WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE, Alan M. Dershowitz (New Haven, CT: Yale University Press, 2002)

> We have to fight the terrorists as if there were no rules, and preserve our open society as if there were no terrorists.[1]

Al-Qaeda's apocalyptic brand of terrorism is the perverted inversion of globalization: "[t]errorism's deterritorialization is a negative reflection of our own economic and political tendencies."[2] Globalization involves the integration of markets, transportation systems, and communication systems;[3] it increasingly renders national boundaries irrelevant; and it is accompanied by a strongly homogenized and homogenizing language, symbol-set, and culture. I do not claim that globalization is an efficient cause of terrorism, in the manner that a Marxist might claim that the economic relations supporting capitalism produce the class consciousness of proletarians destined to overthrow those relations. Neither do I claim that globalization is a final cause of terrorism, in the sense that al-Qaeda's attacks were motivated by hostility towards international economic and cultural developments. Chomsky is probably right that bin Laden and his gang had no significant knowledge of or interest in globalization.[4] Furthermore, I do not claim that terrorism is the only form of criminality parasitic upon globalization: with increased trade in goods and services and facilitated flows of capital and information come increased opportunities for (plain old) smuggling, drug and arms dealing, money laundering, and computer/Internet crimes. Finally, I do not claim that al-Qaeda's terrorism is any sort of perfect reversed image of globalization. Rather, it feeds off only some formal elements of globalization. Al-Qaeda, like a roving, net-based multinational business, has no necessary or particular national home; its elements merely happen to reside in various sponsor States. This, in White's terms, is its deterritorialization, its post-nation state structural affinity with multinational business. In Dershowitz's terms, al-Qaeda has no return address.[5] Al-Qaeda relied on global communication and financial systems, the availability of educational services to non-nationals, and, chillingly, on the technological components of international travel. Al-Qaeda attacked (whether intentionally or as mere opportunities) targets with strong symbolic value to the United States and therefore to the globalized world — the Twin Towers and the Pentagon.

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1 T.L. Friedman, *Longitudes and Attitudes: The World in the Age of Terrorism* (New York: Anchor Books, 2002) at 35.

2 C. White, "The New Censorship" (2003) 307:1839 Harper's Magazine 15 at 19.

3 Friedman, *supra* note 1 at 3.

4 N. Chomsky, *9-11* (New York: Seven Stories Press, 2001) at 32: "Bin Laden himself has probably never heard of 'globalization.' Those who have interviewed him in depth, like Robert Fisk, report that he knows virtually nothing of the world and doesn't care to."

5 Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002) at 2.

September 11, 2001 set a precedent that we cannot erase.[6] It established a horrible possibility, a blueprint for the mad, and therefore a species of risk that we must work hard to reduce both now and for the foreseeable future. Our efforts at risk reduction must begin with reflection and understanding of the danger we face and the types of remedies we might deploy. We might believe that Dershowitz could give us some substantial assistance, given the title of his book — *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* — and the glowing endorsements on its back cover. Regrettably, the book provides less assistance than might have been hoped.

My lack of enthusiasm is not based on the book's occupation of the "scholarship lite" genre. Most academic scholarship is published but not read or at least not read widely. Accessibility to the broad market of informed public opinion is a virtue, not a vice. The book, however, has two main weaknesses. First, despite its apparent promise, *Why Terrorism Works* is less about global terrorism or terrorism generally than about Palestinian terrorism and the legitimacy of Israel's defence against terrorism. Second, Dershowitz is imprisoned within a particular perspective: that of the constitutional appellate litigator. One might recall the old adage that "to a person with a hammer, everything looks like a nail." To certain appellate litigators, all problems look like constitutional and juridical problems. Dershowitz suffers from a lack of a systemic perspective, a lack of appreciation of the roles of the other branches of government — particularly the executive — in responding to national crises, and correspondingly over-emphasizes the importance of the judicial system. I shall attempt to trace these two limitations in Dershowitz's development of his thesis.

Dershowitz's thesis has the following elements: Terrorism is rational, goal-seeking behaviour. Terrorism has "worked"[7] because the West has encouraged it. Terrorism will cease to work — or will be less successful — if we adjust our international and domestic policies and practices. If terrorism ceases to work, terrorists will be deterred. More specifically, terrorism must not be rewarded and it must attract serious disincentives. To aid domestic criminal law efforts to combat terrorism, our constitutional guarantees relating to privacy and security of the person should be rebalanced.

Every particle of Dershowitz's thesis bears consideration. At best, I can but gesture here at some of the issues Dershowitz raises — (I) his approach to terrorism; (II) the presuppositions of rebalancing; and his proposed rebalancing of (III) international policies and (IV) domestic law. I should immediately note, however, that Dershowitz does not advocate anything like a wholesale abandonment of civil rights. He seeks only "[a]n appropriate balance" that "increases security considerably without diminishing liberty

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6 See H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Markham, ON: Penguin Books Canada, 1977) at 273:

> It is in the very nature of things human that every act that has once made its appearance and has been recorded in the history of mankind stays with mankind as a potentiality long after its actuality has become a thing of the past. No punishment has ever possessed enough power of deterrence to prevent the commission of crimes. On the contrary, whatever the punishment, once a specific crime has appeared for the first time, its reappearance is more likely than its initial emergence could ever have been.

Dershowitz, with his talk of deterrence, might have meditated on this passage.

7 In the sense that it has accomplished the objectives of those committing the terrorist acts.

unduly."[8] Moreover, Dershowitz is more concerned to open up debate than to provide a recipe for successfully managing terrorist risks.[9] To be fair, his recommendations have a provisional, discussion-initiating character.

I. "TERRORISM"

I will consider (A) Dershowitz's reflections on the definition of terrorism, (B) his focus on Palestinian terrorism, and (C) the relationship between the Palestinian-Israeli conflict and the fight against al-Qaeda.

A. DEFINING "TERRORISM"

Dershowitz refers to the difficulties of defining terrorism. As he puts it, "[o]ne man's terrorist is another man's freedom fighter."[10] The problem, it might be thought, lies in developing a definition of terrorism that distinguishes acts we want to condemn as "terrorist" from those we do not[11] (this concern may be particularly acute if our actions or those of our allies could be argued to fall under the definition of terrorism).[12]

Perhaps surprisingly, given Dershowitz's identification of the problem of defining "terrorism," official definitions circulate in both domestic [13]and international law.[14] The definitions may be more or less useful or vague. Their existence may indicate, though, that defining "terrorism" is not the hard issue. Rather, the hard issues are whether or not terrorist conduct may be justified or excused in particular circumstances (for example, by members of a resistance group against an evil occupier), and whether or not we or our allies must accept responsibility for indefensible terrorist conduct. Dershowitz could have addressed the issues of justification or excuse in terms of the cost-benefit analysis he employs in chapters three to five. That he failed to pursue these issues may betray his concern to maintain his

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8 Dershowitz, *supra* note 5 at 210.

9 *Ibid.*

10 *Ibid.* at 4. For a short but thoughtful essay on the definition of terrorism, see C. Hitchens, "Terrorism: Notes Toward a Definition" in *A Long Short War: the Postponed Liberation of Iraq* (Toronto: Penguin Books, 2003) at 23.

11 Many legal terms cannot be formally defined in terms of necessary and sufficient conditions. One legal response is to avoid definition and instead establish some criteria which must be applied on a case by case basis to identify whether a particular act falls within the classification. Another response is to list matters falling under the definition. Such a list may be closed ("means") or open ("includes").

12 See Chomsky, *supra* note 4 at 24, 44; Hitchens, *supra* note 10 at 24; Dershowitz, *supra* note 5 at 7.

13 See the definition of terrorism in s. 83.01(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46.

14 See *e.g.* United Nations, *Declaration on Measures to Eliminate International Terrorism*, United Nations General Assembly Resolution 49/60, 9 December 1994, Annex, article 3, online: United Nations <www.un.org/documents/ga/res/49/a49r060.htm>; United Nations, *Convention of the Organization of the Islamic Conference on Combating International Terrorism*, 1 July 1999, art. 1, s. 2, online: United Nations Treaty Collection <www.oic-un.org/26icfm/c.html>; League of Arab States, *The Arab Convention on the Suppression of Terrorism*, 22 April 1998, online: Arab Gateway (Arab League) <www.al-bab.com/arab/docs/league/terrorism98.htm>. Some international instruments avoid defining terrorism, and instead specify certain types of conduct as "terrorist acts." See *e.g.* United Nations, *International Convention for the Suppression of Terrorist Bombings*, United Nations General Assembly, 15 December 1997, online: United Nations Office on Drugs and Crime <www.unodc.org/unodc/terrorism_convention_terrorist_bombing.html>; and United Nations, *European Convention on the Suppression of Terrorism*, 27 January 1977, online: Council of Europe <www.conventions.coe.int/Treaty/EN/Treaties/Html/090.htm>.

moral case against Palestinian terrorism, without dealing with morally difficult aspects of the Israeli-Palestinian relationship.

Dershowitz also fails to deal with a very important issue involving the definition of terrorism: the question of whether a definition of terrorism is needed at all for domestic criminal law purposes. At the very least, one might observe that Dershowitz does not register any opposition to a domestic criminal law definition of terrorism. One might infer — or, I admit, speculate — that Dershowitz has no principled objection to the incorporation of a definition of terrorism into domestic criminal law. Dershowitz does, after all, advocate domestic legal solutions to terrorism, including, most prominently, his "torture warrant" procedure and his "national identity card" program (which I shall discuss below).

The need for a definition of terrorism for domestic criminal law purposes is not obvious. In Canada, for example, we had a vast array of rules to deploy against terrorist acts, without the need for any of the additions legislated through Bill C-36.[15] We could take criminal law jurisdiction over terrorist offences if they occurred here (as in the case of any other domestic offence), if they had a "real and substantial connection" in one of their stages to Canada,[16] or even if they occurred wholly outside Canada, but engaged one of our special jurisdictional rules.[17] Our offence provisions would have captured virtually any terrorist conduct, whether it was murder, kidnapping, conspiracy, counselling the commission of an offence, or money laundering. Terrorist ambitions would have been an aggravating factor in sentencing. Police were armed with substantial investigatory tools, including search warrants and wiretap warrants. One might easily have concluded that our rules could have captured all relevant aspects of terrorist conduct, and changes were not required.

In response, one might argue that special provisions are necessary to regulate terrorism investigations, because of the practical difficulties in penetrating terrorist organizations and in gaining intelligence respecting terrorist leaders. No doubt the practical difficulties of gathering evidence respecting terrorist organizations are greater than those for many non-terrorist organized crime groups. It would be difficult to insert a "Donnie Brasco" into al-Qaeda.[18] The ethnic and community ties of some terrorist groups prevent easy infiltration. It would be difficult to turn a "Sammy the Bull" against bin Laden.[19] Religious terrorists cannot be bought with promises of leniency or of new lives through the Witness Protection Program when heaven is their reward. Terrorist organizations premised on al-Qaeda's model are dispersed internationally and have cell structures, which prevent individuals in one unit from having much (if any) information about another unit.[20] Because of dispersal and cell-

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15 Bill C-36, *Anti-terrorism Act*, S.C. 2001, c. 41 (effective 24 December 2001). My observation is commonplace. See *e.g.* K. Roach, "The New Terrorism Offences and the Criminal Law" in R.J. Daniels, P. Macklem & K. Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 151.

16 *R. v. Libman*, [1985] 2 S.C.R. 178.

17 See s. 7 of the *Criminal Code* for a large set of jurisdictional rules turning on , for example, the location of attacks and the status of victims.

18 J.D. Pistone (with R. Woodley), *Donnie Brasco: My Undercover Life in the Mafia* (Markham, ON: Penguin Books Canada, 1987).

19 P. Maas, *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia* (New York: Harper Paperbacks, 1997).

20 See J.G. Stein, "Network Wars" in Daniels, Macklem & Roach, eds., *supra* note 15 at 73.

structure, electronic interceptions of private communications (telephone taps in particular) may not be very effective. For similar reasons, one might contend that the structure of international terrorism following al-Qaeda's model prevents any easy application of our criminal law secondary liability rules or conspiracy rules. To snag terrorist leaders in the net of liability, the bases for a finding of culpable participation in criminal acts must be expanded.

Suppose that our criminal laws could not reach some aspects of terrorist conduct. What should be the legislative response? Perhaps amendments would be required, but perhaps not.

If amendments were considered appropriate, the consequences of the proposed legal changes should be carefully reviewed. Dershowitz does refer at one point to the necessity for completing a "civil liberties impact" assessment before any anti-terrorist legislation is passed.[21] This is a reasonable proposal. Civil liberties impacts would likely be considered in the legislative process, though, without the need for this formal step.[22] In addition to a civil liberties impact assessment, the practical impact of new rules should also be assessed. The difficulty is this: like a human being, the law is both highly resilient and very fragile. Our criminal law rules have developed in increments over centuries. The rules of procedure, evidence, substantive offences, and sentencing co-exist in a long-evolved web or network of interrelationships. The criminal law has swallowed some enormous changes, such as those entailed by the *Canadian Charter of Rights and Freedoms*,[23] without (generally) choking and ceasing to do its job.[24] But the criminal law has also been faced with some legislative innovations that have thwarted its operations. Consider the gang trial cases in Manitoba and Alberta. These have been based, at least to a degree, on new criminal organization provisions. So far, these trials have involved massive expenditures of public funds. The trials have either ground to a halt or are grinding, slowly, towards an uncertain future.[25] The results of these trials have not justified their expense. In the Alberta context, the blame, if blame is

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21 *Ibid.* at 222.

22 See L. Smith, "Have the Equality Rights Made any Difference?" in P. Bryden, S. Davis & J. Russell, eds., *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 1994) 60 at 70.

23 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [*Charter*].

24 The *Charter* did take the criminal law to a new stage of evolution. The transition has been buffered, however, by judges' inclination to view pre-*Charter* rules as consistent with the *Charter*. The *Charter*, for example, has not required a complete re-writing of the common law of evidence: *R. v. Williams* (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), Martin J.A. at 372; leave app. S.C.C. refused [1985] 1 S.C.R. xiv. The courts interpret "fundamental justice," in part, on the basis of the rules that we have relied on for centuries: *R. v. Creighton*, [1993] 3 S.C.R. 3, McLachlin J. One relatively exceptional (but relatively brief) exception to the "business as usual" approach to the *Charter* occurred with *R. v. Askov*, [1990] 2 S.C.R. 1199 [*Askov*], which resulted in thousands of cases being stayed across Canada. The *Askov* excess was soon tempered by *R. v. Morin*, [1992] 1 S.C.R. 771 [*Morin*], so that the processing of cases could return to a point closer to business as usual.

25 On the collapsed prosecution of the Manitoba Warriors, see D. Stuart, "Time to Recodify Criminal Law And Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 Man. L.J. 89. In Alberta, our gang trial was bifurcated. One branch, being heard by Sulyma J., was recently stayed: *R. v. Chan* (2003), 172 C.C.C. (3d) 349 (Alta. Q.B.). This decision will probably be appealed. The other branch, being heard by Binder J., rolls on. By my count, this branch has yielded at least 25 written decisions to date on pre-trial matters, and it is unclear when the case will be set down for trial. See *inter alia*, *R. v. Trang* (2002), 11 Alta. L.R. (4th) 52 (Q.B.).

to be apportioned, may be attributed to investigative over-enthusiasm and to the sheer scope of evidence-gathering. One wonders, though, whether the real culprit is legislative misdirection. If we lacked the criminal organization provisions now nestled in the *Criminal Code*, and the investigations and prosecutions had followed "ordinary" criminal law rules and practice, would the proceedings have been so clumsy? When assessing legislative amendment, we must try to identify the unintended consequences which will surely follow. We should ensure that the cure is not worse than the disease.

Another caution is that legislative amendment may create an undesirable precedent in the law. To catch terrorists, it may be necessary to lower the standards of protection of criminal suspects and accuseds. The danger is that these lowered standards may drift into other areas of the law. If we can relax constitutional protections and increase police powers to catch terrorists, why not adopt the same approach for organized crime offences, drug trafficking, serial killings, murder, robbery, or any other offences? It is very likely that there will be only a tiny number of terrorism investigations and prosecutions. But the rules we develop for this most visible form of crime are likely to have a profound influence on the rules we apply to other crimes.

A last reflection is that legislative amendment may have no practical adverse effects, because the amendment accomplishes nothing. Its effects are purely rhetorical. In this sort of case, the ill effect of the legislation is that it distracts from real issues by falsely assuring that public safety is being promoted.

As a result of an assessment, we may conclude that it is preferable to not legislate, even though our domestic criminal law cannot capture all aspects of terrorism. The costs of action may outweigh those of inaction. This assessment would not mean that terrorists are given leave to frolic beyond the borders of the law.

Instead, the judgment that the limits of the law have been reached would indicate that real focus of the fight against terrorism should be outside the juridical precincts of the legal system. Part of this fight would be carried by domestic security personnel, such as the police. Dershowitz does recognize that legal and practical changes are required to promote domestic and international information-sharing between policing and other security and intelligence-gathering organizations.[26] While each jurisdiction may not have much information, a number of jurisdictions together may compile significant information. It is common knowledge that domestic police and intelligence groups failed to communicate properly before September 11. It is common knowledge that domestic law enforcement groups often fail to communicate properly — hence, the success of serial killers who operate in different jurisdictions.[27] Improving communications will require organizational-culture change, increased resources for transmitting and analyzing information, and possibly legal changes respecting governmental agencies' entitlements to disclose information to other agencies. The same sort of changes would be required to facilitate international information-sharing.

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[26] Dershowitz, *supra* note 5 at 198.

[27] The Honourable Mr. Justice A. Campbell, *Bernardo Investigation Review: Report* (Toronto: The Solicitor-General of Ontario, 1996).

Outside of the domestic security apparatus, those who will carry the fight against terrorists will not be lawyers, but members of the military and intelligence communities. The most important work to combat terrorism will be done by those with the skills, knowledge, and resources to permit them to understand our adversaries, predict their tactics and movements, and shut them down before they can inflict further damage. These are not jobs for lawyers.

Dershowitz's failure to address the problems involved in the expansion of domestic criminal law may seem to be a minor deficiency. Dershowitz, however, may be betraying a lawyer's prejudice that problems are best solved through creating more law. By failing to consider the appropriate scope of domestic criminal law and its proper role in combating terrorism, Dershowitz gives no assistance on the crucial issue of when military solutions, as opposed to juridical solutions, should be deployed. The promotion of legal solutions is also a distraction from what may be the more important issues of the provision of adequate financial and informational resources to military and policing organizations. Dershowitz also improperly implies that lawyers play a central role in the fight against terrorism. We do play a central role when new legal rules to combat terrorism are proposed, as we do when alleged terrorists have been arrested and are being prosecuted. We definitely play a major part in protecting suspects and ordinary citizens from executive and legislative excess in pursuit of terrorists. But when the job is to stop armed fanatical murderers from killing our people, lawyers are not key players; we have only supporting roles.

B. PALESTINIAN TERRORISM

Why Terrorism Works would seem to be about terrorism generally. The book was written in the shadow of September 11. The book's cover suggests a relationship between Arafat and bin Laden. In the upper left corner of the dustjacket of the hardcover edition of the book is a photograph of a smiling Arafat, who is looking toward the right side of the cover. In the lower right corner of the cover is a photograph of a smiling bin Laden, who is looking toward the left side of the cover. The cover intimates that the two have shared a glance, a knowing wink and a nod.[28] The book begins with some remarks about religiously-inspired terrorism of the al-Qaeda variety.

Yet the terrorism Dershowitz describes is Palestinian terrorism. It is, expressly, his "paradigm" case.[29] In chapter two, over some 67 pages, Dershowitz details Palestinian terrorist acts and the reception of Arafat and the Palestinian Liberation Organization by the United Nations and European leaders. R.A. Posner has commented that chapter two is a "powerful, sickening narrative of Palestinian terrorism since 1968; I had forgotten how much of it there was after as well as before the Oslo accords of 1993 that were supposed to end it."[30]

Dershowitz's concentration on Palestinian terrorism creates three problems.

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[28] I note that the cover of the softcover edition lacks these photographs.

[29] Dershowitz, *supra* note 5 at 169.

[30] "The Best Offence" (2002), online: *The New Republic Online* <www.thenewrepublic.com/docprint.mhtml?i+20020902&s=posner090202>.

First, while an account of Palestinian terror and United Nations and European appeasement is an important subject, some readers might consider Dershowitz to have employed a sort of bait and switch tactic. The book gives the impression of being about responses to international terrorism, but international terrorism is not precisely its topic.

Second (and more significantly), a reader might complain that Dershowitz's account is one-sided. It is simply an indictment of Arafat and Palestinian terrorists. I do not for a moment suggest that a more balanced account would entail any contention that suicide bombings in marketplaces are morally justified or that every Israeli countermeasure is morally equivalent to terrorist bombings. I do not think reasonable people would dispute, however, that the moral and legal interactions of Israel and the Palestinians are complex, and that blame may be — to some degree, in some proportions — shared. The perspective that Michael Walzer offers is, I think, valuable. In his view, "four wars" rage between Israel and the Palestinians:

> [T]here is a Palestinian war to destroy and replace the state of Israel, which is unjust, and a Palestinian war to establish a state alongside Israel, which is just. And there is an Israeli war to defend the state, which is just, and an Israeli war for Greater Israel, which is unjust. When making particular judgements, you always have to ask who is fighting which war, and what means they have adopted, and whether those means are legitimate for these ends, or for any ends.[31]

Third, the use of Palestinian terrorism as a precedent raises the issue, with which Dershowitz never fully grapples, of the degree of similarity between Palestinian terrorism and al-Qaeda's terrorism. Dershowitz is sensitive to the reality that Palestinian terrorism has a different logic than al-Qaeda's terrorism. Palestinian terrorism, generally, has defined goals and terrorist acts have been pursued as means to achieve those goals.[32] Al-Qaeda's brand of apocalyptic terrorism, in contrast, is "irrational," serving "no realistic demands."[33] Dershowitz comments that "[t]hese kinds of irrational terrorism may be the most difficult to deter, because they are typically not subject to the usual rules of human cost-benefit calculation."[34] This concession, however, seriously undermines the value of Dershowitz's argument. While his deterrence approach may apply to Palestinian terrorism, the nature of al-Qaeda's terrorism may frustrate deterrence efforts. We cannot assume that "one size fits all" in the war against terrorism. Dershowitz does not explain how the deterrence model should be altered to combat the peculiar species of irrational, apocalyptic terrorism. In fact, Dershowitz appears to reject deterrence as an appropriate approach to al-Qaeda, and instead advocates prevention and incapacitation through military means.[35] If this is the way to address international non-Palestinian terrorism, then much of the book's argument is beside the point.

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31 "The United States in the World — Just Wars and Just Societies: An Interview with Michael Walzer" (2003), online: *Imprints: A Journal of Analytical Socialism* <www.info.bris.ac.uk/~plcdib/imprints/michaelwalzerinterview.html>; M. Moore, "Top Israeli Officer Says Tactics are Backfiring" (2003), online: *Washington Post* <www.washingtonpost.com/ac2/wp-dyn/A44374-2003Oct30?language=printer>.

32 Dershowitz, *supra* note 5 at 94.

33 *Ibid.* at 95; see also Friedman, *supra* note 1 at 37; and Hitchens, *supra* note 10 at 25.

34 Dershowitz, *supra* note 5 at 95.

35 *Ibid.* at 98 and 181.

C. THE PALESTINIAN-ISRAELI CONFLICT AND AL-QAEDA

Dershowitz makes the remarkable claim that by virtue of their appeasements, "our European allies made September 11 inevitable."[36] This contention twists the leftist claim that the West (that is, the United States) made September 11 inevitable because of foreign policies damaging to the mid-East region. Dershowitz agrees that the West is indeed responsible for al-Qaeda's attacks. He interprets the West, though, as the United States' (sometimes) European allies. Furthermore, the conduct responsible for the attacks is not the ill visited on Arab countries, but the benefits bestowed on Palestinian terrorists. Al-Qaeda perceived that terrorism has been an effective political tactic, and so followed the Palestinian precedent.

For Dershowitz to sustain his claim, he must demonstrate that Palestinian terrorism had precedential value because it "worked" and that al-Qaeda actually followed that precedent.

Dershowitz argues that Palestinian terrorism has been successful. He goes so far as to provide a chart, showing in one column "Palestinian terrorist acts" and in the other column "Benefits to Palestinian cause."[37] The benefits fall into three main classes: the international recognition of rights of self-determination of the Palestinian people (particularly by the United Nations),[38] condemnations of Israel,[39] and personal benefits for Arafat.[40]

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36 *Ibid.* at 35.

37 *Ibid.* at 57-78.

38 United Nations General Assembly resolution, December 10, 1969 (*ibid.* at 59); United Nations granting of observer status to the PLO, November 22, 1974 (*ibid.* at 65); United Nations establishment of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, November 10, 1975 (*ibid.*); U.S. President Jimmy Carter "[recognized] the 'legitimate rights' of the Palestinian people and their need to 'participate in the determination of their own future'," January 4, 1978 (*ibid.* at 67); United Nations International Day of Solidarity with the Palestinian People, November 29, 1978 (*ibid.*); European Economic Community's Venice Declaration, stating that the Palestinian people "must be placed in a position ... to exercise fully its rights of self-determination," June 13, 1980 (*ibid.* at 69); United Nations General Assembly "upgraded" Palestinian status — Palestine representatives gained many rights of member states, July 7, 1998 (*ibid.* at 77).

39 The United Nations General Assembly passed a resolution "equating Zionism with racism," November 10, 1975 (*ibid.* at 65); a United Nations Security Council resolution condemned Israel's practices in putting down the first intifada, December 22, 1987 (*ibid.* at 73).

40 Meeting with United Nations Secretary General Kurt Waldheim, November 22, 1975 (*ibid.* at 66); meeting with Austrian Chancellor Bruno Kreisky and former West German Chancellor Willy Brandt, July 6-8, 1979 (*ibid.* at 68); meeting with the Prime Minister of Spain, September 13-15, 1979 (*ibid.*); meeting with the President of Portugal, November 2, 1979 (*ibid.*); official visit to Greece, December 14-16, 1981 (*ibid.* at 69); meeting with the President of Italy and with Pope John Paul II, September 15, 1982 (*ibid.* at 70); address to the United Nations General Assembly, December 13, 1988 (*ibid.* at 73); second meeting with Pope John Paul II, December 23, 1988 (*ibid.*); meeting with the President of France (Mitterand), May 2, 1989 (*ibid.*); signing of Oslo Accords "on the White House lawn", September 13, 1993 (*ibid.* at 74); with Yitzhak Rabin and Shimon Peres, awarded the UNESCO Peace Prize, September 17, 1993 (*ibid.* at 74); with Rabin and Peres, awarded the Nobel Peace Prize, December 10, 1994 (*ibid.* at 75); addressed Harvard University, October 24, 1995 (*ibid.*); meeting with United States President Bill Clinton, May 1, 1996 (*ibid.* at 76); addressed Oxford University, June 3, 1996 (*ibid.*); addressed Rice University at Houston, March 5, 1997 (*ibid.*); addressed Erasmus University of Rotterdam, with Dutch Prime Minister, March 30, 1998 (*ibid.* at 77); received honourary Ph.D. in business administration from Maastricht University in the Netherlands, August 31, 1999 (*ibid.* at 78); third meeting with Pope John Paul II, March 22, 2000 (*ibid.*).

Do these benefits provide evidence from which one may conclude that Palestinian terrorism has "worked"? A review of the chart discloses no obvious temporal correlation between terrorist acts and purported benefits. One might justly respond that this comment misses the point: no benefits whatsoever should have followed any terrorist acts. Certainly the stance of the United Nations and European leaders towards Palestinian terrorism is highly disquieting.[41] Nonetheless, it might be argued that the Palestinian people should have a recognized right to self-determination. International recognition of that right was achieved independently of terrorism, and despite terrorism. Another difficulty with Dershowitz's position is more practical. Arafat has benefitted personally from international attentions. The Palestinian people have received the benefits of high-level international declarations. How have these benefits concretely improved the living conditions of ordinary Palestinians? What benefits have people in the street seen? Do Palestinians now have a recognized independent State, in relatively peaceful co-existence with its Israeli neighbour? Notwithstanding the list of benefits Dershowitz has provided, one could reasonably argue that terrorism has not "worked" for the Palestinians.[42] On the basis of the evidence, Palestinian terrorism might seem a poor precedent.

Moreover, Dershowitz nowhere provides any evidence or argument supporting the purported link between Palestinian terrorism and al-Qaeda's attacks. The aims and objectives of al-Qaeda are not those of Palestinian terrorists — except making Jews targets.[43] The Palestinian terror has been — at least since the mid-1990s — confined to Israel and now lacks an international dimension. Both Palestinian terrorists and al-Qaeda have employed suicide bombers. The suicidal attack, though, is not a peculiarly Palestinian tactic. It is part of the common currency of terrorism and war. Dershowitz himself reminds us of the suicidal bravery of Samson.[44] Dershowitz leaves us to speculate about the causal link between Palestinian terrorism and al-Qaeda's attacks. The foundation for his inference seems to be no better than *post hoc ergo propter hoc.*

Finally, the title of Dershowitz's book would suggest that al-Qaeda's terrorism "worked." In one sense, it worked very well. Bin Laden and his henchmen engineered the deaths of thousands, destroyed millions of dollars of property, and caused consequential costs in further millions. The attacks seriously shook the consciousness of North Americans. I hope I do not speak only for myself in claiming that we have not been the same since September 11. In another sense, bin Laden's terrorism "worked" because he is perceived to have tweaked the nose of the great Satan United States — and to have gotten away with it. He therefore is an inspiration to some.[45] But on any objective, rational basis, does this mean that bin Laden's terrorism "worked"? His minions are hunted around the globe and some have been killed or apprehended. Afghanistan was attacked and his sponsor Taliban regime

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41 One of the strong undercurrents of the book is that the conduct of European leaders shows that anti-Semitism is not dead, but sublimated (Dershowitz, *supra* note 5 at 91). See P.E. Kirman, "Hatred against the Jews has become more insidious these days" *Edmonton Journal* (19 October 2003) D13 (a review of P. Chesler, *The New Anti-Semitism: the Current Crisis and What to do About It*); and M. Strauss, "Antiglobalism's Jewish Problem" (2003), online: *Foreign Policy* <www.foreignpolicy.com/story/ printer.php?storyID=13958>.

42 Friedman, *supra* note 1 at 19.

43 Dershowitz, *supra* note 5 at 94.

44 *Ibid.* at 6.

45 Friedman, *supra* note 1 at 70.

excised. Bin Laden has fled underground, like a rat into a hole. Is this how terrorism "works"? Would any rational member of an oppressed group look on bin Laden's actions and think that this sort of technique could possibly advance his or her cause? I do not know whether it is fair to judge that Palestinian terrorism has "worked." I do suggest that al-Qaeda's terrorism has not.

II. REBALANCING

Dershowitz sets up the case for re-balancing by devoting the second part of the book (chapter three) to a hypothetical case: how would an "amoral" society defend itself against terrorism? Strictly speaking, Dershowitz does not describe a purely "amoral" society, since an amoral society might be perfectly content to let some citizens perish at terrorist hands — what difference would it make? What Dershowitz has in mind is a society that seeks to defend its national integrity and the lives and property of at least some of its citizens but is not bound by constitutional constraints.[46] It is more selectively moral than amoral. In any event, Dershowitz outlines how this unconstrained State, in responding to terrorist threats, might engage in international action (for example, using "massive retaliation," "pre-emptive attacks," and "collective punishment") and limit domestic freedoms (for example, restrict freedom of the press, eliminate public trials, reduce the independence of the defence bar, abridge privacy and mobility, and allow torture as a means to extract information about past or prospective terrorist activities). The "amoral" State, free from legal shackles, could deal with terrorism with maximum effectiveness. It could "wipe out" terrorism.[47]

Dershowitz's amoral society might seem like a fantasy, a civil libertarian's fascist boogeyman, an imaginary zero point on the rights axis of a graph of efficiency and rights. Dershowitz's amoral society is not purely hypothetical, though. He does refer, for example to "tyrannical" regimes, such as the former Union of Soviet Socialist Republics.[48] One is put in mind of old claims about the safety of tourists in Red Square. People had no rights, but they were safe.[49] Tyranny has a deeper level of reality in Dershowitz's implicit social theory. Dershowitz places the "amoral" society — tyranny — and its efficiencies on one balance of his scale. On the other he places constitutional civil liberties.[50] Tyranny is a condition we could reach if we were to limit our rights and freedoms excessively, in the name of efficiency. By implication, tyranny is the natural state of the legislature and executive, from which we are preserved by court-maintained constitutional rules. Dershowitz's assumptions about efficiency and about the latent tyranny of the legislature and executive deserve scrutiny, as does his focus on State action generally.

A. EFFICIENCY

What evidence do we have for the proposition that an "amoral" society would combat terrorism more effectively than a constitutional democracy? History does not provide overwhelming evidence. Tyrannical states have often been sponsors of terrorists. Arguably,

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46 *Supra* note 5 at 106-107.
47 *Ibid.* at 3.
48 *Ibid.* at 106.
49 This suggests the other old claim that tourists were safe in Las Vegas when the mob controlled the town.
50 Dershowitz, *supra* note 5 at 210.

they have not been avoided as targets because of superior preventative technology, but because even terrorists do not usually bite the hands that feed them.

Consider what might seem at first glance a disconnected point: Amartya Sen has observed that "in the terrible history of famines in the world, no substantial famine has ever occurred in any independent and democratic country with a relatively free press."[51] With this in mind, one might wonder whether constitutional democracies might be *more effective* than tyrannies in combating terrorism. We should not simply assume that social protection is inversely proportional to rights recognition.

Dershowitz may be betraying a perspective based on representing particular criminal accuseds. This perspective is isolated and individualist. From this perspective, civil liberties may seem to collide with law enforcement interests in efficient information gathering, arrest, and prosecution. Constitutionally-protected rights and freedoms may be used to strike down legislation sought to be applied against an accused, to exclude evidence, or to stay charges. Dershowitz refers to the trial of Zacarias Moussaoui and FBI investigators' failure to obtain a warrant to search his laptop computer.[52] It is not clear, however, that the failure to pursue this particular lead was truly a consequence of legal rules, as opposed to FBI disinclinations to follow up, the FBI's lack of awareness or assimilation of other available information, and the FBI's devotion of insufficient resources to the investigation. When has any good investigator declined to pursue a lead, just because he or she lacks reasonable grounds for a warrant to be issued *today*? Regardless, assume that constitutional rules did block efficient investigation of Moussaoui, and that, without those rules, Moussaoui would have been arrested, the September 11 plot foiled, and thousands of lives saved. The legal rules, then, produced significant injury in this particular case (again, this is only an assumption; the case has not been made that the legal rules, as opposed to human error, were the real weakness in North America's defence).

From a broader, more systemic perspective that takes into account more than success or failure in a particular case, the relationship between civil liberties and efficiency is more complex and ambiguous. In the criminal process, civil liberties play more of a role in managing State action, in channelling it, and in directing it away from certain tactics, than in blocking policing. The constitution, one might say, helps shape the form of policing. The recognition of constitutionally-protected civil liberties has not induced a crisis in law enforcement. American and Canadian prisons have plenty of guests. Overall, one might be inclined to argue that our system is rather too efficient.

The notion of efficiency does not entail merely success in achieving a particular objective, such as putting all offenders in custody. If that were the only measure of efficiency, then the most efficient system would be to imprison everyone, since then all offenders (along with everyone else) would be caught. Efficiency refers to the relationship of benefits and costs. An efficient tactic is one that maximizes benefits while minimizing costs. With this explication of efficiency in mind, instead of focusing on the particular perpetrator, consider

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[51] A. Sen, "Democracy as a Universal Value" (1999) 10:3 Journal of Democracy 3 at 6-7, online: Journal of Democracy <www.muse.jhu.edu/demo/jod/10.3sen.html>.

[52] *Supra* note 5 at 110 and 244, n. 4.

the perspective of the ordinary citizen, or better, the perspective of the whole citizenry. Suppose that, over an extended period (not just in connection with a single investigation), the State were free from constitutional constraints on police powers. No assumption of State malevolence need be made. Indeed, the State could be assumed to act in the highest good faith and with every intention of bringing only the guilty to justice. The State, though, works through humans, and would therefore make mistakes. What would be the aggregate increase in individuals' undeserved misery caused by the State — over 10 years, 20 years, 50 years — as opposed to that experienced in a constitutional democracy? Comparing tragedies and playing numbers games seems pernicious. Nonetheless, viewed systemically, over the long term, it is at least not clear that the moral and social value of success in one or some small number of cases would exceed the moral and social costs of unlimited State power. It is likely that the costs of unfettered power in terms of undeserved human misery would be high, and we could not safely predict that the State would have a much better rate of catching the truly deserving than it does now. Again, the point is that we should not simply assume that a constitutionally-constrained regime would control crime less efficiently than an unconstrained regime.

Dershowitz's concern with Israel may play a role in his staging of his arguments. Suicide bombings and other attacks on Israelis by Palestinians occur frequently. Atrocities seem a weekly occurrence. Terrorists are found on the streets in relatively high numbers. Israel must function in a state of emergency, in expectation of armed aggression. In this context, some reduction of some civil liberties may be prudent. Moreover, less constitutionally constrained police actions are likely to yield relatively large numbers of arrests of true potential perpetrators and to disclose planned terrorist activities, simply because the "base rate" of terrorism is high.

In a time of emergency here, such as shortly after the September 11 attacks, some reduction of civil liberties may also have been prudent. We do not have the evidence to conclude, however, that we are living in a state of emergency akin to Israel. Absent evidence of emergency, we should not assume the rules appropriate to emergency.

B. THE STATE AS LATENT TYRANT

The view that, if unchecked, the legislature and executive will tend to tyranny is an entirely appropriate perspective for defence counsel in our adversary system. Indeed, this is the perspective that defence counsel should adopt. They should be highly suspicious of and sensitive to State abuses of power. Were I charged with an offence, I would want my counsel to have this perspective. This perspective leads to a privileging of civil liberties arguments and to the privileging of the view that the courts (with defence counsel) stand as the protectors of civil liberties. This perspective is valuable and has its place, but it may support a distorted model of how our system of governance actually works. The perspective tends to concentrate the law in the hands of lawyers and the courts. The executive appears essentially law-less. The legislature contributes legislation, but legislation must be validated or certified as true law by the courts. The rule of law, under this model, is rule by the courts (one might say that this view transforms the rule of law into the rule of lawyers).

Of course, each branch of government, each element of the separation of powers — legislature, judiciary, executive — has a different role to play in the actualization of the rule of law. Each of these elements, nevertheless shares more than support by tax dollars. Each is constituted by law and each is obligated to take as its standard of action the dictates of law. Each has a different set of legal jobs, but the law belongs to each equally — or better, each belongs to the law equally. More generally, the law belongs to all citizens equally or each of us belongs to the law equally. It is the standard for our actions, unless we are criminals. From this perspective, the rule of law is the distributed internal standard of the law inhering in all of us as individuals and in our institutions.

This perspective precludes a vision of the legislature and executive as essentially tyrannical. At their foundation, they are as shaped by law and as committed to law as the courts. If we perceive the State, in a system governed by the rule of law, as essentially law-abiding, that permits us to assert that we may, to a degree informed by actual experience, trust the State. For the most part, generally, its members can be trusted to follow the law, to try to do the right thing. If this general orientation were not the case, North American life as we know it would be impossible. We would indeed need to bear arms against the ravages of the State oppressor.[53] Talk of trust, though, does not always mean that our trust has been earned. As is the case when we trust other individuals, sometimes our trust is misplaced. Whether the members of the State meet their commitments in particular cases is an issue properly given over to the courts and to the scrutiny of counsel.

The point of talk of trust is this: It is not necessary to have a court-based solution for every social or political problem. At least in the first instance, if it makes sense for any public involvement respecting a problem at all, the response could be essayed without the prior approval of the courts.

I think that Dershowitz would go along with these thoughts for some distance, since his recommendations concerning executive action such as military retaliation against terrorists and concerning the national identity card presuppose a relatively benign State. This presupposition is inconsistent with, or at least is not fully explained by, Dershowitz's general civil libertarian orientation. In contrast, Dershowitz's "torture warrant" recommendation runs counter to the trust that may be due (*prima facie*) the executive. The theory behind Dershowitz's various recommendations therefore does not appear to be consistent.

C. INDIVIDUAL RESPONSIBILITY

Dershowitz may again betray his professional disposition by his virtually exclusive focus on State action — whether the action he discusses is legislative, executive, or judicial. Dershowitz does not discuss what we may do personally to reduce the risks of post-September 11 life. He does not tell us what we can do as individuals to respond to the

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[53] Actual experience is key. The State in many countries has been lawless. It has deserved no trust, but attracts instead righteous resistance. My empirical assumption is that, again, "by and large, for the most part, generally" the rule of law has a firm grip on members of our State institutions. My more theoretical assumption is that, despite our too-frequent error, evil is not a necessary tendency of humanity; power (political or otherwise) does not necessarily corrupt — although it may, and we must therefore be vigilant.

challenge of terrorism. He assumes that the State will do all of the responding for us. For Dershowitz, all solutions must be legal solutions.

I grant that neither you nor I are in a position to mount an armed attack against bin Laden or any sponsor regime. But you and I may well be in a position to respond to terrorists armed with box cutters who want to steer our airplane into a building. Again, Dershowitz lacks a systemic vision. The State plays a role in reducing terrorist risks, but so do we as individuals. We might have hoped that Dershowitz could at least gesture towards our proper roles as individuals in responding to the challenge of terrorism.

III. INTERNATIONAL POLICIES

Dershowitz's basic argument respecting international policies is that terrorists should not be appeased. Instead of encouraging terrorists by extending benefits to them after attacks, no benefits should follow. Harsh retaliation should be the response to terrorism.[54] Dershowitz therefore condemns those who seek to justify terrorist acts by reference to "root causes," and who respond to terrorist acts with pleas to address these causes. Dershowitz points out that many groups suffer under adverse circumstances, but do not resort to terrorism. Those groups that do resort to terrorism should be penalized. Dershowitz does not assert that their legitimate concerns should never be dealt with, as if terrorism worked a sort of forfeiture. Their concerns, however, should be addressed according to independent criteria, at an appropriate time, with (perhaps) remedies discounted because of terrorism.[55]

The "no incentives" aspect of Dershowitz's recommendation is straightforward. What of the disincentives? Dershowitz discusses some military options, which include collective punishment and targeted assassination. He does not address the general conditions that must be satisfied for military action to be pursued in preference to juridical action. These conditions are very important in judging the legitimacy of "collective punishment" and "targeted assassination." I might contribute some observations.

We should begin with a presumption in favour of our ordinary criminal processes. These would include appropriate international cooperation, such as through extradition. This presumption is justified because it reduces the risks that military action will harm innocent individuals who are direct targets and that it will harm others who are not direct targets. It also reduces the risk that military action will provide an unwelcome precedent for our own citizens or for others. If our military adventures "work," others may be prompted to try the same tactics. If others do try the same tactics and we object, they could retort that they were only doing what we have done before. Dershowitz, somewhat inconsistently, ignores these problems of precedent. His thesis, in part, is that potential terrorists will be motivated by the success of terrorist acts. But equally, potential terrorists could be motivated by the success of States' military interventions, particularly if those involve collective punishment and targeted assassination. We have to take care that military solutions do not legitimate terrorist responses.

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54 Dershowitz, *supra* note 5 at 166.

55 *Ibid.* at 26.

The "presumption of normal process" may be rebutted only if strict criteria are met.[56]

First, the nation must face a severe and extraordinary risk or threat. The extraordinary threat would entail death or serious injury to innocent individuals or large-scale property damage and damage to infrastructure and institutions. The evidence should permit the inference that aggression is directed at the State itself, not only at some individuals or institutions within the State. The risk is borne by the collectivity of the State, by the people, their property, and their institutions as a whole.

Second, normal process must be inadequate to reduce the risk. To preserve the State from the actualization of the risk, a resort to extraordinary processes must be necessary. Practically, satisfaction of this criterion requires evidence that we cannot arrest, transport, detain, charge, prosecute, sentence, and execute sentence against the individual or individuals who pose the risk, either by ourselves or with the formal or informal cooperation of our allies and other States. The ordinary power imbalance, which permits the State to subject the individual to compulsory process, is absent.

Third, the means adopted to reduce or eliminate the risk must have a reasonable chance of success. This generally requires that the target of the means be the individuals who actually pose the risk. Directing operations at others would be pointless. Furthermore, the means adopted should minimize the use of force. That is, the means should be carefully focused and the risks to others posed by the means should be as minimal as is reasonably possible.

Fourth, the expected benefits of an operation must be balanced against the foreseeable costs of the operation. Considerations here include whether the operation would actually reduce risks by eliminating a critical player or link in a terrorist conspiracy, or would amount to nothing more than an inconvenience; or whether the operation would incite a local population to increased hostility or to increased support for the terrorists.

Fifth, the process for authorizing the military operations should be appropriate. Decisions to authorize extraordinary tactics should be made by the head of the executive, the commander-in-chief of the military. Some express delegation to subordinate officials could be permissible to deal with rapidly developing situations. While the facts are not being determined in a court of law, there should still be some substantial showing, based on convincing evidence, to satisfy the decision-maker that the criteria referred to above have been met.

Sixth, in a democracy, there must be provision for openness, transparency, and public accountability. Dershowitz is right that State officials should not engage in any conduct that they would fear to have publicly disclosed.[57] The prospect of public disclosure is an important check on State action. The point of talk of trust is that this requirement should not be translated into a need for a court order to conduct military operations. We should trust the

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[56] I shall not discuss the relationship of these conditions to international law or whether any of Dershowitz's proposed measures would run contrary to international law.

[57] *Ibid.* at 152.

executive and its professionals to do the right thing. At an appropriate time after the operations have been completed, there should be a requirement to make the operations public, so that the people (not first and foremost the courts) may judge the legitimacy of the operations. Disclosure could be made, for example, through press releases or in reports to the legislature.

One might object that this little list of conditions makes no mention of blameworthiness or "desert" — that is, it does not mention whether those who are the targets of military operations "deserve" to be so targeted. "Desert" is a key concept in our litigation system. In criminal cases, no person can be formally punished unless the person has first been found guilty and thus to deserve punishment. Moreover, a person should not receive a particular punishment unless the person deserves that sort of punishment. If, however, the context is not litigation, the notion of desert loses its grip. If an individual must defend himself or herself and can only do so by resorting to deadly force, the issue is whether there were reasonable grounds to conclude that the assailant posed a relevant threat, not whether the assailant "deserved" to die. Similarly, if a country is forced to resort to deadly force, the issue is whether the targets pose the relevant threat, not whether they meet the standards for criminal liability. Self-defence turns on risk assessments and risk-reduction assessments, not on desert assessments.

More generally, one might object that this list of conditions makes no reference to moral side-constraints. Are there some things that we would simply not do to defend ourselves? Am I suggesting that, in self defence, anything goes?

Dershowitz does provide some ammunition for responding to these questions. Unfortunately, the material is confined to the chapter respecting torture. Dershowitz does not provide a discussion of principle that rises above this particular context. (It may be that Dershowitz's theoretical failure is due, again, to his litigation myopia. He may assume that outside the realm of the domestic legal system we are in the realm of the lawless or amoral, so there would be no need to provide an account of moral limitations.) Dershowitz refers to two contrary positions. One is a sort of moral absolutist position that would prohibit conduct which (very generally) treats individuals as means and not ends — that is, conduct that does not respect individuals' dignity and autonomy. The other is a consequentialist position that holds conduct to be justified if it promotes the greatest good for the greatest number.[58] This sort of position would not be troubled by the violation of norms, so long as the social benefits of doing so demonstrably exceeded the costs.[59] Dershowitz refers to an alternative approach advanced by Michael Walzer.[60] Walzer argued (in particular) that torture is morally wrong. But, in a "ticking bomb"[61] case, not resorting to torture is also morally wrong. Numbers do count morally. The choice is not between moral and immoral action — that is, moral/not torturing and immoral/torturing; or immoral/not torturing, moral/torturing. Instead, the choice

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58 *Ibid.* at 149-50, 142-48.

59 Dershowitz does discuss "rule utilitarianism," which would be troubled by the violation of norms (*ibid.* at 146). I will avoid the "act utilitarianism"/"rule utilitarianism"/"absolutist rejoinder" debate here.

60 *Ibid.* at 140. See M. Walzer, "Political Action: The Problem of Dirty Hands" (1973) 2 Phil. & Pub. Affairs 160.

61 See Part IV.B, below, on "ticking bomb" cases.

is between two types of moral wrong. To save many, we may be forced to do wrong. Our concern to promote social good may require us to violate our norms.

Walzer and Dershowitz's arguments could have been buttressed by distinctions that have been drawn in and about the criminal law, particularly the distinctions between conduct that is not illegal; conduct that is *prima facie* illegal but is justified (was right in the circumstances), conduct that is *prima facie* illegal and not justified (was not right) but for which the perpetrator may be excused and not held legally blameworthy; and conduct that is illegal and neither justified nor excused but for which the perpetrator receives no or a very lenient punishment. One way of expressing the Dershowitz/Walzer view is that, in some circumstances, measures such as torture may not be right (not "justified"), but the actor may be excused.[62] Sometimes circumstances demand that we do what appears, on its face, to be wrong.

With this background in hand, we can turn to Dershowitz's discussions of "collective punishment" and "targeted assassination."

A. COLLECTIVE PUNISHMENT

Dershowitz advocates "collective punishment" — that is, injuring individuals or destroying the property of individuals who were not terrorists, but who had some other relevant connection to terrorists.[63] The basic idea is this: While we may not be able to apprehend terrorists themselves, either because they have intentionally killed themselves or because they have been able to go "underground," their friends, families, and communities can be harmed. In other words, if deterrence cannot be achieved through the imposition of punishment on terrorists themselves, deterrence may be achieved indirectly through the imposition of punishment on others. Because of the threat of attack, these others may influence terrorists to refrain from criminal conduct or may cease their "support" activities (which should at least impair the capacities of future terrorists).[64]

Dershowitz adds an interesting procedural step to the collective punishment process. He suggests that reprisals should be made predictable through "notice."[65] A State should

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62 This is the result if a defence of necessity is successful in a criminal trial. The elements of this defence in Canada are that there was an imminent peril or danger, there was no reasonable alternative to the illegal conduct, and there was a proportionality between the harm inflicted and the harm avoided (see *R. v. Latimer*, [2001] 1 S.C.R. 3; and *R. v. Perka*, [1984] 2 S.C.R. 232). A criminal accused need only raise a reasonable doubt about whether the circumstances satisfied the necessity conditions. Dershowitz does refer to the availability of the necessity defence, but he does not analyze the defence in terms of its applicability to Walzer's "two wrongs" approach or in terms of the refinements in moral assessment that the defence suggests (Dershowitz, *supra* note 5 at 124-25, 135).

63 "Collective punishment" should be distinguished from the problem of "collateral damage." The problem of "collateral damage" or risk of injury to innocent third parties is present whenever any armed intervention occurs — whether the intervention is by a SWAT team, occurs in the course of a high-speed vehicular pursuit, or is the result of a cruise missile or helicopter gunship attack. In contrast, collective punishment involves a direct attack on third parties. The injury is not merely "collateral" to the pursuit of another objective. From the standpoint of injured civilians, this distinction may seem valueless. The distinction may play a role in moral analysis, however.

64 Dershowitz, *supra* note 5 at 172.

65 *Ibid.* at 178.

announce consequences in advance. If a terrorist attack occurs, the specified consequences for the community will result. In this way, it will be made clear that the destruction is the fault of the terrorists.[66] Dershowitz also qualifies the collective punishment tactic by requiring that consequences to a community be proportional to its complicity.[67]

Resort to collective punishment must assume that terrorists pose an extraordinary risk and that the risk cannot be reasonably reduced through normal processes. If there were evidence that community members had actually aided or abetted terrorists, by voluntarily providing food, shelter, or financial support, these individuals would be parties to terrorism. In this sort of case, any lingering concerns about desert would be satisfied, and we would feel less squeamish about targeting the community members.

But this is the easy case. The harder case is whether collective punishment can be resorted to if community members are not parties to terrorist offences. Terrorists may simply happen to occupy their community. Any cooperation may have been coerced. Those who are targeted for collective punishment (for example, by the destruction of their homes) may have had nothing to do with the terrorists.

One response to the harder case turns to the evidence. Are there reasonable grounds for believing that an attack on the community, regardless of whether community members are parties to terrorist crimes, will reduce the risk of further terrorist attacks? If the community is attacked, will pressure be put on the terrorists to desist? If the community is attacked, will others become reluctant to provide support to the terrorists? Unless the destruction would have a strong link to the reduction of the terrorist risk, it could not be justified. In circumstances in which community members are not parties to terrorist activities, it is doubtful whether a strong rational case for attacking them could be advanced.

Moreover, evidence of the likely costs of the operation should be assessed. Collective punishment is as likely to increase support for terrorism as it is to diminish it. People may indeed fear having their homes or property destroyed in collective punishment actions. But those whose homes or property are destroyed are likely to harbour very strong resentments — and those who in fact had absolutely nothing to do with terrorists are likely to be as resentful as those who had secretly supported terrorists. Collective punishment could well be a terrorist recruiting tool.

Another response to the harder case turns on our moral side-constraints. Suppose that an official were taken hostage by terrorists. Suppose that we have evidence from which we could predict that if we were to kidnap a member of one of the terrorists' families — an individual who is completely innocent — and if we were to prove to the terrorists that we would harm this individual, our official would be released. Would we use this form of collective punishment? Would we use the innocent as a tool against the unreachable guilty? And if we were prepared to sacrifice the innocent, just how far would we be prepared to go? Perhaps this question could only be answered if we knew just what was at stake. If the stakes were

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[66] *Ibid.* at 177.
[67] *Ibid.* at 176.

high enough, if the evidence were clear enough, then we might have no choice but to do the wrong thing. Again, we would not be doing right. We would be doing what was necessary.

These reflections cast some doubt on whether collective punishment might ever be practically or morally appropriate. In any event, the collective punishment tactic has less relevance in the case of al-Qaeda than in the case of Palestinian terrorism. Al-Qaeda operatives have no communities. They live in Saudi Arabia, in Afghanistan, in Bali, in Germany, in the United States, and perhaps even in Canada. What community could be collectively punished? How could punishment of a community in one country (and how would it be selected?) be thought to have an effect on minimizing al-Qaeda's activities? A further problem with al-Qaeda operatives is that it appears they have no particular concern with their own families or communities. The sacrifice of family members would not be a disincentive. As Friedman writes, "they hate us more than they love their own families."[68]

Once again, Dershowitz's approach seems to be tailored more for Israel and the Palestinians than for the fight against al-Qaeda.

B. TARGETED ASSASSINATIONS

Individuals may legally kill in self defence (whether killing in self defence is permissible as a matter of personal morality and whether one should turn the other cheek, at least when the cheek is one's own, is another matter). I believe that Dershowitz is right that, in appropriate circumstances, targeted assassination is a defensible State tactic.[69]

Dershowitz's discussion is not detailed.[70] The conditions described above would have to be satisfied. Some particular concerns are as follows:

The target, personally, would have to pose or at least make a substantial contribution to the extraordinary threat to the State. Of course, the evidence must establish that the target is the person who in fact is the source of the threat (that is, the identity of the perpetrator must be established, so that the wrong person is not targeted). The threat must be of the right kind. Plenty of off-shore criminals threaten North America in a variety of ways, ranging from teenage computer hackers and virus-designers, to drug dealers, to money launderers, to contract killers. Despite their threats, there seems to be no inclination (except perhaps in Tom Clancy novels[71]) to task special operations units with their neutralization. Dershowitz raises the issue of whether targeted assassination would be an appropriate response to a past offence, as opposed to a present threat. He states, quite properly, that the acceptability of targeting for past offences is more problematic than targeting for present risks.[72] Targeting for past offences may bring a certain satisfaction. This tactic, however, appears to be an attempt to deal with issues of desert and punishment that are properly the subject of domestic criminal procedures. I suggest that the better view is that "past offence" targeting cannot be justified on the criteria I have reviewed. Of course, evidence that a person has engaged in

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68 Friedman, *supra* note 1 at 83.

69 Dershowitz, *supra* note 5 at 183.

70 See *ibid.* at 184.

71 See Tom Clancy, *Clear and Present Danger* (New York: Berkley Books, 1990).

72 Dershowitz, *supra* note 5 at 120, 185.

terrorist conduct in the past could, along with other evidence, support the inference that the person will engage in terrorist conduct in the future. If a person is a continuing risk, this may be a factor tending to support the taking of extraordinary steps to diminish that risk.

The target must not be amenable to normal processing. If the target can be apprehended (like an ordinary murderer (even serial killer) or domestic terrorist (such as Timothy McVeigh)), then the procedures we have established for dealing with criminals among us should be employed. An international terrorist, however, may lie outside of our domestic criminal jurisdiction, outside of our extradition arrangements, or simply outside the reach of any practical arrest, detention, transportation, and confinement until trial mechanisms. Even if operators are able to get close enough to a target to kill him or her, this does not entail that the operators can be exfiltrated safely if they must bring the target with them. Part of the analysis respecting the types of measures that are appropriate to reduce risk includes an assessment of the risk posed by the measures to our own people.

The means used to neutralize the target must minimize risks to non-target populations. This "minimization" criterion suggests a presumption in favour of special operations forces deployment. Individuals and personal weapons tend to be more precise than bombs lofted from afar. Even if smart bombs (such as cruise missiles) were to be employed, special operations forces on the ground may be required to target the munitions accurately.[73]

IV. DOMESTIC POLICIES

Some of Dershowitz's recommendations are innocuous.[74] Dershowitz would not tamper with some types of institutions — the free press, trial by jury,[75] the right to counsel and the right to make full answer and defence through counsel, and professors' and students' academic freedom.[76] (An uncharitable reader might accuse Dershowitz of special pleading. He is not disposed to limit the types of institutions that are his bread and butter.) I will examine two of Dershowitz's more controversial recommendations, concerning national identification cards and the use of strong measures (like torture) to extract information respecting terrorist attacks.

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73 "Surgical" special forces operations, like medical surgery, require extensive training and special equipment. Like medical surgery, these operations are resource-intensive. If countries are interested in minimizing civilian casualties, they should be prepared to fund their special forces adequately.

74 For example, his plea for better airport security (*ibid.* at 206-207).

75 Dershowitz makes an interesting argument in favour of the jury system. Ordinarily, the jury system is justified on the basis that it brings the "touchstone of common sense" into the court room. Lay people are perfectly capable of deciding facts and applying the law to the facts, and we rely on their common sense to ensure just dispositions of cases (*R. v. Corbett*, [1988] 1 S.C.R. 670). Dershowitz defends trial by jury on institutional independence grounds. He intimates (rather than argues) that judges are subject to political (or other?) influence. Juries, however, cannot be politically influenced. They are transitory decision-making entities, and their members return to the "anonymity" of private life once jury duty is completed. Juries may make mistakes, but not because of political pressure (Dershowitz, *supra* note 5 at 218).

76 See *ibid.* at 111, 211, 219-20 (right to counsel); 210-11 (free press); and 211 ("critical professoriate and student body").

A. NATIONAL IDENTIFICATION CARDS

Dershowitz recommends the use of national identity cards. These would be used to manage populations; they would permit the accurate identification of card-holders.[77] A single hard-to-forge card could be used to ascertain identity at, for example airline check-ins. In Dershowitz's view, a single identity card is not problematic from the standpoint of the card's contents, since (almost) all of the information that would be available on the card is already made available through other forms of card identification. Dershowitz's card would have "five elements: the bearer's name, address, Social Security number, and photograph, and a finger or retinal print matching a chip in the card."[78] He does not explore the combination of other information on such cards (for example, credit card or debit card information, health information or health insurance information). Dershowitz is "hardpressed" to think of any civil libertarian arguments against this "simple card."[79] According to Dershowitz, the real issues do not concern the cards themselves, but the circumstances in which authorities may demand production of the cards (that is, the real issues are legal issues about reasonable grounds and reasonable demands). Dershowitz quotes Robert Kuttner: "Conservatives and liberals both distrust a national ID card. Yet the data that would be contained in an identity card already reposes in countless private credit files and public Social Security, passport, and motor vehicle records. It would be far more rational to have a national ID card, but then strictly limit its use."[80] Because of his constitutional rights focus, Dershowitz does not address several problems with national identification cards — even if it is assumed that such cards would not, by themselves, run afoul of constitutionally-protected privacy interests.

The single national identity card could create a false assurance of reliability. If experience is any indication, a national identity card system would be beset with practical difficulties — at least as many as beset our current identity card systems. Sixteen-year olds with computers and colour printers would work out ways to forge the cards. Some corrupt governmental employees would sell materials used to produce the cards. Poor security arrangements at governmental offices would permit thieves to make off with card-making materials.[81] Identity cards would be stolen from individuals. If, for example, a credit card number is stolen, an individual must deal with that loss. However, if a card containing far more information were stolen, the individual could have to deal with far more extensive life disruptions. If biometric information were stored on the cards, that information could doubtless also be used by thieves. "Identity theft" might stretch to theft of genetic identity.

A national identity card system would also clash with North American cultural values. It may be that all information that would be expressed on a single card would be information that is already expressed on a number of different cards. The distribution of the information on different cards is useful; it allows us to control the nature of information passed on to particular institutions. The national identity card diminishes our control. It would force us to

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77 *Ibid.* at 201.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.* at 205, citing "Privacy and National ID Cards" *Boston Globe* (1 May 2002) *ibid.* at 259 fn. 33.

81 See R. Fife, "'Biggest Loss' of Personal Information in Canada" *Edmonton Journal* (30 September, 2003) A3, respecting the theft of computers containing personal information from Revenue Canada offices in Laval, Quebec.

disclose more about ourselves than we might want. It would also force us to disclose more than institutions might need. We are currently reforming the legal rules governing businesses' collection of personal information about individuals.[82] Federal and provincial legislation already restricts public bodies' rights to collect information.[83] Dershowitz's identity card suggestions run counter to the direction of national and international developments in privacy protection.

Part of the difficulty with a national identification card lies in the area of symbolism. Very generally, identification is properly demanded in circumstances in which there is a likelihood that we are not entitled to do what we're trying to do. For example, if we seek to enter a secure or restricted area, we are asked for identification because some people are not permitted to enter that area. Only approved individuals are. It must be established that we fall on the approved list. Moreover, some particular identified social interests are promoted through the requirement to provide identification —for example, keeping unauthorized individuals from accessing sensitive information found in the restricted area, keeping unauthorized individuals from operating motor vehicles, and keeping unauthorized individuals from charging videos to our account. The use of different identification cards is consistent with those cards' respective support of different interests. The national identification card serves no specific identified social interest. The card suggests that public areas like the street are, in reality, restricted areas, on which only authorized individuals may pass. At any moment, our entitlement to walk the streets could be challenged. Furthermore, the cards suggest that only those authorized to be in public places would be entitled to pass there. The cards suggest a government registry of approved individuals — those not on the approved list lack the privilege to move about in public. The mere requirement to hold a national identification card could change our consciousness of public space. We could lose our sense of public freedom. To use Dershowitz's phrase, we could lose a significant part of the "feel of freedom."[84] Dershowitz does not discuss the consistency of national identification cards with the "feel of freedom."

B. TORTURE

Doubtless the most notorious and disturbing of Dershowitz's recommendations is his advocacy of "torture warrants."[85] Dershowitz is concerned with "ticking bomb" cases — that is, cases in which there are reasonable grounds to believe that an individual possesses information relevant to a highly significant imminent risk to a significant number of individuals. The disclosure of that information to the authorities would enable them to reduce

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82 See Alberta's Bill 44, *Personal Information Protection Act*, 3rd Sess., 25th Parl.

83 See *e.g.* the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; and the *Privacy Act*, R.S.C. 1985, c. P-21.

84 *Ibid.* at 126-30. The phrase was suggested to Dershowitz by Harvey Silvergate (*ibid.* at 246 fn. 25). Dershowitz was recently paid $36,000 plus expenses to speak at a federal government-sponsored forum on biometrics about his national identification card proposals: Campbell Clark, "Coderre accused of bias over national identity card plan" *The Globe and Mail* (7 October 2003) A13; and Citizenship and Immigration Canada, "Minister Announces Forum on Document Integrity and Biometrics," News Release (3 October 2003), online: Citizenship and Immigration <www.cic.gc.ca/english/press/03/0338-pre.html>.

85 Dershowitz, *ibid.* at 141.

that risk substantially. No other means of obtaining the information are available. In these sorts of cases, the use of physical or psychological strong measures or pressure tactics to force disclosure from the information-bearing individual is, according to Dershowitz, morally permissible. Dershowitz argues that the mechanism that should be employed to regulate these tactics ought to be juridical. Pressure tactics should be permitted only if a judge finds that the grounds are satisfied and the judge is prepared to issue a warrant authorizing specified measures. Dershowitz's fear is that if juridical procedures are not employed, authorities will in fact use strong measures, but their activities will remain invisible and unregulated. The uses of torture will multiply in the dark. In Dershowitz's view, juridical regulation is supported by the need for open, transparent, public, and accountable uses of strong measures.[86]

As I indicated above, Dershowitz does refer to the moral complexities of arguments in support of tactics such as torture. Assume, for the sake of Dershowitz's argument, that torture could be morally defended in some extreme circumstances. Many areas of Dershowitz's position require elaboration: What types of risks would permit torture? (risks of death or severe personal injury? severe property damage?[87]) How many individuals must be at risk? (would one be enough? if not, how many more?) What sort of information must a person possess to be subjected to torture? (knowledge of a plan? knowledge of financial support? knowledge of the whereabouts of a potential perpetrator?) What types of evidence could be relied on? (would hearsay suffice?) What standard of proof would have to be satisfied? (only proof on a balance of probabilities? proof beyond a reasonable doubt?) What sorts of strong measures could be permitted? (Dershowitz's sterile needle under the fingernails?[88] psychological disorientation? shaking? suffocation? near drowning? electrical stimulation?) How could information gathered from torture be used? (Dershowitz is right that the information could not be used against the subject in his or her own prosecution,[89] but what of the prosecution of others?)

Again, assume for the sake of Dershowitz's argument that these "details"[90] could be acceptably worked out. For Dershowitz, the officials who ought to decide whether torture should be permitted are judges, pursuant to a legal mechanism. Here, I think, we see Dershowitz's litigation myopia at work. A mechanism is required to regulate torture; the mechanism must be juridical.

An argument may be made that "torture warrants" and their procedures are not legally possible, in that such creatures would be inconsistent with the rule of law as it is administered through our courts. Torture violates the legal principle of the presumption of innocence. The authorities must believe that the subject of torture is hiding some guilty information, which they must extract. It is precisely because the authorities do not know what this information is — and even whether it actually exists — that they must resort to torture. Torture (very obviously) violates the legal principle against self-incrimination, the principle that individuals

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86 *Ibid.* at 152, 158.

87 Dershowitz would confine the risks to those of "ticking bomb" situations (*ibid.* at 141).

88 *Ibid.* at 148.

89 *Ibid.* at 135.

90 Clearly, without a resolution of these issues, Dershowitz's torture warrants could never be implemented in practice.

should be free to choose whether or not to disclose information to the authorities.[91] Torture is the paradigm case of conscription of the individual against himself or herself. Torture divides the individual. It pits the pain of the physical body or pain of the psyche against the will and knowledge of the individual. It hopes to use the body and the mind to break the spirit. Furthermore, underlying both legal principles is our commitment to the inherent dignity of the individual. Torture violates this dignity by treating individuals not as ends in themselves, not as persons with choice and autonomy, but as means to the disclosure of information. To this extent, torture violates the principles of fundamental justice on which at least our criminal justice system is founded.

One might go on to argue that these principles are not merely products of our legal system, not merely contingent aspects of the North American version of legality. Individual dignity and autonomy may be constitutive elements of the rule of law itself. This is the intuition behind the social contractarian tradition. The law does not exist naturally. Neither is it merely imposed on populations. The law is both derived and draws its authority from the consent of governed. The authority of the law is derived from the equal "auto-nomy", the personal law-establishing authority, of each individual subject to the law. At least as legal subjects, we each have this radical equality, this radical authority; we are each, at least as legal subjects, due respect and recognition. Without respect for individuals, we may have effective tyranny — but we will not have the rule of law. As Dershowitz notes, there have been many legal regimes (including old England) that have permitted torture.[92] This *de facto* correlation of torture and law obscures the crucial issue of whether those regimes were illegal just insofar as they did permit torture.

Torture runs precisely contrary to the respect and dignity due to the tortured subject. He or she has no dignity, and is not respected. Torture ignores humanity, and is visited on mere material objects from which torturers seek to extract information. Torture is the victory of force over the person-object. It is inherently anti-legal.

Of course, the contractarian intuition and the claims based upon it require significant unpacking to be convincing. The contractarian intuition, however, is the more-or-less explicit foundation of the American republic. We might have expected Dershowitz to attend to at least the dissonance between the notion of legality and the availability of torture.

I have, nonetheless, conceded above that Dershowitz is right that torture may be excused in some circumstances. Do my comments about the rule of law render torture a political impossibility? I suggest that my comments about the rule of law prevent the legal system — the legislatures that create the laws and the judges that apply the laws — from establishing torture procedures. The executive, which retains our social instrumentalities of violence, is the proper branch of government to determine whether strong measures are warranted in particular cases.[93] I do not mean that determinations by the executive should be "law-less"

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91 See *e.g. R. v. Hebert*, [1990] 2 S.C.R. 151, McLachlin J., as she then was.

92 Dershowitz, *supra* note 5 at 156.

93 I have no doubt that right now, respecting crimes both great and small, strong extra-legal measures are employed by members of the executive. Some of these measures are tolerable. Others are not. What are we to do? The paradox of the "ticking bomb" cases is that we seem forced to make rules where rules do not apply, to regulate the unique and extraordinary, to make legal what must be illegal. Could we

in the sense of being without rules. Rules should indeed be established (if they can be established) to set out the circumstances in which strong measures are warranted, the types of measures that could be warranted, the evidence required to establish the need for such measures, the decision matrix indicating the members of the executive that have the authority (depending, for example, on time constraints) to make decisions, and the nature of public disclosure mechanisms. More importantly, I do not mean that determinations by the executive do not fall under the scrutiny of the rule of law. There are many ways in which executive decisions to resort to strong measures could be reviewed —for example, in the course of litigation against subjects of torture or (alleged) co-conspirators; in civil litigation against the executive; in public complaints procedures against the executive; in legislative committee investigations of the executive. If members of the executive resort to "strong measures," they should be held accountable. The executive must always be compellable to establish that it warrants our trust.

Whatever the merits of my suggestions, the key point is that if strong measures may be required, the solutions to the problems of employing these measures must be drawn from our political system as a whole (which does include the judiciary); but the solutions do not lie with the judiciary alone. A better approach to problems of torture lies beyond Dershowitz's focus on the courts.

V. CONCLUSION

Dershowitz raises some serious issues about responses to terrorism and the setting of appropriate limits for responses to terrorism. Regrettably, his discussions of the issues do not rise to their seriousness. While there is a need to act now against terrorism and to avoid looping disengaged debate, if our policies are to have a hope of success, particularly if our policies are to restrict any of our long-standing civil liberties, we had better develop the best case we can before moving forward. While Dershowitz may have produced a useful first memorandum, his book is a long way from being a convincing final argument.

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make a law that is, in effect, not a law? In circumstances of necessity, like those of the "ticking bomb" case, we seem pressed beyond the limits of law.