generalized this critique beyond the area of commitment of the mentally ill. A similar lack of articulated criteria and a similar abdication of democratic responsibility plagued other areas in which important preventive decisions were being made as well.

One such area, that received far more public attention than the confinement of the mentally ill, was the Nixon administration's proposal for the preventive detention of criminal defendants who were believed to pose a danger to the community during the inevitable hiatus between arrest and trial. I wrote a series of articles critiquing this proposal, in part on the basis of our inability to predict violence without substantial "overprediction," but also because of the lack of clear standards and criteria. This is how I put it in an article published in the American Bar Association Journal in 1971:

A pretrial detention statute, if it is to survive constitutional attack, should at least be as clear as an ordinary criminal statute is required to be about who is going to be confined. Yet the operational criteria in this statute authorize the detention of defendants charged with certain crimes if the release will not "reasonably assure the safety of any person or the community".

At least two critical issues are buried in this vague and ambiguous phrase. The first is, what *kind* of a predicted crime warrants confinement? . . . Must it be a felony? The second critical but unanswered question is, how *likely* must it be that the predicted crime will be committed? Must it be more likely than not? Must it be reasonably likely? Must it be almost certain? These questions are not answered They are fundamental questions of legislative policy and scope. Reasonable judges might come to diametrically opposite conclusions about the intended reach of the statute, as judges constantly have when interpreting similarly vague language in statutes authorizing

²⁴ *Id.*

confinement of people on grounds of mental illness. Mental illness statutes, for example, with similar language, have been applied to conduct as varied as check forgery, vagrancy and, all too often, even noncriminal nuisances.²⁵

I expressed particular concern about the phrase, “safety of any person or the community”:

The phrase, “safety of any person or the community”, is particularly troubling. This disjunctive suggests that a defendant may be confined even if he poses no danger to individuals; danger to the community is sufficient. And danger to the community, as distinguished from the individuals who make it up, suggests that the statute could be applied to anticipated crimes of speech, advocacy and political organization. These are the traditional crimes against the community.²⁶

I worried that acceptance of pretrial preventive detention based on vague criteria and inaccurate predictions might not be limited to defendants awaiting trial.²⁷ I, along with other civil libertarians, expressed the fear that acceptance of this approach to crime prevention “might be an opening wedge leading to widespread confinement of persons suspected, on the basis of untested predictions, of dangerous propensities.”²⁸ I pointed to Israel as a democratic country committed to the rule of law and facing the threat of terrorism. The Israeli legal system authorized the preventive detention of persons believed likely to engage in acts of terrorism.²⁹ I traveled to Israel on a Ford Foundation grant to study how the Israeli system, which they called “administrative detention,” worked in practice.³⁰

I concluded that although the need to prevent terrorism was understandable, the “Emergency Defense Regulations” then in effect were far too vague and open-ended to comport with

²⁵ Alan M. Dershowitz, *Imprisonment by Judicial Hunch*, 57 A.B.A. J. 560, 560–61 (1971) [hereinafter *Imprisonment by Judicial Hunch*]; see, e.g., JAY KATZ, JOSEPH GOLDSTEIN & ALAN M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 536–618 (1967) (surveying cases involving various forms of commitment, including civil, incompetency-to-stand-trial, and insanity-defense commitments).

²⁶ *Imprisonment by Judicial Hunch*, *supra* note 25, at 561.

²⁷ *Id.* at 561–62.

²⁸ Alan M. Dershowitz, *On “Preventive Detention”*, 12 N.Y. REV. OF BOOKS 22, 22 (1969).

²⁹ Alan Dershowitz, *Preventive Detention of Citizens During a National Emergency—A Comparison Between Israel and the United States*, 1 ISR. Y.B. ON HUM. RTS. 295, 296 (1971).

³⁰ *Id.* at 296, 297.

democratic accountability.³¹ I offered the following conclusion:

Nonetheless, I personally favor repeal of the Emergency Defense Regulations

If Israel feels that it cannot live with the normal rules of evidence in cases of suspected terrorists, then the Knesset should enact special rules of evidence for a narrowly circumscribed category of cases during carefully defined periods of emergency.³²

I compared Israel's formal approach to preventive detention with the less formal approach that characterized efforts by the United States to prevent threats to our national security. Describing our approach as exploiting the "stretch points of liberty," I expressed grave concern that these stretch points authorized discretionary decisions with little or no public accountability.³³

[W]hether a country must invoke extraordinary powers or whether it already has sufficient powers at its disposal tells us little about the actual condition of liberty within its borders. Every legal system has its "stretch points," its flexible areas capable of expansion and contraction, depending on the situation. The "stretch points" in our own system include: broad police and prosecutorial discretion; vaguely defined offenses, such as disorderly conduct; inchoate crimes like conspiracy (which may also be vaguely defined) and denial of pretrial release (which can sometimes result in confinement exceeding a year). Some systems employ such devices as "common law (judge made) crimes," *ex post facto* legislation, or emergency powers to achieve similar results.³⁴

VII. A GENERAL THEORY OF PREDICTION AND PREVENTION

In 1973, I was invited to deliver the Robert S. Marx lectures at the University of Cincinnati. I used these lectures as an occasion to lay out a general theory of predictive justice. In the two long articles that resulted from these lectures, I summarized the hidden history of prevention in the criminal law and tried to articulate a

³¹ *Id.* at 321.

³² *Id.*

³³ Alan Dershowitz, 'Stretch Points' of Liberty, *THE NATION*, Mar. 15, 1971, at 329, 329, 330.

³⁴ *Id.* at 330.

theory of preventive actions based on predictive decisions.³⁵ The most important point I made was that an

important conclusion, perhaps the most important for purposes of this study, is that although preventive confinement has always been and will always be practiced, no jurisprudence of preventive intervention has ever emerged. It may sound surprising, even arrogant, to say this, but it appears to be true. No philosopher, legal writer, or political theorist has ever, to this writer's knowledge, attempted to construct a systematic theory of when it is appropriate for the state to confine preventively. This is so for a number of reasons. The mechanisms of prevention have been, for the most part, informal; accordingly, they have not required articulate defense or justification. Moreover, there are many scholars who simply deny that preventive intervention, especially preventive confinement, really exists; or if they acknowledge the existence of these mechanisms, they deny their legitimacy, thus obviating the need for a theory or jurisprudence. Finally, it is extremely difficult to construct a theory of preventive confinement that neatly fits into existing theories of criminal law and democracy.³⁶

Despite the lack of a systematic theory or jurisprudence of prevention,

there has always existed a widespread series of practices, involving significant restraints on human liberty, without an articulated jurisprudence circumscribing and limiting its application. People are confined to prevent predicted harms without any systematic effort to decide what kinds of harms warrant preventive confinement; or what degree of likelihood should be required; or what duration of preventive confinement should be permitted; or what relationship should exist between the harm, the likelihood, or the duration. This is not to say that there currently exists a completely satisfactory jurisprudence or theory justifying the imposition of punishment for *past* acts. (Recall Pound's observation that "in Anglo-American law, more than in other

³⁵ See Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part I: The English Experience*, 43 U. CIN. L. REV. 1, 57, 59 (1974) [hereinafter *Preventive Confinement, Part I*]; Alan Dershowitz, *The Origins of Preventive Confinement in Anglo-American Law—Part II: The American Experience*, 43 U. CIN. L. REV. 781, 781–82 (1974).

³⁶ *Preventive Confinement, Part I*, *supra* note 35, at 59.

systems, juristic theories come after lawyer and judge have dealt with concrete cases and have in some measure learned to dispose of them.") But at least many of the right questions have been asked and some interesting answers have been attempted. Even Blackstone's primitive statement "that it is better that ten guilty persons escape, than that one innocent suffer" tells us something important about how to devise rules of evidence and procedure. There is no comparable aphorism for preventive confinement: is it better for X number of "false positives" to be erroneously confined (and for how long?) than for Y number of preventable harms (and of what kind?) to occur? What relationship between X and Y does justice require? We have not even begun to ask these kinds of questions, or to develop modes of analysis for answering them.³⁷

VIII. NATIONAL SECURITY AND WIRETAPPING

In a 1972 article, I focused specifically on "national-security wiretaps," calling for warrants in such cases. I rejected both extreme positions: that of some civil libertarians that there was no justification at all for national security wiretaps based on anything short of the "probable cause" required for ordinary crimes; and the administration's position that you don't need any basis for national security wiretaps.³⁸ I came to the conclusion that special warrants should be required for national security wiretaps, and that permanent records should be kept of all requests for such intrusions.³⁹ I wrote:

The phrase "domestic national-security wiretap" is not self-limiting or self-defining. It means what its history tells us it means. It means what this and previous administrations have defined it to mean. Only if we are given some idea of how it has been used can the people, and the courts, have any intelligent basis for judging whether the alleged need for domestic national-security exception

³⁷ *Id.* at 59-60 (footnotes omitted) (quoting Roscoe Pound, *Introduction* to RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* xi (Rachel Szold Jastrow trans., Patterson Smith 1968) (1911); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 358 (John L. Wendell ed., Harper & Bros. 1847)).

³⁸ Alan M. Dershowitz, *Wiretaps & National Security*, COMMENTARY, Jan. 1972, at 56, 56, 59.

³⁹ *Id.* at 61.

outweighs its potential for abuse. . . .

. . . My surmise is that if the Justice Department were to turn over the records of domestic national-security wiretaps in any given year for study to a non-partisan group of scholars, many abuses . . . would emerge. If I am wrong—if an impartial evaluation were to disclose that warrantless domestic national-security taps have been narrowly employed only in cases of immediate, extreme, and irremediable danger to our survival—then there might be grounds for exempting this class of wiretaps from the usual constitutional requirements. But neither the people nor the courts can intelligently decide whether this is so until we are given some idea of how such wiretaps have in fact been used. In the meantime, on the basis of what we already know, we have good reason for supposing that “national security” is sometimes invoked as a pretext for political surveillance of an altogether illegitimate kind.⁴⁰

A few years later I elaborated this position:

A warrant requirement would also facilitate the gathering of information on *how many* wiretaps, or other electronic surveillances, are in operation and *who* is conducting them. . . .

. . . Governmental eavesdropping today is simply out of control, and it is entirely possible that we have seen only the tip of the iceberg. . . .

The Nixon clique *may* just have been the worst offenders, though we can never know this with certainty unless we learn more about what went on during earlier administrations. The [Martin Luther] King episode—which

⁴⁰ *Id.*

On the basis of the evidence presently available, I would suggest that if we were to examine all the domestic national-security wiretaps conducted by the FBI, a disturbing picture would emerge. We would find numerous cases where a plausible but narrow national-security concern has been used as an excuse for an improper and pervasive wiretap whose real purpose is political surveillance. Unfortunately, however, there is no way for the citizenry—or even the courts—to examine the logs of all national-security wiretaps. We are left instead with the assurances of people like former attorney general Herbert Brownell that “Experience demonstrates that the Federal Bureau of Investigation has never abused the wiretap authority.”

But what “experience” is Brownell referring to? To whom has this been “demonstrated”? Certainly not to the public. I, for one, do not feel that we can rely on the self-interested assurances of former Justice Department officials that all is in order.

Id.

in my view is the single most reprehensible example of unjustified intrusion that we are aware of—is enough to raise serious questions about national security wiretap policies during the Kennedy and Johnson administrations. . . . That the King tap was authorized by well meaning good guys with beneficent purposes only demonstrates how pervasive the problem of wiretapping has been.

Louis Brandeis . . . could well have been commenting on the comparison between the King wiretap and the Nixon outrages when, in a dissenting opinion condemning all wiretapping, he cautioned nearly a half century ago that:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁴¹

⁴¹ Alan Dershowitz, *Before Watergate and After: Unchecked Wiretapping*, THE NEW REPUBLIC, May 31, 1975, at 16-17 (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

Indeed the only conclusion that seems crystal clear from the Watergate, [Martin Luther] King and [Daniel] Ellsberg disclosures is that anything J. Edgar Hoover was involved in carried the strong potential for personal abuse. This is not to suggest that every Hoover wiretap was improper, or that every improper wiretap was conducted under Hoover's aegis. Nor is it to imply that those government officials who cooperated with Hoover can shift the responsibility to him; they knew that Hoover was using the national security eavesdropping authority in wholly improper ways. . . .

The fact that Hoover was centrally involved in warrantless national security taps from the time of their initial authorization (and even before that, according to some sources) casts shadows over the purposes behind all of those taps. Even before the recent revelations, however, it was difficult to justify the need for a national security exception to the constitutional requirement of a warrant for all wiretaps. . . .

Despite the ease with which wiretap warrants are obtainable in national security cases, the warrant requirement does afford some protection in a narrow but important category of cases: those in which there is not even a pretense of legitimate governmental interest in national security. Few law enforcement or intelligence officials would have the temerity to ask a judge to authorize a wiretap on a senator or on the Democratic National Committee in order to gather damaging information about the private lives of political opponents. This is not to deny that in some situations—like the King case—a national security "justification" could be "offered." Nor is it to fall into the trap of believing that a warrant requirement—whether imposed by statute or constitutional interpretation—would be obeyed by the authorities. The government is the largest practitioner of "civil disobedience" when it comes to civil liberties, and there are few effective enforcement mechanisms. But a warrant requirement would make it somewhat

IX. SCAM WARRANTS

Several years later, I proposed warrants as a prerequisite for certain kinds of governmental scams:

[W]e cannot tolerate a society in which the government is empowered to conduct every manner of scam at will and without any regulation or accountability. That, in a nutshell, is the present situation. Second, it seems unlikely that we could realistically do without all scam operations. Some are obviously needed to catch predatory criminals, especially potential terrorists and assassins.

....

There is one possible safeguard that promises significant control over “bad” scams while allowing “good” scams to be used when appropriate. The object of the good scam is to give the predatory criminal the opportunity to do on camera what he has already been doing in private. Law-enforcement authorities should be required, therefore, as a precondition to conducting a scam, to obtain a warrant from a judge authorizing the operation. This scam warrant—like search warrants and wiretap warrants—would have to be based on probable cause for believing that the target of the proposed scam is involved in an ongoing criminal activity and that hard evidence of this activity cannot be obtained without a scam. If probable cause were shown, the judge could approve the scam and impose limits—of time, scope, and intrusiveness—on its implementation.

Being forced to obtain a scam warrant from a judge would not solve all the problems, any more than the requirement of a warrant for searches and wiretaps solved all problems associated with these sometimes necessary evils. But it would go a long way toward bringing the scam under the control of the law and imposing limits on its use.

The scam will always be with us, as it has been since the serpent tempted and tricked Eve into eating the forbidden fruit. But the scam as a technique of law enforcement is now out of control. Every prosecutor, undercover investigator,

more difficult for some authorities to get away with some particularly indefensible taps—and that is generally all that can be expected of a civil liberties safeguard.

Id. at 15–16.

and policeman . . . is free to conduct any scam he sees fit to without fear of judicial rebuke. The Supreme Court, which gave birth to the entrapment defense, is in the process of committing infanticide on it. The courts have virtually abdicated all responsibility for controlling abuses of the scam.

. . . Legislation is needed to stop bad scams and control good scams: the proposal for a scam warrant holds some promise. But an informed and concerned public is the best protection of our liberty.⁴²

My proposal for a "scam-warrant" generated little public discussion or controversy, though it made for interesting classroom discussions. My next proposal for warrants, on the other hand, provoked a firestorm of criticism and stimulated an international debate.

X. TORTURE WARRANTS

The proposal that proved to be so controversial was for a "torture warrant." Here is how that controversial proposal came to be:

In [1988] I traveled to Israel to conduct some research and teach a class at Hebrew University on civil liberties during times of crisis. In the course of my research I learned that the Israeli security services were employing what they euphemistically called "moderate physical pressure" on suspected terrorists to obtain information deemed necessary

⁴² ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 259–61 (2002) [hereinafter *SHOUTING FIRE*].

There are good scams and bad scams. . . .

. . . .

There are at least two different debates over the types of scams that are currently taking place. The first is in the courts: which kinds of scams, if any, constitute *unlawful* entrapment? The second, and potentially far more important, is the debate that is taking place among the public as a result of such highly publicized undercover operations as ABSCAM: regardless of what the courts may say, is it good public policy to allow prosecutors and police to stimulate crime in order to catch criminals?

. . . .

Do we want a society in which every citizen is always subject to being tempted by governmental ruses?

Do we want a society in which the honesty, the integrity—and perhaps, ultimately, the loyalty—of every citizen are open to testing by government agents?

Do we want a society in which deception by the government of its citizens becomes a way of life?

. . . Do we really want to become a scam society?

Id. at 253, 254, 259.

to prevent future terrorist attacks. The method employed by the security services fell somewhere between what many would regard as very rough interrogation (as practiced by the British in Northern Ireland) and outright torture (as practiced by the French in Algeria and by Egypt, the Philippines, and Jordan today). In most cases the suspect would be placed in a dark room with a smelly sack over his head. Loud, unpleasant music or other noise would blare from speakers. The suspect would be seated in an extremely uncomfortable position and then shaken vigorously until he disclosed the information. Statements made under this kind of nonlethal pressure could not be introduced in any court of law, both because they were involuntarily secured and because they were deemed potentially untrustworthy—at least without corroboration. But they were used as leads in the prevention of terrorist acts. Sometimes the leads proved false, other times they proved true. There is little doubt that some acts of terrorism—which would have killed many civilians—were prevented. There is also little doubt that the cost of saving these lives—measured in terms of basic human rights—was extraordinarily high.

In my classes and public lectures in Israel, I strongly condemned these methods as a violation of core civil liberties and human rights. The response that people gave, across the political spectrum from civil libertarians to law-and-order advocates, was essentially the same: but what about the “ticking bomb” case?

The ticking bomb case refers to a scenario that has been discussed by many philosophers, including Michael Walzer, Jean-Paul Sartre, and Jeremy Bentham. Walzer described such a hypothetical case in an article titled “Political Action: The Problem of Dirty Hands.” In this case, a decent leader of a nation plagued with terrorism is asked

“to authorize the torture of a captured rebel leader who knows or probably knows the location of a number of bombs hidden in apartment buildings across the city, set to go off within the next twenty-four hours. He orders the man tortured, convinced that he must do so for the sake of the people who might otherwise die in the explosions—even though he believes that torture is wrong, indeed abominable, not just sometimes, but

always.”

In Israel, the use of torture to prevent terrorism was not hypothetical; it was very real and recurring. I soon discovered that virtually no one was willing to take the “purist” position against torture in the ticking bomb case: namely, that the ticking bomb must be permitted to explode and kill dozens of civilians, even if this disaster could be prevented by subjecting the captured terrorist to nonlethal torture and forcing him to disclose its location. I realized that the extraordinarily rare situation of the hypothetical ticking bomb terrorist was serving as a moral, intellectual, and legal justification for a pervasive *system* of coercive interrogation, which, though not the paradigm of torture, certainly bordered on it. It was then that I decided to challenge this system by directly confronting the ticking bomb case. I presented the following challenge to my Israeli audience: If the reason you permit nonlethal torture is based on the ticking bomb case, why not limit it exclusively to that compelling but rare situation? Moreover, if you believe that nonlethal torture is justifiable in the ticking bomb case, why not require advance judicial approval—a “torture warrant”? That was the origin of a controversial proposal that has received much attention, largely critical, from the media. Its goal was, and remains, to reduce the use of torture to the smallest amount and degree possible, while creating public accountability for its rare use. I saw it not as a compromise with civil liberties but rather as an effort to maximize civil liberties in the face of a realistic likelihood that torture would, in fact, take place below the radar screen of accountability.⁴³

I renewed my call for a torture warrant requirement following 9/11, when it became clear that the United States was employing torture—including “waterboarding”—in its efforts to prevent further acts of terrorism.

Many of my critics distorted, either deliberately or carelessly, my position on torture, accusing me of supporting the use of torture in a broad array of situations. They “accused me of ‘circumventing constitutional prohibitions on torture,’ giving ‘thumbs up to torture,’

⁴³ WHY TERRORISM WORKS, *supra* note 8, at 139–41 (footnote omitted) (quoting Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFS. 160, 167 (1973)).

‘proposing torture for captured terrorist leaders,’ according U.S. agencies ‘the right to torture those suspected of withholding information in a terrorist case,’ and ‘advocating . . . shoving a sterilized needle under the fingernails of those subjects being interrogated.’⁴⁴ A critic writing in the *Huffington Post* has accused me of endorsing Nazi policies and of being a “right wing political prostitute[], Jew[ish] in name only.”⁴⁵ Another reviewer “called me ‘Torquemada Dershowitz,’ a reference to the notorious torturer of the Inquisition.”⁴⁶ Still another called me “the New Machiavelli,” saying that I argued for “the negation of the rule of law,” and that my “views deserve to be widely read and [negated],”⁴⁷ all without dealing with any of the hard questions that this issue presents.

I wrote the following in response:

All forms of torture are widespread among nations that have signed treaties prohibiting all torture. The current situation is unacceptable: it tolerates torture without accountability and encourages hypocritical posturing. I would like to see improvement in the current situation by reducing or eliminating torture, while increasing visibility and accountability. I am opposed to torture as a normative matter, but I know it is taking place today and believe that it would certainly be employed if we ever experienced an imminent threat of mass casualty biological, chemical, or nuclear terrorism.⁴⁸

I then posed the following question:

[I]f torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?

⁴⁴ Alan Dershowitz, *Tortured Reasoning*, in TORTURE: A COLLECTION 257, 265 (Sanford Levinson ed., 2004) [hereinafter *Tortured Reasoning*] (quoting, in order, Brendan O’Leary, *In Defence of the Indefensible*, TIMES HIGHER EDUC., Oct. 4, 2002, at 23; Jed Babbin, Op-Ed., *The Silence of the Lambs: Torture is Not Appropriate Treatment for Terrorists*, WASH. TIMES, Mar. 21, 2002 at A19; Paul William Roberts, *Islamists and Their Enemies*, GLOBE AND MAIL (Can.), Sept. 7, 2002, at D2; Jane Genova, Oct. 9, 2002).

⁴⁵ Larisa Alexandrovna, *Alan Dershowitz: Was He Against Nazi Practices Before He Was for Them?*, HUFFINGTON POST, Nov. 11, 2007.

⁴⁶ *Tortured Reasoning*, *supra* note 44, at 265 (quoting Babbin, *supra* note 44).

⁴⁷ Jonathan Sumption, *The New Machiavelli*, THE SPECTATOR (U.K.), Apr. 29, 2006, at 49.

⁴⁸ *Tortured Reasoning*, *supra* note 44, at 257.

....

... The road to tyranny has always been paved with claims of necessity made by those responsible for the security of a nation. . . . Requiring that a controversial, even immoral, action be made openly and with accountability is one way of minimizing resort to unjustifiable means.⁴⁹

In an article for the *University of Pennsylvania Journal of Constitutional Law*, I responded to criticism of my proposal by Professor Seth Kreimer:

Oliver Wendell Holmes Jr. once defined the law as “[t]he prophecies of what the courts will do in fact.” . . . My own normative preference would be for the courts to declare all forms of torture unconstitutional, even if its fruits are not used against the defendant and even if it is not administered as “punishment.” My own normative preference would also be for law enforcement officials to refrain from using torture, but my empirical conclusion is that they will, in fact, employ it in “ticking bomb” cases. My prediction of what the current courts “will do in fact” is different from Professor Kreimer’s. I hope he is right, but I think I am right.

If he is right, he should support my proposal for some kind of legal structure that promotes visibility and accountability through a “torture warrant.” In the absence of some such structure, it will be difficult to get a test case before the courts, since torture will continue to be administered beneath the radar screen and with the kind of “deniability” that currently shrouds the practice. The open authorization of limited torture warrants could, on the other hand, be challenged on its face, and we would soon learn whose prediction is more accurate. If he is right, all forms of torture would be declared unconstitutional. If I am right, there would, at least, be some accountability, visibility, and limitations on a dangerous practice that is currently shrouded in secrecy and deniability.⁵⁰

⁴⁹ *Id.* at 257, 273–74.

⁵⁰ Alan M. Dershowitz, *Reply: Torture Without Visibility and Accountability is Worse Than with It*, 6 U. PA. J. CONST. L. 326, 326 (2003) (footnotes omitted) (citing Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)). My insistence on accountability is also commonly misunderstood to constitute advocacy for the underlying intrusion. For example, many of my critics have accused me of favoring torture because I advocate a torture warrant. Others have accused me of advocating restrictions on speech

I also answered a powerful criticism of my torture warrant proposal by Judge Richard Posner. I recognized that there are compelling arguments against “legitimizing” a horrible practice such as torture by subjecting it to legal regulation.

The[re is a] strong[] argument against my preference for candor and accountability [in] the claim that it is better for torture—or any other evil practice deemed necessary during emergencies—to be left to the low-visibility discretion of low-level functionaries than to be legitimated by high-level, accountable decision-makers. Posner makes this argument:

Dershowitz believes that the occasions for the use of torture should be regularized—by requiring a judicial warrant for the needle treatment, for example. But he overlooks an argument for leaving such things to executive discretion. If rules are promulgated permitting torture in defined circumstances, some officials are bound to want to explore the outer bounds of the rules. Having been regularized, the practice will become regular. Better to leave in place the formal and customary prohibitions, but with the understanding that they will not be enforced in extreme circumstances.

The classic formulation of [Posner’s] argument was offered by Justice Robert Jackson in his dissenting opinion in one of the Japanese detention camp cases:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far subtler blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an

because I favor narrowly limited speech codes. See *infra* pp. 757–60. Exactly the opposite is true. My insistence on articulated criteria is generally designed to reduce the frequency of the intrusion. For example, when I opposed American military involvement in Vietnam, I challenged the administration to seek and secure a formal declaration of war. This did not mean that I favored the war in Vietnam. Indeed I opposed it. I believed, however, that if we were to fight a war, the administration and Congress ought to be compelled to articulate the basis for this war in a formal resolution—a resolution which I would oppose on its merits, just as I probably would oppose most requests for torture warrants and most attempts to define what constitutes censorable speech. See *infra* pp. 760.

order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

[But e]xperience has not necessarily proved Jackson's fear or Posner's prediction to be well founded. The very fact that the Supreme Court expressly validated the detentions contributed to its condemnation by the verdict of history. Today the Supreme Court's decision in *Korematsu* stands alongside decisions such as *Dred Scott*, *Plessy v. Ferguson*, and *Buck v. Bell* in the High Court's Hall of Infamy. Though never formally overruled, and even occasionally cited, *Korematsu* serves as a negative precedent—a mistaken ruling not ever to be repeated in future cases. Had the Supreme Court merely allowed the executive decision to stand without judicial review, a far more dangerous precedent might have been established: namely, that executive decisions during times of emergency will escape review by the Supreme Court. That far broader and more dangerous precedent would then lie about "like a loaded weapon" ready to be used by a dictator without fear of judicial review. That comes close to the current situation, in which the administration denies it is acting unlawfully, while aggressively resisting any judicial review of its actions with regard to terrorism.⁵¹

⁵¹ *Tortured Reasoning*, *supra* note 44, at 267–69 (quoting, in order, Richard A. Posner, *The*

I acknowledged that

[t]he major downside of any warrant procedure would be its legitimization of a horrible practice, but in my view it is better to legitimate and control a *specific* practice that [is in fact taking place] than to legitimate a *general* practice of tolerating extralegal actions so long as they operate under the table of scrutiny and beneath the radar screen of accountability. Judge Posner's "pragmatic" approach would be an invitation to widespread (and officially—if surreptitiously—approved) lawlessness in "extreme circumstances." Moreover, the very concept of "extreme circumstances" is subjective and infinitely expandable.⁵²

I continue to receive criticism, indeed vitriolic condemnation, for even raising the issue of torture warrants, but I am proud of having stimulated a debate about this highly emotional, yet important issue. Debate, even about the unthinkable, is essential to democratic accountability, especially if the "unthinkable" is actually occurring under the radar screen, as torture clearly is and will continue to be in this age of terrorism.

XI. SPEECH CODES OR COMMON LAW

Another area in which I have controversially advocated the articulation of precise criteria and accountability has been freedom of expression, especially on university campuses. My views on speech are well known: I am as close to an absolutist against any laws of censorship as anyone can reasonably be. In my book *Finding Jefferson* I describe my position as "a presumptive absolutist":⁵³

All speech should be presumed to be protected by the Constitution, and a heavy burden should be placed on those who would censor to demonstrate with relative certainty that the speech at issue, if not censored, would lead to irremediable and immediate serious harm. No one should be allowed—in the famous but often misused words of Justice Oliver Wendell Holmes Jr.—falsely to shout fire in a crowded theater, but anyone should be allowed to hand out leaflets in

Best Offense, THE NEW REPUBLIC, Sept. 2, 2002, at 28; *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting)).

⁵² *Id.* at 271–72.

⁵³ FINDING JEFFERSON, *supra* note 6, at 30 (emphasis omitted).

front of the theater urging people not to enter because of potential fire hazards.⁵⁴

I am particularly critical of the censorship of speech on university campuses in the name of "political correctness."⁵⁵ As I wrote in *Shouting Fire*:

Though [students who seek to censor "offensive" speech] insist on being governed by the laws of the outside world when it comes to their personal lives, railing against visitor rules and curfews, they want their universities to adopt rules that restrict their First Amendment rights of free speech in order to shield them from the ugly realities of prejudice.⁵⁶

Yet despite my strong opposition to censorship, I have surprised both my supporters and detractors by calling for "speech codes" on campuses. My reasoning is similar, in some respects, to my advocacy of torture warrants.

Just as the use of torture is inevitable in ticking bomb situations, so too is censorship inevitable on all university campuses in extreme situations. If a professor used the "N" word to call on an African-American student in class—or comparable taboo words to call on a woman, a Jew, a gay or lesbian, a Latino, or an Asian-American—that teacher would be fired (or at the very least disciplined). There are other forms of expression as well that would not be tolerated in a university. Precisely what those are we don't know, but we will know it when we see. Accordingly, there already exists a speech *common-law* (or more precisely a censorship common-law) at every university. The issue, therefore, is not whether there is or should be any censorship of expression by universities. We already know the answer to that question: there is and there should be in those kinds of extreme cases. I know of no responsible person or organization who would defend the right of a teacher to use the "N" word in calling on or routinely discussing African-American students. The remaining question is whether it is better to leave the decision as to which words in which contexts are prohibited to the after-the-fact discretion of an administrator, or to decide in advance on a list of prohibited expressions. In other words, is it more protective of freedom of expression to have a "censorship *common-law*" to be applied on an ad-hoc basis by a dean, or to have a "censorship *code*"

⁵⁴ *Id.* at 30–31.

⁵⁵ *SHOUTING FIRE*, *supra* note 42, at 193.

⁵⁶ *Id.* at 192–93.

debated and agreed upon in advance by the equivalent of legislative branch of the university—a student or faculty senate or some other representative body.

I strongly favor a code to a common-law, because it provides advanced fair warning and an opportunity to challenge the provisions of the code before they are enforced.

In 2002, there was an ugly racial incident at Harvard Law School that led to a campaign by some student groups for censorship of offensive speech. The dean appointed a committee to recommend an approach to this delicate problem. He put me on the committee because of my vocal opposition to censorship and my support for a maximalist position on freedom of speech. My fellow committee members were surprised when I proposed that we try to draft a speech code.

“I thought you favored freedom of speech,” one of the libertarian student members said in frustration.

“I do,” I replied. “That’s why I want a code. I don’t trust the dean—or anyone else—to decide which speech should be prohibited.”

“No speech should be prohibited,” the student replied.

I then gave my examples of the professor and the “N” word.

“That’s different,” the student insisted.

“Then let’s try to codify exactly what else may be ‘different,’” I responded.

The committee spent more than a year trying to come up with a code of prohibited expressions, but it could not come to any agreement. The “N” word itself could not be prohibited because one of our colleagues, Professor Randall Kennedy, had written a brilliant book entitled *Nigger: The Strange Career of a Troublesome Word*.⁵⁷ We tried to define the circumstances under which the “N” word could and could not be used, but we could not come to any agreement. Nor could we agree on other disputed forms of expression, such as opinions regarding negative characteristics associated with particular groups. At the end, we reported back that we could not come up with a code. It was a useful experiment in democracy and accountability. I would have preferred us to adopt a code limited to those instances of expression—such as a teacher calling a minority student by a negative racial or other term—which everyone agrees is unacceptable in a classroom

⁵⁷ RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD* (2002).

setting. This would have sent a powerful message that *no other* type of speech, regardless of how offensive it might be to some, can be prohibited. If a particularly inappropriate expression that had not been included in the codification were then to be used, the committee could consider including it for *future* discipline, but it could not be the basis for imposing discipline for speech that took place *prior* to its inclusion in the codification.

The virtue of a code is that it completely occupies the area of sanctions. It leaves no room for “common law crimes” or broad decanal discretion. The vice of a code is that it often excludes conduct (or, in this case, speech) that is novel, or that was not considered by the codifiers. In the area of freedom of expression, the virtue of such a limitation trumps its vice, at least in my view.

I suspect that there would be similar difficulty in agreeing on a code that incorporated precise rules as to when, if ever, certain forms of coercive interrogation—including non-lethal torture—could be applied under which circumstances. As with censorship, however, the alternative to a code (or a warrant) will not be no torture, it will be torture authorized on an *ad hoc* basis by low-visibility security officials, with little or no accountability. In this area, as well, a code or warrant requirement would occupy the entire area and make it illegitimate for low level decision-makers to improvise or create a “common-law” of torture. With torture, as with censorship, under-inclusion and accountability are to be preferred to over-inclusion, secrecy, and the unaccountable exercise of discretion.

In 2007, I taught a university-wide course with Professor Steven Pinker on the issue of Taboo. The question posed by the course was whether there are any issues that are so delicate, sensitive, controversial, or disgusting that they should be treated as “taboos,” even on a university campus dedicated to open dialogue and the free exchange of views. Most Americans are brought up to believe in freedom of expression, but almost everyone has at least one type of speech that he/she would suppress. In our course, we searched for a *theory* of taboo—a description or prescription of genres of expression that lay outside the presumption of discussability and are, or should be, subject to suppression, censorship or tabooization. Professor Pinker presented some evolutionary and psychological arguments for the existence and utility of some taboos, while questioning many of the taboos that currently seem to exist on university campuses. I discussed the legal and moral arguments for and against any

exceptions to the general presumption of free expression. Among the issues we addressed were torture, the sale of human organs, research on alleged genetic differences based on race or gender, and deeply offensive speech such as Holocaust denial. We plan to continue offering a variation on this course over the coming years in an effort to come up with a coherent theory that is both empirically and normatively sound.

XII. JEFFERSON AND JUDICIAL DISCRETION REGARDING SPEECH

In my book *Finding Jefferson*, I wrote about a letter by our third President that I found in a bookstore and purchased.⁵⁸ In that letter, Jefferson railed against granting judges the power to decide which types of incitements to violence should not be protected by the freedom of speech.⁵⁹ He argued that if this power is given to judges, the decisions will be based on the conscience of each individual judge, and the absence of standards will destroy freedom of speech.⁶⁰ This is what he wrote:

[I]n practice it is the conscience of the judge, & not of the speaker, which will be the umpire. The conscience of the judge then becomes the standard of morality, & the law is to punish what squares not with that standard. [T]he line is to be drawn by that; it will vary with the varying consciences of the same or of different judges & will totally prostrate the rights of conscience in others.⁶¹

Thomas Jefferson, who famously opposed the Alien and Sedition Acts, which codified censorship of certain types of speech, also opposed common-law censorship, especially by judges.

Jefferson's views on freedom of speech, as on so many other issues, were complex and sometimes contradictory. He opposed judicial discretion—the “conscience of the judge”—as the “umpire” of what could be spoken.⁶² He also opposed the Alien and Sedition Acts, because they were *federal*, rather than *state*, codes of censorship.⁶³

In *Finding Jefferson*, I asked whether Jefferson would “prefer an

⁵⁸ FINDING JEFFERSON, *supra* note 6, at 79.

⁵⁹ *Id.* at 60.

⁶⁰ *Id.*

⁶¹ *Id.* at 197 (transcribing a Letter from Thomas Jefferson, President of the United States, to Elijah Boardman (July 3, 1801) (on file with author)).

⁶² *Id.*

⁶³ *Id.* at 61.

explicit limit on freedom of speech? Or an implicit redefinition of such freedom, while continuing to proclaim the absolute inalienability of the right of free speech?"⁶⁴

I then provided my own preference, as well as Jefferson's:

Given these two options, I know what I would prefer. I always opt for explicitness and candor because I believe these qualities are essential to accountability and that accountability is essential to democracy. I think Jefferson might have come out the other way—insisting that the right to absolute freedom of speech be preserved explicitly, but that the definition and scope of the right could be alienated implicitly. For Jefferson, the rhetoric of inalienability must be preserved even in the face of the pragmatic need to compromise.⁶⁵

Jefferson's concern, expressed in 1801, is an early statement of the need for articulated standards and democratic accountability in the context of freedom of expression. I was fortunate to have found a letter that so well expressed (for the most part) my own views, formed a century and half later, based on the experience and history of a more recent era.

XIII. THE LACK OF A SINGLE STANDARD FOR EVALUATING HUMAN RIGHTS: THE CASE OF ISRAEL

Much of my writing about human rights in general and Israel in particular has focused on lack of a single-articulated standard for criticism directed at the Jewish state, as contrasted with other states. I have critiqued such selective criticism because it is directed at one particular *nation*—the Jewish state—rather than at particular *violations* of human rights *wherever* they are committed. This critique goes back to John Ely's *Law Journal* Comment that I had the privilege of editing, which dealt with the prohibition against Bills of Attainder.⁶⁶ At its core, this prohibition requires legislatures to prescribe general rules of condemnation, without knowing the particular entities to which they will be directed.⁶⁷ The legislature may not criminalize a *person*; it must instead

⁶⁴ *Id.* at 184.

⁶⁵ *Id.* at 184–85 (footnote omitted).

⁶⁶ *Legislative Specification*, *supra* note 14, at 330.

⁶⁷ See generally *id.* at 330–33 (describing the history of the development of the prohibition against Bills of Attainder).

criminalize an *act* in advance of that act occurring.⁶⁸ It must then apply that general criminal law equally to all who commit it, or at least consistently with the seriousness of the violation.

Neither the United Nations, nor most international human rights organizations, have complied with these principles when it comes to Israel. They have first selected the target for their condemnation—Israel—and then constructed rationalizations for their targeting decision. As I wrote in *The Case For Israel*:

Since shortly after its establishment as the world's first modern Jewish state, Israel has been subjected to a unique double standard of judgment and criticism for its actions in defending itself against threats to its very existence and to its civilian population. This book is about that double standard—both its unfairness toward Israel and, even more important, its pernicious effect on encouraging terrorism by Palestinians and others.

....

... [M]y request is that all people of goodwill should simply apply the same principles of morality and justice to the Jewish state of Israel that they do to other states and peoples.

....

... The double-standard applied to Israel endangers the rule of law and the credibility of international institutions. The disproportionate, sometimes even exclusive, focus on Israel's imperfections gives the international community a ready excuse to ignore far more serious and sustained violations of human rights.⁶⁹

I plan to write a book demonstrating how the real victims of the international community's singular, indeed obsessive, focus on the imperfections of the Jewish state, have not been Israelis or Jews. The real victims have been those who have suffered genocide because the United Nations and the international community have been so focused on Israel that they have ignored far graver problems. The working title for this book is *The Second Six Million*, referring to the number of people who have been subjected to genocide since the end of the Holocaust.

⁶⁸ The prohibition against ex post facto legislation is an important element in this check.

⁶⁹ ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 11, 12, 236 (2003).

XIV. THE LACK OF STANDARDS FOR CONSTITUTIONAL INTERPRETATION

Another area of law in which I have insisted on candor and accountability relates to constitutional interpretation. I have written about the problem of misusing canons of constitutional construction in the interests of ideologically driven results in several contexts, including the Supreme Court's disastrous decision in *Bush v. Gore*.⁷⁰ In my book, *Supreme Injustice*, I wrote about that case:

This book is about the culpability of those justices who hijacked Election 2000 by distorting the law, violating their own expressed principles, and using their robes to bring about a partisan result. I accuse them of failing what I call the shoe-on-the-other-foot test: I believe that they would not have stopped a hand recount if George W. Bush had been seeking it. This is an extremely serious charge, because deciding a case on the basis of the identity of the litigants is a fundamental violation of the judicial oath, to "administer justice without respect to persons."⁷¹

I proposed the following heuristic test as a tool of analysis:

[I]magine if the one hundred most experienced observers of the high court—academics, Supreme Court litigators, journalists who cover the justices—had been presented, one year before the Florida case, with a hypothetical case based precisely on the facts of the Florida case, but without the names or party affiliations of the candidates. Imagine as well that these neutral experts had been given all the opinions ever written by the justices on the relevant areas of law (equal protection, voting rights, the criteria for granting a stay, the force of precedent) as well as their extrajudicial writings and speeches concerning the role of the Supreme Court. Imagine further that these experts were asked to predict how each justice would vote on the four determinative issues:

1. Would he or she agree to review the decisions of the Florida Supreme Court?

⁷⁰ 531 U.S. 98 (2000).

⁷¹ ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 12 (2001).

2. Would he or she vote to stay the hand count prior to hearing argument in the case?

3. Would he or she find the Florida law to be in violation of the equal-protection clause?

4. If the justice did find the law in violation of the equal-protection clause, would he or she order the hand count stopped rather than remanding the case back to Florida for a count with proper standards?

Finally, imagine if the experts were asked to assess which justice was most likely to respond affirmatively to the first question, which most likely to respond affirmatively to the second question, and so on.

I...posed this thought problem to several dozen professors and Court watchers. Their responses have confirmed my view that few, if any, of the experts in my hypothetical test would have correctly predicted the outcome of the case or how the majority justices would vote on the four questions. (I believe that not a single expert would have predicted correctly, unless they imagined or guessed who the litigants would be.) Nor would the experts' inability to predict the justices' votes demonstrate any inadequacy on *their* part. The experts are "right," and the justices who voted yes on the four questions were "wrong." Law must be predictable if it is to be credible. "The known certainty of the law is the safety of all," said Lord Coke. Oliver Wendell Holmes once described law as "the prophecies of what the courts will do in fact." Predictability is the essence of judicial legitimacy and accountability. Judges are not supposed to make it up as they go along, especially when they know in advance that making it up in a certain way will elect a candidate they wish to see in office.⁷²

In my most recent book, *Is There a Right to Remain Silent*, I wrote the following:

No one mode of constitutional interpretation, and indeed no combination of modes, will inexorably lead to the "right" constitutional result in the face of textual and historical ambiguity. One thing that seems clear to me, though I know

⁷² *Id.* at 117–18 (footnotes omitted) (quoting 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 395a (18th ed., The Lawbook Exchange, Ltd. 1999); Holmes, *supra* note 49, at 461).

there is some dispute even with regard to it, is that judges have a responsibility to be candid, honest, and open about the absence of a single "right" answer and an obligation to explain why, in light of the availability of multiple plausible answers, they chose a particular one. Too few justices are as open as they should be about these ambiguities, uncertainties, and choices. Most prefer a *Wizard of Oz* approach, pretending that they are oracles whose role it is to *discover*, rather than to *invent* or *construct*, the "constitutionally mandated" outcome. They seem to think it is important for the public to believe that there is only one right result.⁷³

XV. CRIMINAL SENTENCING

Much of my criticism of the lack of standards and accountability has focused on the criminal process, since I have been teaching criminal law all through my career. Early on, I wrote extensively about the excessive reliance on untrammelled discretion in the "law" of sentencing, both in the context of imprisonment and execution.

In the late 1970s, I edited a short book, for the 20th Century Fund, called *Fair and Certain Punishment*, which introduced the idea of channeled discretion in sentencing. In the background paper for this book, I wrote that:

The central problem in criminal sentencing as it exists today is the diffusion of responsibility among organs of government that has resulted from the indeterminate sentence. No one person or institution really has responsibility for deciding the actual sentence.

....

... [T]his diffusion... has obvious and very serious drawbacks. It permits the system to operate on inertia, with no person or institution bearing the responsibility for making the fundamental moral decision: what is the *just* sentence for the typical perpetrator of a particular kind of crime...?

....

The questions of justice and policy embodied in the sentencing decision involve the relative seriousness of crimes and the level of punishment appropriate for each crime

⁷³ COERCIVE INTERROGATION, *supra* note 5, at 131.

and/or type of criminal—questions of enormous gravity both for individuals and for society. Democratic theory would seem to dictate that such important decisions concerning human liberty should be made by the most representative elected body. There can be no doubt that, of the three bodies involved in the criminal-sentencing system, the legislature is more representative than the trial court . . . or the parole board. The legislative process, whatever its shortcomings, is the most open; debates are public, votes are recorded, and anyone may present an opinion to a representative for his consideration.

Democratic theory also imposes constraints upon the legislative role in sentencing. The *ex post facto* and bill of attainder clauses of the Constitution limit the role of the legislature in sentencing decisions; it may not make individual sentencing determinations about past crimes, and it may make only general sentencing determinations about future crimes. And the Constitution limits the degree of punishments authorized to those which are not cruel and unusual (or disproportionate or whatever other formulation appears in the relevant state constitution).

It is clear that no democratic society would ever leave it to judges, administrators, or experts to decide which acts should constitute crimes. That decision is quintessentially legislative, involving, as it does, fundamental questions of policy. Likewise, it should not be left to judges, administrators, or experts to determine the bases on which criminal offenders in a democratic society should be deprived lawfully of their freedom.⁷⁴

I expressed these concerns to a wider audience in the *New York Times Magazine* in 1975, proposing a new approach called “presumptive sentencing.”⁷⁵

Under this approach, the legislature would not only decide the minimum and maximum for a given crime; it would also decide what the fairly typical first offender convicted under

⁷⁴ Alan M. Dershowitz, *Background Paper*, in FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 67, 117, 123–24 (1976).

⁷⁵ Alan Dershowitz, *Let the Punishment Fit the Crime; Indeterminate Prison Sentences, a Major Reform Until Recently, Are Now Considered a Mess, by Liberals and Conservatives Alike*, N.Y. TIMES, Dec. 28, 1975, § 6 (Magazine), at 7.

the statute should receive. . . . This would place significant pressures on sentencing judges to impose sentences within the presumptive range, while leaving them the flexibility to go outside it in truly extraordinary cases.

. . . .

The upshot of this presumptive-sentencing scheme would be to move in the direction of flat-time and mandatory minimum sentencing without eliminating all discretion. . . .

. . . .

. . . The only possible barrier might be the combined paranoia of liberals who suspect that any proposal supported by conservatives must be a disguised form of "repression" and of conservatives who believe that any change championed by liberals must be "soft on crime." The truth is that the movement toward more legislatively fixed sentences . . . is a movement for structural reform. As such it is capable of generating either harsh or soft sentences, depending on how the blanks are filled in by the legislatures.⁷⁶

Most legislatures opted for harsh sentences, which is their prerogative in a democratic society. Although I generally disfavor this result, it is better for a "bad" result to be reached democratically, so long as it conforms with the Constitution, than for a "good" result to be reached autocratically and without accountability.

In a critique of a particularly creative sentence devised by a well-meaning judge, I argued in the *Yale Law Journal* that the admittedly imperfect policy decisions by the legislature should be preferred over the perfectly undemocratic discretion exercised by judges:

In attempting to evaluate his own actions in imposing the novel punishment of compulsory preaching for the crime of corporate price fixing, Judge Renfrew has, I fear, failed to ask the crucial question. He has asked a series of *substantive* questions As the responses cited . . . indicate, reasonable people disagree about the answers to each of these and the other questions raised by the Judge. The critical *institutional* question—and the one

⁷⁶ *Id.*

he never asks—is whether it is the proper function of an appointed judge, in a democratic society, to devise and impose novel punishments about which there is certain to be a fundamental diversity of views.

....

The kind of decision Judge Renfrew made, involving the weighing of policy alternatives with general application, is quintessentially a legislative one. It is clear that no democratic society would ever allocate an individual judge the authority to decide—on a case by case basis—whether classic violations of the antitrust laws should or should not be deemed criminal. Nor would it allocate to an individual judge the authority to decide—without any statutory guidance—the appropriate punishment for a typical violation of a criminal statute. These are decisions that should be made by the most representative elected bodies in a democratic society. The legislative process, whatever its shortcomings in practice, is the most open: debates are public, votes are recorded, and legislators are accountable to the electorate in the next election.⁷⁷

Not surprisingly, a few years later, when a federal criminal code was proposed that introduced the standardization of sentencing, I supported the bill—not because I liked all of its content, but because it would achieve more equity in sentencing and would expose the policy choices to public scrutiny.

In an article supporting the bill, I noted that:

A nation's criminal code may be among its most important charters. It reflects the balance struck between liberty and security. It establishes priorities in law enforcement. It manifests the society's level of compassion for its most downtrodden—both those who perpetrate crime, and their victims. It sets comparative values on life, liberty, property and privacy.

....

The enactment of a new criminal code should occasion deep reflection and vigorous debate. Nearly every citizen has a potential stake in the criminal code. Hardly any American family is untouched by crime, either as victim or accused.

⁷⁷ Alan M. Dershowitz, *The Paper Label Sentences: Critiques*, 86 YALE L.J. 626, 626–27 (1977) (footnote omitted).

Every American seems to have an opinion—informed or otherwise—about the appropriate responses to crime.

....

... It is impossible, in a heterogeneous nation such as our own, to achieve complete agreement on the content of a criminal code. We have not achieved consensus—nor will we in the foreseeable future—on such fundamental and divisive issues as capital punishment, exclusionary rules, wiretapping, immunity, entrapment, length of imprisonment, conspiracy prosecutions, obscenity, drug crimes, judicial discretion, plea bargaining, increased federal prosecutorial power, crimes of advocacy, and sexual offenses. Indeed, if “consensus” were to be defined as the support of a substantial majority, I am afraid such a consensus might well exist in favor of capital punishment, harsh sentences, vigorous prosecution of drug and obscenity sellers, and the elimination of exclusionary rules. . . .

....

... Were Congress a bevy of Platonic Guardians, with no electorate to whom to answer, perhaps the Code would have imposed considerably greater restrictions on the police, reduced the length of sentences, abolished numerous crimes, added others, and enacted a more humane and progressive criminal code. But legislators are not Platonic Guardians; they do have electorates to whom they answer.

....

... Whatever the ultimate resolution, we—as a nation—will be better off for having ventilated these fundamental issues about how we govern ourselves and how we respond to crime.⁷⁸

XVI. CAPITAL PUNISHMENT: IMPOSING DEATH WITHOUT STANDARDS

My critique of the death penalty has also focused, in large part, on the absence of articulated and consistently applied criteria. When I was a law clerk, I was assigned to write a memorandum on the constitutionality of the death penalty for crimes that did not take human life. In it, I posed the question as follows:

⁷⁸ Alan M. Dershowitz, *Foreword: Evaluating a Proposed Criminal Code*, 72 J. CRIM. L. & CRIMINOLOGY 381, 381–84 (1981).

May human life constitutionality be taken by the state to protect a value other than human life? Certainly, if the value sought to be preserved were economic, the taking of human life would be unconstitutional regardless of the efficacy of the deterrent. Here, however, the value sought to be preserved is probably considered nearly as important as life by a substantial portion of the populace. Nonetheless, I would think that there is a general consensus that the value is still less than life. And when this consensus is coupled with the questionable efficacy of capital punishment as a unique deterrent to sexual crimes, a persuasive argument can be made that death may not constitutionally be imposed for sexual crimes that do not endanger human life.

Thus, my tentative conclusions on the matter of capital punishment and the Eighth Amendment are as follows:

The Supreme Court should not at this time hold that the death penalty always violates the Constitution. It should hold that the death penalty for rape (and other sexual crimes) does violate the Constitution. It should hold that the death penalty is unconstitutional when imposed upon certain types of murderers (i.e., those for whom capital punishment is not a unique deterrent). It should hold that the death penalty is unconstitutional when imposed for certain types of murders (e.g., noncommercial passion killings about which it is fairly certain that capital punishment does not uniquely deter). It should carefully scrutinize the few (and becoming fewer) capital cases that come before it, in an effort to define categories of cases where the death penalty is unconstitutional.

In this way, as Professor Alexander Bickel suggests, “a process might [be] set in motion to whose culmination in an ultimate broader judgment [—the moral inadmissibility of capital punishment itself—] at once widely acceptable and morally elevating, we might [look] in the calculable future.”⁷⁹

On the basis of this memorandum Justice Goldberg, joined by Justices Brennan and Douglas, issued a dissenting opinion from the denial of certiorari in a case called *Rudolph v. Alabama*, which

⁷⁹ Alan M. Dershowitz, *Memorandum to Justice Goldberg on the Constitutionality of the Death Penalty*, reprinted in *SHOUTING FIRE*, *supra* note 42, at 288–89 (alteration in original) (quoting *THE LEAST DANGEROUS BRANCH*, *supra* note 12, at 243).

included the following:

I would grant certiorari in this case . . . to consider whether the *Eighth* and *Fourteenth Amendments to the United States Constitution* permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.

The following questions, *inter alia*, seem relevant and worthy of argument and consideration:

(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate "evolving standards of decency that mark the progress of [our] maturing society," or "standards of decency more or less universally accepted"?

(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against "punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged"?

(3) Can the permissible aims of punishment (*e.g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e.g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute "unnecessary cruelty"?⁸⁰

This dissenting opinion led to continuing litigation regarding the constitutionality of the death penalty. In 1970, I co-wrote an article with Justice Goldberg in the *Harvard Law Review* in which we argued that

the death penalty is, at the very least, highly suspect under the standards of degrading severity and wanton imposition. . . .

. . . .

. . . The extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness. It is difficult to conceive of a rational standard of classification which could explain the extraordinary

⁸⁰ *Rudolph v. Alabama*, 375 U.S. 889, 889-91 (1963) (emphasis added) (footnotes omitted) (some alteration in original) (quoting, in order, *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Francis v. Resweber*, 329 U.S. 459, 469 (1947) (Frankfurter, J., concurring); *Weems v. United States*, 217 U.S. 349, 370, 371 (1910)).

infrequency of execution. Furthermore, when the evidence of extreme rarity is viewed in the context of the standardless discretion that in fact governs imposition of capital punishment, the inference of arbitrariness is stronger. . . .

Most commentators describe the imposition of the death penalty as not only haphazard and capricious, but also discriminatory. . . . The impact of the death penalty is demonstrably greatest among disadvantaged minorities.⁸¹

In *The Best Defense*, I cited the landmark capital punishment case, *Furman v. Georgia*:⁸²

Three of the Justices—Douglas, Brennan, and Marshall—adopted Justice Goldberg’s argument that the death penalty is cruel and unusual punishment. Two others, Stewart and White, refused to go that far, concluding instead that the manner by which the death penalty was then imposed—at the discretion of judges and juries—results in death being imposed “so wantonly and so freakishly” as to operate in a cruel and unusual way. As Justice Stewart put it: “These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”⁸³

I noted: “The analogy to lightning is wrong: lightning strikes people at random; the death penalty is imposed disproportionately on blacks, the poor, males, and those who refuse to plea bargain.”⁸⁴

XVII. DEFENSES AND EXCUSES

In the area of substantive criminal law as well, I have focused attention on the lack of clearly articulated standards for invoking defenses ranging from insanity to self defense. I wrote a book entitled *The Abuse Excuse* in which I railed against the invocation—true or false—of vague excuses that often put the dead victim on trial. I focused particularly on excuses that rely on an alleged history of abuse, arguing that

a history of victimization . . . may or may not be a contributing factor—among many others—to the act of

⁸¹ Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784, 1792 (1970) (footnotes omitted).

⁸² 408 U.S. 238 (1972).

⁸³ ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 310–11 (1982) [hereinafter *THE BEST DEFENSE*] (quoting *Furman*, 408 U.S. at 309, 310).

⁸⁴ *Id.* at 311 n.*.

killing or maiming committed by the abuse victim. How much of a factor it may be in any given situation will vary from case to case and may be beyond the ken of current science to determine. It should be up to the law to decide—as a matter of policy—how much weight to ascribe to this very partial causative factor, both in general and in any particular case.⁸⁵

I concluded the book with the following caveat:

Nothing in this book is intended to deny that the issue of criminal responsibility is complex and not subject to simple “either-or” solutions. Responsibility is a matter of degree, and a history of abuse may well be one relevant factor in the calibration of responsibility and the calculation of punishment. Surely a Mafia hit man who cold-bloodedly murders a stranger for profit is more culpable than an abusive wife who strikes back in frustration or fear. For a criminal-justice system to earn the characterization of “civilized,” it must reflect . . . degrees of guilt. Judges should take such differences into account in imposing sentences, and jurors should be presented with an array of staircased verdicts representing different degrees of culpability. This is supposed to be done under the existing law of homicide, by its breakdown into degrees of murder and manslaughter. But these distinctions often make little sense, as for example the difference between first-degree murder, which generally requires “premeditation,” second-degree murder, which generally requires “malice aforethought,” and voluntary manslaughter, which often requires that the act be “intentional” but “provoked.” Jurors have understandable difficulties comprehending such terms and differentiating among them, thus encouraging lawyers to make emotional appeals such as those in the Menendez and Bobbitt cases.

The time has come for our legal system to confront the issues of responsibility in a rationally calibrated manner that is comprehensible to jurors and citizens. A people who does not take responsibility seriously places liberty at risk. As George Bernard Shaw once put it: “Liberty means responsibility. That’s why most men dread it.” Today, many

⁸⁵ ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 25 (1994).

men and women seem unwilling to take responsibility for their actions. Excuses abound in every sphere of life from the most public to the most private. Evasions of responsibility breach the social contract and rend the very fabric of democracy. We must stop making excuses and start taking responsibility. What is at stake is far more than the punishment of criminals and the deterrence of crime. It is the very nature of our experiment with democracy.⁸⁶

One particular defense that has lacked standards for centuries is the so-called “necessity defense.” It has long been said that “necessity knows no law.”⁸⁷ (A variation on this theme is the well known quip dating back to Cicero that “in time of war the laws are silent.”)⁸⁸ I have critiqued this approach, as I did in the *Israel Law Review* in 1989:

The defense of necessity is essentially a “state of nature” plea. If a person finds himself in an impossible position requiring him to choose between violating the law and preventing a greater harm, such as the taking of innocent life—and he has no time to seek recourse from the proper authorities—society authorizes him to act as if there were no law. In other words, since society has broken its part of the social contract with him, namely to protect him, it follows that he is not obligated to keep his part of the social contract, namely to obey the law. Thus, it has been said that “necessity knows no law”.

....

The point of the necessity defense is to provide a kind of “interstitial legislation”, to fill “lacunae” left by legislative and judicial incompleteness. It is not a substitute legislative or judicial process for weighing policy options by state agencies faced with long-term systemic problems.⁸⁹

In 1999, the *Harvard Law Review* revisited the famous “Case of the Speluncean Explorers,” a hypothetical about a group of lost and

⁸⁶ *Id.* at 318–19 (quoting BERNARD SHAW, MAN AND SUPERMAN: MAXIMS FOR REVOLUTIONISTS, at l. 25 (1903), available at <http://www.bartleby.com/157/6.html>).

⁸⁷ There is a judge before whom I have practiced who has been nicknamed “Necessity” because he too “knows no law.”

⁸⁸ See, e.g., BrainyQuote, Marcus Tullius Cicero Quotes, http://www.brainyquote.com/quotes/authors/m/marcus_tullius_cicero.html (last visited Sept. 1, 2008).

⁸⁹ Alan M. Dershowitz, *Is it Necessary to Apply “Physical Pressure” to Terrorists—And to Lie About It?*, 23 *ISR. L. REV.* 192, 195–96, 198 (1989).

starving explorers who kill and eat a comrade to survive and whether they are guilty of murder. The case also deals with necessity and lacunae in the law. I wrote an opinion in the case as "Justice De Bunker":⁹⁰

My preference in this situation is for the following rule of law: when a tragic choice is sufficiently recurring so that it can be anticipated, and when reasonable people over time have disagreed over whether a given choice should be permissible, the onus must be on the legislature to prohibit that choice by the enactment of positive law if it wishes to do so.

....

... [N]either approach [permitting or outlawing the cannibalism, however necessary] is more "natural" than the other. Nor can the case be resolved by reference to any inalienable right, such as the "right to life." Both approaches claim to be natural and to further the right to life. Both also have considerable moral and empirical advantages and disadvantages, and no one in our society is inherently better suited to choose one over the other than anyone else. Yet a choice must be made. Accordingly, we move the argument from the level of substance to the level of process: who shall be authorized to make such decisions, on what bases shall they be made, and if there are gaps in the primary decisionmaking, who shall be authorized to fill the gaps in particular cases? These issues must also be matters of preference and persuasion.

The problem presented by this case has existed since the beginning of recorded history. There are examples—at differing levels of abstraction—in numerous works of history, religion, and literature. Why then did the representative body that was authorized to enact general laws not specifically address this recurring issue? . . . Philosophers and legal scholars have also considered these issues over the years. Yet few, if any, criminal codes explicitly tell starving cave explorers, sailors, or space travelers what they may, should, or must do if they find themselves in the unenviable position in which these defendants found themselves. . . .

⁹⁰ David L. Shapiro et al., *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1899 n.* (1999).

What does this long history of legislative abdication of responsibility tell us about how *we*, a court, should resolve this case? It tells us that the people do not seem to want this issue resolved in the abstract by legislation. Our elected representatives apparently prefer not to legislate general approval or disapproval of the course of action undertaken by the defendants here. Our citizens cannot bring themselves to say that eating one's neighbor in the tragic situation presented here is morally just. Nor can they bring themselves to say it is unjust. They would prefer to leave the decision, as an initial matter, to the people in the cave (at least as long as they make it on some rational and fair basis). Then they would have a prosecutor decide whether to prosecute, a jury whether to convict, a court whether to affirm, and an executive whether to pardon or commute. That is the unwieldy process, composed of layers of decisionmakers, they seem to have chosen.

The question still remains: by what criteria should we, the Supreme Court, decide whether to affirm the jury's conviction (and recommendation for clemency)? . . . I begin with my strong preference—a preference which I believe and hope is now widely shared—for a society in which any act that is not specifically prohibited is implicitly permitted, rather than for a society in which any act that is not specifically permitted is implicitly prohibited. As Johann Christoph Friedrich von Schiller similarly expressed, “Whatever is not forbidden is permitted.” The lessons of history have demonstrated why the former is to be preferred over the latter.⁹¹

XVIII. WHAT IS REASONABLE DOUBT?

I have also criticized the vagueness of the criteria under which a jury is supposed to decide whether the prosecution has proved its case “beyond a reasonable doubt”:

Under what circumstances is a doubt “reasonable”? The U.S. Supreme Court, in an act of abject intellectual cowardice, has declared that the term “reasonable doubt” is

⁹¹ *Id.* at 1899, 1902–05 (quoting JOHANN CHRISTOPH FRIEDRICH VON SCHILLER, *WALLENSTEIN'S CAMP*, sc. 6 (1798), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS 365 (John Bartlett & Justin Kaplan eds., 16th ed. 1992)).

self-explanatory and, essentially, incapable of further definition. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," the Court has declared, which brings to mind Talleyrand's quip that "if we go on explaining, we shall cease to understand one another." . . . Such a lazy attitude toward the central concept underlying the constitutional presumption of innocence is a bit like the late Justice Potter Stewart's approach to the interpretation of hardcore pornography: I can't define it, but "I know it when I see it."

The problem with "reasonable doubt," however, is that juries do not necessarily know it when they see it because legislatures and the courts have been utterly unwilling to tell them what it is, beyond a few unhelpful clichés. Courts are quite willing to tell juries what reasonable doubt is *not*.⁹²

XIX. THE EXCLUSIONARY RULE AND POLICE "TESTILYING"

Another area of criminal law in which accountability and visibility play an important role is the so-called "exclusionary rule," which prohibits the government from introducing into evidence against a criminal defendant statements or physical evidence obtained by the police in violation of the Fourth or Fifth Amendments to the Constitution. My interest in the exclusionary rule developed during my clerkships, when I drafted several opinions dealing with this controversial issue. The most important case was *Escobedo v. Illinois*, in which I drafted the following paragraph:

We have . . . learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system

⁹² ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 69–70 (1996) [hereinafter REASONABLE DOUBTS] (quoting, in order, *Miles v. United States*, 103 U.S. 304, 312 (1880); Charles Maurice de Talleyrand (source unknown, but see, for example, BrainyQuote, Charles Maurice de Talleyrand Quotes, http://www.brainyquote.com/quotes/authors/c/charles_maurice_de_talley.html (last visited Sept. 1, 2008)); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

of law enforcement, then there is something very wrong with that system.⁹³

The theme of this paragraph—the right to know of one’s rights—has pervaded my thinking and teaching. Although my criminal law mentor, Professor Joseph Goldstein, strongly opposed the exclusionary rule because it often freed guilty defendants, I favored it because it encouraged accountability and the articulation of standards.

Before we had an exclusionary rule, courts would not have to decide whether a challenged search or seizure did or did not violate the Fourth Amendment. They would decline to reach that issue because even if there was a violation, the exclusionary rule did not operate and the evidence would be admissible. Therefore, the courts needed not define what police action did or did not violate the Fourth Amendment. A major effect of the exclusionary rule, with all of its negatives, has been to require articulation and definition of when violations of Fourth Amendment or Fifth Amendment rights occur, because now the courts have to reach that issue. Some courts, however, have begun to circumvent this obligation by introducing harmless error doctrines. Many courts now start an opinion by saying that defendant raises constitutional issues about the search or confession, but because we have decided that the error, if an error at all, was harmless we need not reach the issue of whether the exclusionary rule or the Fourth Amendment was violated, which is why I have been a critic of the way in which the harmless error doctrine has become a cover for allowing violations of the Fourth and Fifth Amendments.

Another way of circumventing constitutional standards is for the police simply to lie about the circumstances giving rise to the search or interrogation. This widespread practice is called, by the police themselves, “testilying.”⁹⁴ I demonstrated in *Reasonable Doubts* how testilying undercut democratic accountability: “‘The blue wall of silence’ is a code that forbids one policeman from testifying against another and requires policemen to ‘back up’ a fellow officer, even if they know he is lying.”⁹⁵

Nor was this practice limited to police [or even]

⁹³ Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (footnote omitted).

⁹⁴ REASONABLE DOUBTS, *supra* note 92, at 52 (citing COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCS. OF THE POLICE DEP’T, CITY OF N.Y., COMMISSION REPORT 36 (July 7, 1994) [hereinafter POLICE CORRUPTION]).

⁹⁵ *Id.* at 54.

supervisors. As the Mollen Commission reported:

Several former and current prosecutors acknowledged—"off the record"—that perjury and falsification are serious problems in law enforcement that, though not condoned, are ignored. The form this tolerance takes, however, is subtle, which makes accountability in this area especially difficult.

....

... A cop who was working undercover for the Mollen Commission said he feared that if he did not lie, the other cops would immediately suspect that he was working undercover, because *real cops do lie*. Fuhrman said the same thing on the tapes, when he railed against one of his partners who refused to lie, accusing him of not being a real cop.

FUHRMAN: He doesn't know how to be a policeman. "I can't lie." Oh, you make me [expletive] sick to my guts. You know, you do what you have to do to put these [expletives] in jail. If you don't [expletive] get out of the [expletive] game. He just wants to be one of the boys. But he doesn't want to play. You know? Pay the dues.

MCKINNEY: So how does he deal with it?

FUHRMAN: He doesn't lie.

MCKINNEY: . . . Says he's not going to lie.

FUHRMAN: Uh-huh. Not a policeman at heart. . . .

....

I have been writing, teaching, and lecturing about the pervasiveness of police perjury since I first encountered it in the notorious Jewish Defense League murder case in the early 1970s. In 1982, I set out my version of "The Rules of the Justice Game," which included the following:

Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.

Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.

Rule V: All prosecutors, judges, and defense attorneys

are aware of Rule IV.

Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.

Rule VII: All judges are aware of Rule VI.

Rule VIII: Most trial judges pretend to believe police officers who they know are lying.

Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.

....

My views were echoed by a lawyer who has had long experience with the Philadelphia police. In an interview on the *Today* show, David Rudovsky put it this way:

The accountability starts in the Police Department. But for years, judges and district attorneys have simply been asleep at the wheel in Philadelphia. And unfortunately, the mentality among too many judges, not all, too many district attorneys is the same as the police, the ends justify the means. "And so if they've crossed the line, we'll overlook it."⁹⁶

Testilying hides police and prosecutorial misconduct from public scrutiny and accountability. So long as it continues to be "winked at" by so many judges and senior prosecutors, democratic accountability will be severely constrained.⁹⁷

XX. MY THEORY OF RIGHTS: RIGHTS FROM WRONGS

In attempting to construct my own general theory of rights, it should not be surprising that I have emphasized visibility and accountability.

It is more realistic to try to build a theory of rights on the agreed-upon wrongs of the past that we want to avoid repeating, than to try to build a theory of rights on idealized conceptions of the perfect society about which we will never

⁹⁶ *Id.* at 54, 57–59 (footnotes omitted) (quoting POLICE CORRUPTION, *supra* note 94, at 42; THE BEST DEFENSE, *supra* note 83, at xxi–xxii; David Rudovsky, *Today* (NBC television broadcast Nov. 9, 1995)).

⁹⁷ For an example of how a judge can promote democratic accountability by strict scrutiny of FBI and prosecutorial testimony and conduct, see Chief Judge Mark Wolf's decision in the Boston FBI cases. *United States v. Salemme*, 91 F. Supp. 2d 141 (D. Mass. 1999).

agree. Moreover, a theory of rights as an experiential reaction to wrongs is more empirical, observable, and debatable, and less dependent on unprovable faith, metaphor, and myth, than theories premised on sources external to human experience. At bottom, therefore, my theory of rights is more democratic and less elitist than divine or natural law theories. It is also more truthful and honest, because rights are not facts of nature, like Newton's Laws, waiting somewhere "out there" to be discovered, deduced, or intuited.⁹⁸

I have criticized "divine law" and "natural law," because they are standardless and subjective.

The problem is that no such external standard actually exists in nature or in the word of God. The only way it can emerge is if it is constructed on the basis of the broader experiences of the entire world over time, rather than the limited experiences of one particular society at a single point in its history. The need for basic universal standards for defining and even enforcing these standards, with due concern for the variations made necessary by different cultural and experiential factors, is the great human challenge we face. We cannot abdicate it to God or nature.

Law and morality are the constructs of human beings struggling to elevate themselves from the state of nature—to reinforce the human capacity for good and to discourage the capacity for evil. All we can do is articulate and advocate those rights that experience teaches us are essential to avoid the catastrophes of the past Once a consensus emerges that we should try to avoid the recurrence of certain wrongs, we can begin to build a system of rights.⁹⁹

In *Why Terrorism Works*, I tried to apply these general principles to the particular problem of terrorism:

"Off-the-book actions below the radar screen" are antithetical to . . . democracy. Citizens cannot approve or disapprove of governmental actions of which they are unaware. We have learned the lesson of history that off-the-book actions can produce terrible consequences. . . .

. . . .

⁹⁸ RIGHTS FROM WRONGS, *supra* note 9, at 7–8.

⁹⁹ *Id.* at 149–50 (footnotes omitted) (citing H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 221 (Oxford Univ. Press 1983)).

... The important thing is to begin a debate now about how to strike a proper balance. . . .

....

... Now is the time for our government to invite civil libertarians into the tent to consult with law enforcement officials. . . .

Any change in our fundamental civil liberties should be debated. A civil liberties impact statement should accompany every compromise, as should a sunset provision. . . . The balances we ultimately strike . . . will not satisfy absolutists in either the law enforcement or the civil libertarian camps. But if we work together . . . the beneficiaries will be all Americans who rightly demand both safety and freedom.¹⁰⁰

In my most recent academic book, I applied it to constitutional interpretation:

The hole in our constitutional law is gray, if not black, when it comes to such interrogation. This is not as it should be in a nation that prides itself on the rule of law, especially constitutional law. This gaping hole should be filled by meaningful constitutional safeguards. . . .

....

The disparity between what Americans reasonably *believe* is a broad, universal right to remain silent and the narrow, technical, conditional, and limited trial remedy a small number of criminal defendants *actually have* in practice, is far too great for a healthy democracy. Citizens should know their rights, and there should be a close, if imperfect, fit between the hortatory and the enforceable. To accomplish this closer fit, there will have to be compromise at both extremes: the hortatory should be cranked down, and the enforceable should be cranked up. The gap should be closed by making it plain that Americans do *not* have an absolute right to remain silent and by making equally clear that our government does not have the absolute power to use all manner of coercive interrogation, even for preventive purposes.

The privilege against self-incrimination should be

¹⁰⁰ WHY TERRORISM WORKS, *supra* note 8, at 152, 210, 222.

construed to impose restrictions on at least *some* means of coercion, even if the resulting information is never used against a defendant at a criminal trial. Such a construction would give meaning to the word "compelled" as well as the words "criminal case," and would be more consistent with the spirit and history of the right and the wrongs it was designed to combat.¹⁰¹

XXI. SHOULD UNIVERSITIES ARTICULATE STANDARDS FOR AFFIRMATIVE ACTION?

One area where I have reconsidered my demand for articulated standards and accountability is affirmative action. When the Supreme Court rendered its decision in the *Bakke* case, and relied on Harvard's admission policies, I wrote critically of that decision, and especially of its praise for the Harvard system, which I know very well:

[I]nstead of attempting to define the factors that would satisfy the constitutional and statutory standards, Justice Powell apparently found it easier to refer to an existing system.

....

... By approving the Harvard College system—the paradigm of the "diversity-discretion model" of admissions—Mr. Justice Powell legitimated an admissions process that is *inherently capable* of gross abuse and that ... *has in fact been deliberately* manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.

....

... Harvard's concern over its Jewish problem in the 1920's led to the de-emphasis of academic criteria and the development of a discretionary admissions system capable of manipulating a variety of factors, such as personality, character, geography, and genealogy, in order to produce the desired ethnic balance in an entering class. "Thus Harvard's strict meritocratic standards were revised and the admissions committee was invested for the first time with the discretionary power which has characterized its

¹⁰¹ COERCIVE INTERROGATION, *supra* note 5, at 174–76.

deliberations ever since.”

After the Second World War, when universities became less preoccupied with the ethnic makeup of their entering classes, academic criteria began to regain their dominance in the admissions process. . . .

. . . .

In the 1960’s—after a generation of virtual desuetude—the need for “diversity” was resurrected for the commendable purpose of increasing the number of minority students at the University. Again, however, the “diversity-discretion” rhetoric was invoked as a justification for the real goal of the Admissions Office: to increase the *number* of minority persons in the University and in the professions it feeds. . . .

. . . .

Whereas, during the 1920’s, the Admissions Committee de-emphasized objective academic criteria in favor of “diversifying” factors in order to target and decrease the number of Jews, despite their high scores, in the 1960’s, it selectively de-emphasized these objective criteria in favor of “diversifying” factors in order to target and increase the numbers of minority applicants, despite their lower scores. In each case, the same vague, seemingly neutral admissions tools have been employed, but to achieve remarkably different goals.

The crucial point is that the “diversity-discretion” model, because it lacks real substantive content, is inherently capable of manipulation for good or evil results. The concept of “diversity” is so vague that it lends itself to a myriad of widely divergent and ever-changing definitions capable of masking the criteria actually at work.

. . . The “diversity-discretion” model thus subverts the ideals of responsibility and candor that are the hallmarks of any institution of learning in an open and democratic society.

. . . .

The *Bakke* decision . . . reflects the ultimate triumph of ambiguity and discretion over clarity and candor—a direction in which the Supreme Court seems to have been moving inexorably on several fronts over the past decade. . . . Taken to its frighteningly logical extreme, it could even allow a university to weigh an applicant’s race or

religion negatively—as [it] did under President Lowell—in order to enhance diversity in the face of an overabundance of applicants from a particular racial or religious group.¹⁰²

I even went so far as to advocate explicit affirmative “quotas”—that is numerical *floors* not *ceilings*—so that the relevant public would be able to know and evaluate precisely what weight the admissions process was according to race, gender, religion, ethnicity, and other perceived positive and negative factors. I proposed that only those factors deemed relevant to the admission process be included on the application. This might require name-blind applications, since the name of the applicant alone should not be relevant. If the school wanted to give some advantage to legacies, the application could include that fact, as many do. The same would be true of race, financial status, or any other factor to be weighed in the mix. The school would be required to state publicly the precise weight it was according to each factor.

This was, of course, merely a heuristic proposal designed to stimulate debate about the nature of affirmative actions in particular and university admission process in general. No university adopted it, and affirmative action, particularly at private universities, continued to operate on the “diversity-discretion” model. Some public universities, especially very large ones, moved toward some level of quantification, only to be rebuffed by the courts. The Supreme Court plainly preferred a vague model of diversity and discretion to the sort of precision and clarity that would force it to confront the difficult issue of precisely how much weight the Equal Protection Clause of the Constitution allows state institutions to accord race and other generally “suspect” categories.

At some level, I still prefer clarity and accountability in the admissions process to the unaccountable quest for that elusive quality called “diversity.” If a school in fact has a racial or ethnic quota (or target) or “tipping point,” there are good reasons for that important fact to be open and subject to debate or market forces. There are, however, countervailing considerations as well, which I failed to give sufficient weight in my earlier writing.

A university is, after all, a community of scholars. It would

¹⁰² Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 382, 385, 401–04, 406–07 (1979) (footnotes omitted) (citing P. Fieldman, *Recruiting the Elite: Admission to Harvard College* 8, 20–22 (1975) (unpublished Ph.D. dissertation in Harvard archives); S. LIPSET & D. RIESMAN, *EDUCATION AND POLITICS AT HARVARD* 180 (1975)).

undercut that concept for there to be two (or more) distinct categories of members—those admitted exclusively on the criteria of “merit” (however defined) and those admitted on the basis of (or with a heavy thumb placed on the scale by) other factors unrelated (or less related) to relevant abilities, as measured by tested predictive indices, such as grades, test scores, and other accomplishments. By muddling these factors into an indistinguishable mix of diversity and discretion, it becomes most difficult—though not impossible—to argue that there are two (or more) categories of admittees. That may well be a virtue in university administration that outweighs the virtues of clarity and accountability. Reasonable people can disagree about this conclusion.

XXII. CONCLUSION

My own reconsideration of the desirability of explicitness in university affirmative action programs is a useful ending point for this summary of my work up to this point in my life. I leave open for future writing a general theory of when explicit articulation is essential to democracy and when, if ever, deliberate ambiguity, or even hypocrisy, can make a compelling claim. For now it is enough to assert a strong presumption in favor of open and explicit criteria for governmental action in the democratic state. Accountability and dialogue must be the norm, with a heavy burden of persuasion on those who would tolerate secrecy, untrammelled discretion, and lack of accountability when important discussions are made in the name of the people.

I cannot conclude this essay, however, without expressing my profound appreciation to all of the participants at this conference from whom I have learned so much. I will never again write about these subjects without taking into account what I have heard and read from so many committed and able constructive critics and friends. My special thanks go to Paul Finkelman who organized this conference so brilliantly and efficiently. Thanks as well to audience members who asked such perceptive questions. I will long remember this conference with great pleasure and appreciation.

APPENDIX

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