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## Article

### Justice: When Do We Decide?

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*Judicial decisions, legal analysis, and theories of justice often depend on when a decision is made: ex ante versus ex post. Does justice depend on timing? If so what is at stake? These questions became particularly important in the recent debate over the use of torture in interrogations. While some argue that torture should be regulated ex ante, before a particular case arises, others suggest that there should be a complete prohibition on torture ex ante but if the use of torture becomes necessary in a particular case, its employment should be excused after the fact through a necessity defense or other form of public debate. This Article examines the stakes and benefits of ex ante and ex post approaches toward the issue of torture as part of a general problem in law. The Article connects the ex ante and ex post distinction in torture to examples from other areas of law which raise similar difficulties, such as contracts and civil procedure. The Article further draws on legal theory on the ex ante and ex post distinction, from law and economics to the rules versus standards debate, and evaluates its appropriateness for resolving the choice between the ex ante and ex post perspectives in the issue of torture. The Article concludes that the choice between the ex ante and ex post perspectives in torture, as in other areas of law, brings about three dilemmas—normative, institutional, and personal—which should be addressed under one framework. The Article offers tools to manage these dilemmas and applies these suggestions to the issue of torture.*

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# Justice: When Do We Decide?

Yael Aridor Bar-Ilan\*

## I. INTRODUCTION

Judicial decisions, legal analysis and theories of justice often depend on when a decision is made, *ex ante* or *ex post*. Does justice depend on when we decide? If so, what is at stake?

Recently, these questions became particularly important against the background of the issue of torture under the ticking bomb circumstances.<sup>1</sup> Many people oppose any form of torture, whether under terms of necessity or not.<sup>2</sup> They point out that allowing torture in one specific case will lead to moral rootlessness toward human dignity and human rights.<sup>3</sup> However, if asked whether torture should be employed if it will prevent a ticking bomb from exploding and killing 1000 innocent people, few will nonetheless also agree to create an exception. Some suggest that this

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<sup>1</sup> A United Nations (U.N.) convention bans torture and binds signatories to prevent "cruel, inhuman, or degrading treatment," although these are not defined. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), available at <http://www.un.org/documents/ga/res/39/a39r046.htm>. For the distinction between "torture" and "cruel and inhuman" treatment, see Malcolm D. Evans, *Getting to Grips With Torture*, 51 INT'L & COMP. L.Q. 365, 371-72 (2002); John T. Parry, *What is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 238 (2003). For the practical implications of this distinction for U.S. treatment of its detainees, see Martha Minow, *What is the Greatest Evil?*, 118 HARV. L. REV. 2134, 2159 n.93 (2005) (reviewing MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004)). The analysis undertaken in this Article applies beyond "torture" to other coercive methods of interrogations and will refer to both coercive methods of interrogations and torture under the heading of "torture."

<sup>2</sup> See Ariel Dorfman, *Foreword*, in *TORTURE: A COLLECTION* 3, 17 (Sanford Levinson ed., 2004); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1714-15 (2005). For a survey of positions supporting a complete prohibition on torture, see, for example, Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004).

<sup>3</sup> See *supra* note 86 and accompanying text.

“ticking bomb” exception should be allowed ex ante through regulation.<sup>4</sup> Others suggest that law should prohibit torture ex ante, but if the particular case arises then we should consider whether it was permissible to use torture after it was already employed, either through a necessity defense or a public debate held afterwards.<sup>5</sup> This debate repeats itself also with respect to coercive methods of interrogation, which are not formally considered “torture.”<sup>6</sup> As we decide what type of interrogation methods should be allowed, it becomes increasingly important to examine the merits and challenges presented by ex ante and ex post approaches toward the issue of torture and coercive interrogations methods more generally. What are the stakes in following ex ante and ex post perspectives on these issues? Who should decide between the two perspectives? What tools can law offer decisionmakers in making this choice?

The issue of torture is only one example for the potential choice between ex ante and ex post perspectives toward legal issues. Once this choice is realized in torture, it becomes visible in many other areas of law, from contracts to civil procedure and legal transitions.<sup>7</sup> While the ex ante and ex post distinction has already been addressed by legal theory sporadically in these different areas of law, this Article offers the first attempt to connect the different examples and theoretical approaches under one framework in order to examine the ex ante and ex post distinction in torture.

Fortunately, much has already been written on the ex ante and ex post distinction in various areas of law.<sup>8</sup> Legal theory usually takes one of two

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<sup>4</sup> See, e.g., ALAN DERSHOWITZ, WHY TERRORISM WORKS 158–61 (2002) (suggesting a torture warrant system); PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 23–25 (2004) (suggesting that coercive interrogations be used under strict procedural safeguards and that exceptions from these guidelines can only be authorized by the President of the United States on a finding of immediate and urgent need).

<sup>5</sup> See, e.g., Gross, *supra* note 2, at 1553 (offering an absolute ban ex ante but an official disobedience model ex post); Richard Posner, *Torture, Terrorism, and Interrogation*, in TORTURE: A COLLECTION, *supra* note 2, at 297–98 (supporting political absolution for the use of torture after the fact); see also John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 760–61 (2002) (supporting a necessity defense as an ex post excuse rather than an ex ante source of authorization).

<sup>6</sup> The United States has allowed the use of some means of interrogation that have been termed tantamount to torture against its detainees outside the United States. See 18 U.S.C.A. § 2340A (West Supp. 2004).

On coercive interrogation and whether it should be regulated ex ante or ex post, see Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation be Legal?*, 104 MICH. L. REV. 671, 674 (2006) (supporting an ex ante authorization for the use of coercive methods of interrogation).

<sup>7</sup> For the analysis of the ex ante and ex post distinction in contracts and civil procedure, see *infra* Part II.B. For the ex ante and ex post distinction in legal transitions, see Barbara Fried, *Ex Ante/Ex Post*, 13 J. CONTEMP. LEGAL ISSUES 123, 125–26 (2003).

<sup>8</sup> Some of the most important scholarly writings touching on this issue are fairly recent. See LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 436–38 (2002) (explaining that welfare, which usually follows an ex ante approach, is preferable to fairness, which is premised on an ex post approach); Fried, *supra* note 7, at 124–25 (suggesting that both luck egalitarians and welfare economics offer an ex ante approach to policy analysis of legal transitions, but there is also value in

approaches toward the ex ante and ex post distinction. The first approach addresses the two perspectives as reflecting a choice between following policy considerations premised on the economic model of rational choice versus considerations of just outcomes, often associated with fairness.<sup>9</sup> While following an ex ante perspective is important for making individuals act optimally ex ante, following an ex post perspective is important because of the limits of the rational choice model in directing behavior in uncertain environments. Accordingly other considerations need to be taken into account ex post in order to set the appropriate policy for diverse legal issues. Another approach views the choice between the two perspectives as based on whether legal directives should be cast as rules or standards.<sup>10</sup> Rules are associated with ex ante analysis because they receive their content before individuals act, whereas standards enable decisionmakers to consider the particular circumstances of cases as they arise ex post. The choice between ex ante and ex post perspectives is therefore a choice made in advance by devising legal directives as either rules or standards. This Article seeks to avoid the partisan and polarized debate in legal scholarship over which of the two perspectives is superior for different contexts by examining the potential availability of both perspectives for both good and disturbing effects in different legal settings and particularly in torture.

The Article's thesis is that both perspectives are available and important for decisionmakers and legal actors, whether they are legislatures, judges or administrators. Legal instances are a slice of time and time is always flowing. While the ex ante perspective offers a way to solve particular cases looking forward based on rational choices, it is nonetheless stable because it is limited to the set of cases captured before the fact. The ex post perspective provides the opportunity to engage in reexamination in light of particular cases and the experiences they offer after the fact. At the same time, the ex post perspective might rely on cases which are not representative and may reflect arbitrary decisions.

I argue that the dual availability of both perspectives in different legal contexts suggests three dilemmas—normative, institutional and personal—all of which are important for addressing the choice between the perspectives. At the normative level, in each legal field we should determine whether ex ante or ex post analysis is preferable for the legal issue at hand. Are ex ante incentive arrangements more appropriate in the issue of torture compared to the fields of contract law or civil procedure?

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ex post approaches toward this issue); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 185–88 (2004) (offering a theory for resolving the choice between ex ante and ex post perspectives in civil procedure).

<sup>9</sup> See *infra* Part III.A.

<sup>10</sup> See *infra* Part III.B.

At the institutional level, law has to consider which institution is suitable or even capable of considering which perspectives. Are courts more suitable than legislatures or other administrative officials for considering whether to excuse torture after the fact rather than allow it before the fact? The third dilemma concerns the actors acting within institutions. Each legal actor—whether it is an officer in charge of interrogations or a court reviewing the officer’s decision—has to determine whether to follow the *ex ante* determination of the law or to follow an *ex post* perspective toward the issue. Suppose law prohibits torture *ex ante*, should the officer in charge of an interrogation ignore this rule if the use of torture will lead to information that will save the lives of 1000 people? Should a court reviewing the officer’s decision excuse the officer’s actions *ex post* based on a necessity defense?

In Part II, the Article traces the recent debate over whether torture should be regulated *ex ante* or *ex post* and analyzes the benefits of following *ex ante* and *ex post* perspectives in the ticking bomb circumstances. Once these stakes and benefits are realized in the issue of torture they become visible in other areas of law. Accordingly, the Article briefly contrasts the choice between *ex ante* and *ex post* perspectives in torture with similar problems in contracts and civil procedure in order to offer a more general viewpoint from which to consider the dual availability of the *ex ante* and *ex post* perspectives in the issue of torture.

In Part III, the Article turns to examine the suitability of theoretical approaches previously offered for the choice between *ex ante* and *ex post* perspectives for the issue of torture. Is *ex ante* policy analysis more suitable for the issue of torture or should law prefer an *ex post* perspective? Are rules or standards more suitable for regulating torture? Do these theoretical approaches resolve the choice between the two perspectives in the issue of torture and also in other settings? I argue that the current theoretical approaches fall short of offering a satisfying resolution of the *ex ante* and *ex post* distinction, because they focus on an exclusive choice between the perspectives in every legal setting. However, both perspectives are important for the normative analysis of legal fields, from contract law to constitutional law. Both perspectives are important for institutional analysis and for actors acting within these institutions, whether they are administrative officials or judges. We should avoid the pretense that it is possible to choose between the perspectives, entirely exclusively of the other. If we do choose only one perspective, we should be aware of the cost of binding ourselves for the future, even under catastrophic cases. Accordingly, in Part IV, I offer a framework to address the choice between the two perspectives, by discussing the normative, institutional, and personal dilemmas arising out of the dual availability of the *ex ante* and *ex post* perspectives in torture.

## II. EXAMPLES OF EX POST AND EX ANTE PERSPECTIVES IN THE LAW

### A. *Considering Torture in Terms of Timing*

#### 1. *Torture and the Ticking Bomb*

Suppose a terrorist planted a bomb in an undisclosed location, set to go off within a few hours, and the only means for preventing the bomb from exploding and killing hundreds of people is for a government official to torture the terrorist in the hope that he will disclose where the bomb is.<sup>11</sup> Should the official torture the terrorist? Should he torture the terrorist even if torture might not be successful? Should the answer to these questions change if more information is available after torture was employed?

The debate over the moral, legal, ethical and practical aspects of whether torture should be permitted or prohibited in interrogations in order to prevent greater harm is characterized by two traditional conflicting approaches. On the one hand, some advocate a strict prohibition on torture. Deontologists claim that torture is inherently wrong regardless of the consequences; the value of life, and particularly of a dignified life, constrains any other principles or competing values.<sup>12</sup> Human rights are inherently valuable, and torture is wrong because it violates people's autonomy and human dignity.<sup>13</sup> Rule consequentialists reach a similar conclusion but on different grounds: even if some good consequences result from torture, permission for some acts of physical harm will lead to more harmful and problematic ones by weakening moral restraints against using inhumane force.<sup>14</sup> An absolute ban on torture makes society better off compared to situations in which deviation from the rule is permitted.<sup>15</sup>

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<sup>11</sup> After the tragic events of September 11, 2001, the ticking bomb scenario became the focus of public and academic debate. See DERSHOWITZ, *supra* note 4 at 142–49; HEYMANN & KAYYEM, *supra* note 4 at 23–26; IGNATIEFF, *supra* note 1, at 59–60; TORTURE: A COLLECTION, *supra* note 2. Nevertheless, some critique the use of the ticking bomb scenario as irrelevant, because it is so extreme. The real question, they note, is how we treat people in interrogations. See Waldron, *supra* note 2, at 1715 (noting that torture is used by American interrogators to accumulate small pieces of relatively insignificant information that may become important only when added to other information). Even if the ticking bomb scenario is not realistic, it exemplifies the moral dilemma of having to choose between two evils. See generally, Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

<sup>12</sup> See Dorfman, *supra* note 2, at 17; Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 261 (1989).

<sup>13</sup> Gross, *supra* note 2, at 1492; see DERSHOWITZ, *supra* note 4, at 145–46.

<sup>14</sup> Kremnitzer, *supra* note 12, at 254–62.

<sup>15</sup> See Gross, *supra* note 2, at 1495. Under this argument, adhering to the rule banning torture at all times is justified because of the high costs of errors that follow the decisionmaking process of particular catastrophic cases. One problem with a rule consequentialist approach is that for long term consequential analysis to make sense, it has to account for the particular instances, in which the consequences lead to prefer particular—and otherwise conflicting—decisions. For example, in torture a rule consequentialist would have to explain why we should follow the rule of “no torture” even when

The problem however with an absolute ban on torture is that it ignores real life consequences of catastrophic cases and may portray the legal system as unrealistic.<sup>16</sup> While a strict ban on torture may be required in order to set limits to horrible acts, it lacks the ability to cope with real situations in which many would say that security concerns should prevail.<sup>17</sup> As a result, people may simply ignore the law.

To answer these problems, some scholars agree that torture should be tolerated in exceptional cases.<sup>18</sup> For example, in his recent book, *Why Terrorism Works*, Alan Dershowitz suggests that torture be legalized through a “torture warrant” system.<sup>19</sup> Under the torture warrants model, interrogators must seek judicially-issued warrants before using torture in interrogations. The system follows a utilitarian approach according to which it is better to inflict non-lethal pain on one guilty terrorist than to permit a large number of innocent people to die.<sup>20</sup> Dershowitz argues that a different approach is hypocritical because any government will take whatever measures it finds necessary to abate the crisis.<sup>21</sup> Setting a framework for the permission of torture through a torture warrant system will ensure accountability and public review, leading to less torture compared to a system of unauthorized use of torture.

But torture warrants are, as one might expect, imperfect. Torture warrants may lead to too much torture rather than too little torture.<sup>22</sup> Judges usually defer to security officials perhaps because they feel they do not have the professional expertise required to assess the information presented to them in support of officials’ decisions.<sup>23</sup> Warrants are likely to be impractical given the complex procedure required for holding a valuable discussion on the issue<sup>24</sup> and because knowledge of torture methods in advance may undermine the very effectiveness of torture.<sup>25</sup>

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under a utilitarian approach in the particular case the advantages of using torture outweigh the disadvantages.

<sup>16</sup> *Id.* at 1512.

<sup>17</sup> *Id.* at 1490.

<sup>18</sup> *Id.*

<sup>19</sup> See generally DERSHOWITZ, *supra* note 4, at 158–61.

<sup>20</sup> *Id.* at 143–44. For fuller discussion of the utilitarian approach to torture and its disadvantages, see Michael S. Moore, *Torture and the Balance of Evils*, 23 *ISR. L. REV.* 280, 291–94 (1989).

<sup>21</sup> See DERSHOWITZ, *supra* note 4, at 151.

<sup>22</sup> See Gross, *supra* note 2, at 1539–40.

<sup>23</sup> For example, “evidence available already suggests that, in practice, the [United States] Foreign Intelligence Surveillance Court has provided no demonstrable check on administrative requests.” Minow, *supra* note 1, at 2154–55; cf. Itzhak Zamir, *Human Rights and National Security*, 23 *ISR. L. REV.* 375, 402 (1989) (noting that Israeli judges tend to be more restrained when reviewing security forces positions compared to other administrative agencies).

<sup>24</sup> Thus, torture warrants function as a de facto permission because a serious process will not eventually be useful, especially when proceedings are likely to be ex parte. See Gross, *supra* note 2, at 1537–39.

<sup>25</sup> See S.Z. Feller, *Not Actual “Necessity” But Possible “Justification”; Not “Moderate” Pressure, But Either “Unlimited” or “None at All,”* 23 *ISR. L. REV.* 201, 211 (1989) (claiming that a suspect need only persevere until the upper limit of what is allowed is reached).

Finally, appointing judges as torture approvers is likely to taint the status of the judiciary as the first protector of human rights.

In response, some argue that any allowance of torture *ex ante*, whether through torture warrants or legal exceptions, is likely to undermine society at large.<sup>26</sup> Instead, torture should be prohibited outright but its use should be excused under exceptional circumstances if such arise.<sup>27</sup> For example, the officer employing torture might enjoy a necessity defense.<sup>28</sup> Or public debates can be held to determine whether in a particular case the employment of torture was justified. For example, under Oren Gross's model of "official disobedience," torture is absolutely banned, but public officials can and should act despite this ban and seek ratification for their actions through an *ex post factum* public debate.<sup>29</sup> Official disobedience therefore focuses on the absolute nature of the ban, while accepting the possibility of exceptions in truly catastrophic cases.<sup>30</sup> Richard Posner goes even further than Gross in advocating an "unofficial model," in which societies have a strict rule against torture, but rely on officials to disregard the rule when they think they can get political support for their actions later on.<sup>31</sup>

One way to look at the positions discussed above is to cast them as positions for and against torture: those supporting torture warrants like Dershowitz are on the one side of the fence, and those for prohibiting torture at the outset, like Posner and Gross, are on the opposite side.

Another way is to map these positions in terms of timing. While Dershowitz approves of torture, he also believes, as the deontologists do, that torture should be regulated before a particular case occurs rather than left to be determined after a particular case involving the employment of torture arises. In contrast, Gross and Posner oppose any *ex ante* permission for torture. At the same time, they suggest that sometimes torture should be justified (or excused or tolerated) after the fact under exceptional circumstances, either through a necessity defense, clemency, or some model of public debate. Viewed as a question of timing, Dershowitz, Gross, and Posner all support the employment of torture; but while

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<sup>26</sup> See Kremnitzer, *supra* note 11, at 261.

<sup>27</sup> *Id.* at 272.

<sup>28</sup> See Sanford H. Kadish, *Torture, the State and the Individual*, 23 *ISR. L. REV.* 345, 346 (1989) (suggesting that while the state can never morally agree to any form of torture under any circumstances, an individual may enjoy an excuse after the fact).

<sup>29</sup> Gross, *supra* note 2, at 1486, 1489, 1553.

<sup>30</sup> *Id.* at 1522.

<sup>31</sup> Richard Posner, *Torture, Terrorism, and Interrogation*, in *TORTURE: A COLLECTION*, *supra* note 2, at 297–98 ("It is better I think to stick with our perhaps overly strict rules, trusting executive officials to break them when the stakes are high enough to enable the officials to obtain political absolution for their illegal conduct.").

Dershowitz supports the regulation of torture *ex ante*, Posner and Gross support torture decisionmaking *ex post*.<sup>32</sup>

This difference in timing is not merely technical—it is normative. In the following section I discuss the normative dangers and benefits of following *ex ante* and *ex post* perspectives toward legal issues generally and toward the issue of torture in particular. This analysis applies to other areas of law, such as contract law and civil procedure. It will also offer a basis on which to theorize the choice presented by the dual availability of the perspectives across legal fields and specifically in the issue of torture.

## 2 *The Ex Ante Perspective: Merits and Demerits*

The advantages of following an *ex ante* perspective on the issue of torture, just as on other issues, are almost straightforward. Here are several advantages:

*Principled Approach.* The *ex ante* perspective usually offers a principled position on an issue that is determined in advance, often times through a democratic process of compromise. Accordingly, following an *ex ante* approach toward a legal issue has all the benefits of regulating issues through rules.<sup>33</sup> *Ex ante* analysis, like rules, is the result of a deliberation of an issue based on forward-looking criteria. It reflects a balanced solution for future cases in light of the different aspects of the

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<sup>32</sup> For a straightforward analysis of the practical implications of torture warrants versus a necessity defense, see Michael M. Rosen, *How Should We Coerce Life-Saving Information From Terrorists?*, TCS DAILY, Jan. 11, 2005, <http://www.tcsdaily.com/article.aspx?id=011105E>. There is a difference between *ex ante* and *ex post* positions on torture and the distinction between theory and practice, because *ex post* analysis is part of the theoretical articulation of the law and not only of its practice. For the analysis of the theory/practice distinction in torture, see Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003).

<sup>33</sup> Following an *ex ante* perspective after the fact resembles the process of rule-based decision-making. On rule-based decision-making, see FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 51–52 (1991); Frederick Schauer, *Rules and the Rule-Following Argument*, CAN. J.L. & JURISPRUDENCE July 1990, 187, 187; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645 (1991). Nevertheless, rule-based decision-making and *ex ante* analysis are not identical. Most notably, rules represent a *form* of legal directives. The *ex ante* perspective is a lens through which to evaluate substantive positions on law as these positions are determined *before the fact*. This substantive determination may lead to cast legal directives as either rules or standards. Moreover, the *ex ante* perspective may allocate the decision away from rules and toward particularized decisionmaking. Rules are therefore a subset of *ex ante* analysis because they are determined *ex ante*.

It follows that rule-based decisionmaking and following an *ex ante* perspective are distinct in several respects. For example, while rule-based decisionmaking is premised on following entrenched generalizations, an *ex ante* perspective may require decisionmakers to look to the underlying justification of the *ex ante* perspective if such a viewpoint is helpful for determining its application to a particular case. Furthermore, arguments supporting rules may not justify following an *ex ante* perspective *a priori*. For example, efficiency considerations may justify *ex ante* analysis but not rules, as sometimes it may be better to determine in advance that a certain issue will be resolved after the fact through the application of standards. See generally Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992).

problem. It is therefore less likely to be biased toward particular circumstances.

Both those who oppose torture and those who advocate for permission under exceptional cases agree that setting ex ante guidelines for the employment of torture is important given the implications of the decision on society. For those who oppose torture under any circumstances, the principled position is valuable in order to send a clear message of the importance of fundamental rights. They claim that it is only through a clear ex ante ban that one can raise public debate on the issue and prevent a slippery slope in which the permission for some acts of physical harm will lead to more harmful and problematic ones.<sup>34</sup> Given the implications of the employment of torture on a given society, an ex ante approach ensures that the decision on whether or not to employ torture is principled not only in theory but also in practice.

*Allocation of Power.* Ex ante analysis allocates power to certain institutions or agents rather than others.<sup>35</sup> Following an ex ante perspective ensures that the choice over the use of torture and on who decides the issue of torture in particular cases is made by the highest possible level of government. For those who oppose torture, an ex ante approach ensures that the strongest message is sent on the issue, preventing the possibility that officers or courts will decide the issue differently. For those who advocate for ex ante permission under exceptional circumstances, the ex ante resolution of the issue guarantees that the decision to employ torture and the decision over the proper institution which should review its employment will be through a legitimate public debate held in times of calamity rather than taken individually under circumstances of necessity. The ex ante public debate may eventually grant the authority to determine the issue of torture after the fact through courts, but at least when courts review such a case, they do so legitimately based on the authority given to them ex ante.

*Guiding Behavior.* The ex ante perspective guides behavior at the outset.<sup>36</sup> By determining law ex ante and upholding it ex post, private parties take account of the law and conduct their actions accordingly, anticipating no mercy after the fact.<sup>37</sup> The argument of incentives, which is premised on the view of welfare economics, suggests that following an ex ante perspective will provide better outcomes in the long run by making

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<sup>34</sup> See Gross, *supra* note 2, 1507–08, 1526.

<sup>35</sup> For the argument as it is made for rules, see SCHAUER, *supra* note 33, at 158.

<sup>36</sup> A related advantage of the ex ante perspective is that it is not retroactive. On this advantage, see Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 786 (1989).

<sup>37</sup> For an articulation of this argument and its critique in private law, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688–89 (1976).

people act optimally at the outset.<sup>38</sup> This is especially important in the ticking bomb circumstances, because following an ex ante approach ensures that interrogators will not take the law into their own hands.

*Accountability.* A principled ex ante approach resonates with the need for accountability of decisionmakers. It prevents an “under the books” approach to torture both ex ante and ex post. If there is an ex ante regulatory position on torture, officials cannot use the lack of regulation as an excuse to act as they see fit. If torture is permitted ex ante then officials may employ it openly and will be accountable for their actions.<sup>39</sup> An ex ante perspective on torture therefore provides framework and boundaries for guiding officers in charge of interrogations. It prevents tyranny in the name of necessity.<sup>40</sup>

By determining issues ex ante there is a better chance to prevent arbitrariness of decisions. If decisions are left for ex post determination without any ex ante guidelines on who should decide and what factors should matter, there is a higher chance of errors on both issues.<sup>41</sup> Upholding an ex ante perspective toward the ticking bomb issue ensures that treatment of people in interrogations is based on open and known criteria. As a result, officials cannot pick and choose interrogation methods toward different people under similar situations. An ex ante perspective in the torture context also preserves equality and promotes certainty by subjecting officials to similar penalties for taking the law into their own hands. Justice is known in advance so that it can be evenly applied.

*Signaling and Educating.* An ex ante position is valuable as an educational means because it educates the public about what the applicable norm is in advance. This is particularly important in the issue of torture. For those advocating for a complete ban of torture, sending a clear message against torture rather than a complex one is advantageous because it deters from its use and from a general degradation of human rights. On the international level, a torture ban signals that a country is serious about protecting human rights.<sup>42</sup>

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<sup>38</sup> For an articulation of this argument in welfare economics, see KAPLOW & SHAVELL, *supra* note 8, at 48–49, 436–43. See also *infra* Part III.A.

<sup>39</sup> DERSHOWITZ, *supra* note 4, at 154 (noting that when a jet is probably but not certainly going to crash into a densely-occupied office building, a decision to torture the plane’s hijackers should be made with both visibility and accountability).

<sup>40</sup> *Id.* at 153.

<sup>41</sup> Errors may happen because of misunderstanding or miscalculation or because a certain class of decision-makers cannot be trusted to take certain factors into account, when the issue arises after the fact. The argument for rules lies in the attempt to avert risk in a decision-maker’s determination ex post. See SCHAUER, *supra* note 33, at 149–54.

<sup>42</sup> DERSHOWITZ, *supra* note 4, at 142 (suggesting that the stakes are far higher for the United States because the United States sets a standard for international law as its actions help define the law).

But the educational aspect is valuable also for those permitting torture under exceptional circumstances. Not only does an ex ante position signal that people cannot take the law into their own hands and that regulators are able to face difficult dilemmas, but it also demonstrates how a certain country addresses this dilemma. Assuming the law strikes an appropriate balance between liberty and security, it educates for the proper protection of human rights through a public debate and under scrutiny rather than under circumstances of necessity and secrecy.

*Reliance and Certainty.* An ex ante approach promotes reliance and certainty. Once law is determined in advance, people can rely on this decision in order to plan their actions. To this extent, an ex ante perspective enables people to anticipate in advance what the legal rule may be given particular cases. The value of an ex ante approach on torture is particularly important for people's ability to feel secure in their countries, knowing in advance the limits on official action.

A related benefit is that ex ante analysis promotes stability<sup>43</sup> because it narrows the range of potential decisions available in particular cases. Consequently, ex ante-ism prevents changes from the status quo, for better or worse. Stability, like reliance, comes at the cost of flexibility to explore the appropriate and concrete considerations presented by the case after the fact.<sup>44</sup> Ex ante analysis is therefore "conservative" because it entrenches present decisions against the claims of the future.<sup>45</sup> Whether this is a price worth paying will depend on the issue at hand.

*Consent and Pluralism.* Finally, and most importantly, ex ante analysis reflects consent and pluralism. Ex ante analysis reflects certain ideas about justice in democracies. In democracies, people reach compromise on important issues through democratic processes. Such democratic agreement and compromise, if worked out appropriately in practice, is usually settled before the fact through the legislative processes rather than after the fact (through courts for example).<sup>46</sup> This compromise, whether leading to rules or their exceptions, reflects people's consent reacting to the plurality of viewpoints and bridging their differences in advance. Democratic consent can be meaningful only if it is adhered to in particular cases. Indeed, the ex ante perspective is comprised of the very notion that we should treat cases after the fact according to the ex ante principles we agreed on, if our consent is to have any significance.

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<sup>43</sup> For this argument as applied to rules, see SCHAUER, *supra* note 33, at 155.

<sup>44</sup> *Id.* at 157.

<sup>45</sup> *Id.*

<sup>46</sup> See Duncan Kennedy, *Legal Formality*, 2 J. L. STUD. 351 (1973) (arguing that legislative rules represent people's will, but the ambiguity and contradictions they consist of often invites judicial discretion. Thus, even though the goal in democracies is to follow the "law" the ambiguity and contradictions they consist of require discretion for their implementation ex post, thereby undermining the ex ante will).

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Even given these arguments, some oppose ex ante reasoning particularly when it concerns the employment of torture in the face of a ticking bomb. Here are two of the most important limits of ex ante analysis:

*Appropriateness of Solutions.* It is difficult to devise an ex ante solution that will address all issues appropriately. Any ex ante solution offered to a problem is limited to the set of cases known or imagined in advance. Thus it may always fall short in reaching the just decision in a particularized case. The ex ante perspective—like rules—may be defective when new information is discovered after a decision has been made.

Aristotle in *Nicomachean Ethics* notes that all universal laws made up in advance are going to be defective in addressing particular decisions.<sup>47</sup> Aristotle identifies three important features that lead to the limits of universal rules: first, a system “set up in advance is mutable because it can encompass only what has been seen before.”<sup>48</sup> Second, a system set up in advance is characterized by indeterminacy, because it cannot set beforehand all relevant considerations for fitting one’s choice to the complex requirements of a concrete situation, taking all of its contextual features into account.<sup>49</sup> Finally, advance determinations often lack particularity. As Aristotle suggests, a concrete ethical case may simply contain “some ultimately particular and non repeatable elements.”<sup>50</sup> Such cases are by their very nature simply not repeatable and therefore usually unanticipated ex ante.

The issue of torture exemplifies these problems. It may be difficult, if not impossible, to identify external limitations on the employment of

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<sup>47</sup> See MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS—LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 301 (rev. ed. 2001). She quotes Aristotle:

All law is universal; but about some things it is not possible for a universal statement to be correct. Then in those matters in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though without ignoring the possibility of missing the mark . . . . When, then, the law speaks universally, and something comes up that is not covered by the universal, then it is correct, insofar as the legislator has been deficient or gone wrong in speaking simply, to correct his omission, saying what he would have said himself had he been present and would have legislated if he had known.

*Id.*

<sup>48</sup> *Id.* at 302. Locke later noted that even the state of nature cannot provide for every possible contingency in the proper fashion. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 11 (1974).

<sup>49</sup> NUSSBAUM, *supra* note 4, at 303. Universal rules cannot account for the variety of the practical contexts and situation relativity of appropriate choice. Whereas under mutability Aristotle stresses change over time and the importance of surprise, under indeterminacy he stresses complexity and contextual variety. In contemporary analysis, this problem is sometimes referred to as “open texture.” See generally SCHAUER, *supra* note 33, at 36–37.

<sup>50</sup> NUSSBAUM, *supra* note 6, at 304.

torture that will frame torture as a lesser evil.<sup>51</sup> From a jurisprudential perspective, any attempt to balance the complex considerations relevant to the issue of torture is likely to be unsuccessful. It therefore may result in a grant of too much permission to use torture rather, than its limited employment.<sup>52</sup> Moreover, *ex ante* solutions permitting torture under exceptional circumstances tend to be biased—overly discounting the long-term effects of the rule allowing torture on individual rights.<sup>53</sup> This latter consideration is particularly important because those who are usually subject to torture are often the least able to protect their rights.<sup>54</sup> Finally, even if the *ex ante* principle is devised in a way that permits torture only under certain exceptional cases that are determined *ex ante*, the success of such an exception depends on how often it is applied and on its effects on society looking forward. We should never be so optimistic that we fail to raise questions about their consequences in particular cases.

*Generality and Over- and Under-Inclusiveness.* A related but distinct problem is that of over- and under-inclusiveness.<sup>55</sup> Assuming there is a way to reach a suitable solution *ex ante*, whatever solution is chosen it is always going to be limited with respect to some existing or future (even if unpredictable) states of the world. Whatever solution is created *ex ante*, it is always going to be over- or under-inclusive compared to some states of the world whether these are anticipated in advance or not. Even if some particular cases are imagined in advance, it may be too costly to articulate the appropriate *ex ante* perspective so that they would be included in the solution at the outset. After all, resources are scarce and *ex ante* decisionmaking is likely to center on important issues that concern more than only one case. Solutions made in advance capture only a set of cases, which sometimes fail to include all relevant cases and sometimes include cases which are not supposed to be captured by the categories set up in advance. These problems occur whether the norms set out in advance are set through rules or by more lenient legal directives, such as standards.<sup>56</sup>

Devising an *ex ante* solution for the issue of torture may prove particularly challenging in terms of over- and under-inclusiveness. If torture is permitted *ex ante*, it may create a slippery slope because it sends the signal that society is neutral toward torture, thereby diminishing the values of human dignity and human rights.<sup>57</sup> If torture is banned

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<sup>51</sup> See IGNATIEFF, *supra* note 1, at vii–viii. For a review of this attempt, see Minow, *supra* note 1. For review of other attempts, see Gross, *supra* note 2, at 1499.

<sup>52</sup> Gross, *supra* note 2, at 1507.

<sup>53</sup> See *id.* at 1507 & n.93.

<sup>54</sup> See *id.* at 1509–10 & n.110.

<sup>55</sup> On the problem of over- and under-inclusiveness, see SCHAUER, *supra* note 33, at 31–34.

<sup>56</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1978) (noting that even standards are confined by the set of principles underlying them in advance).

<sup>57</sup> See DERSHOWITZ, *supra* note 4, at 145.

completely, it may lead to more concentrated efforts to gather intelligence through alternative, more sophisticated, and less harmful means, but it may also end up with an “off the books” approach. Such an “off the books” approach may have effects on society, which might be better off, if the issue is put back on the books, even ex post.

### 3. *The Ex Post Perspective: The Necessity Defense and Public Debate*

Under ex post approaches toward torture, torture is illegal ex ante, but the employment of torture may be excused, tolerated, or justified ex post.

One example of the ex post perspective as it relates to the issue of torture is the Israeli Supreme Court decision in *Public Committee Against Torture v. Israel*, in which the Supreme Court had to determine whether the General Security Services had authority to employ certain physical means in interrogations.<sup>58</sup> The court indicated that absent legislative authorization for the employment of torture, torture is prohibited but a necessity defense, which is prescribed as a defense in the criminal code, might arise in the appropriate circumstances after the fact absolving the criminal liability of an interrogator who employed physical means in order to prevent a ticking bomb from exploding.<sup>59</sup> The defense cannot offer authorization or justification for employing torture at the outset, but can only serve as an excuse ex post for individuals facing particular circumstances.

More recently, the Federal Constitutional Court of Germany had to rule whether section 14.3 of the Aviation Security Act (Luftsicherheitsgesetz–LuftSiG), which authorizes the armed forces to

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<sup>58</sup> H CJ 5100/94, Pub. Comm. Against Torture v. Israel [1999] 53(4) P.D. 817, reprinted in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, JEWISH VIRTUAL LIBR., ¶¶ 15–17, [http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism\\_law.pdf](http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism_law.pdf) (English translation by Israeli Supreme Court).

<sup>59</sup> *Id.* ¶¶ 33–35. Essentially, the court held that the necessity defense can serve as an excuse rather than a justification for the employment of physical means. See *id.* ¶¶ 36–37. For an evaluation of the court’s approach, see Alan M. Dershowitz, *Is It Necessary to Apply “Physical Pressure” to Terrorists—and to Lie About It?*, 23 *ISR. L. REV.* 192, 195–97 (1989); Kremnitzer, *supra* note 12, at 237. For an overview of the necessity defense and its applicability to General Security Services’ operations, see Moore, *supra* note 20. Some scholars point out that even if this defense is available in theory, it will not apply in practice. See, e.g., Poala Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 *J. INT’L. CRIM. JUSTICE* 785, 791–92 (2004); Kremnitzer, *supra* note 12, at 243–44 (arguing that necessity may not apply because there are other available means for getting the information such as payment of money, that the danger is usually not immediate, and that because the level of harm to be prevented is almost always uncertain).

Recently a similar solution was discussed in H CJ 3799/02 Adalah v. GOC Central Command [2005], available at [http://elyon1.court.gov.il/Files\\_ENG/02/990/037/a32/02037990.a32.pdf](http://elyon1.court.gov.il/Files_ENG/02/990/037/a32/02037990.a32.pdf), in which the Supreme Court of Israel had to determine whether Israeli soldiers wishing to arrest a Palestinian suspected of terrorist activity may be aided by a local Palestinian resident, who gives the suspect prior warning of possible injury. Justice Cheshin suggested that while the procedure is illegal ex ante, it may be excused ex post based on a necessity defense. *Id.* at 14.

shoot down aircraft that are intended to be used as weapons in crimes against human lives, was unconstitutional.<sup>60</sup> “The Federal Constitutional Court held that the Federation lacks legislative competence to issue such regulation in the first place” and that the particular Act is also “incompatible with the fundamental right to life and with the guarantee of human dignity” and is therefore void.<sup>61</sup> Nevertheless, the court left unanswered the question whether—if such a shoot down indeed happened despite the lack of formal statutory authorization—there will eventually be criminal liability, or whether such liability will be excused under criminal law.<sup>62</sup>

Many scholars follow such an ex post approach to the issue of torture. One scholar argues that necessity should be a mitigating factor after the fact when determining whether or not to prosecute those who employed torture.<sup>63</sup> Others point to the need to hold a public debate post factum rather than legitimize the use of torture after the fact through formally established institutions.<sup>64</sup>

There are several merits to the ex post approach as applied to the issue of torture:

*Appropriateness of Solutions.* Ex post analysis offers the opportunity to reach the most appropriate decision in a particular case. Decisionmakers can examine particular issues as they arise and reflect on the particular justice they require. As such the ex post perspective benefits from hindsight but also from the information that is available only post factum.

The ability to reach the most tailored solution is, as an ontological matter, possible only after the case arises. Aristotle insisted that experience and phenomenon are necessary for reaching correct judgments.<sup>65</sup> Ethical judgments can only be just to the extent they are

<sup>60</sup> Press Release, Bundesverfassungsgericht, Authorisation to Shoot Down Aircraft in the Aviation Security Act Void (Feb. 15, 2006), available at <http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html>.

<sup>61</sup> *Id.* For a recent analysis of the case, see Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 GERMAN L.J. 761 (2006), available at <http://www.germanlawjournal.com/article.php?id=756>.

<sup>62</sup> *See id.*

<sup>63</sup> Gaeta, *supra* note 59, at 793–94.

<sup>64</sup> *See* Gross, *supra* note 2, at 1522–35; Posner, *supra* note 5, at 296–98.

<sup>65</sup> Aristotle identified the importance of “appearances” in explaining the world. *See* NUSSBAUM, *supra* note 47, at 240. The philosophical method based on the appearances includes several levels of inquiry. First, the philosopher must set down the appearance that is relevant to the group/issue discussed. *Id.* at 245. This process requires judgment. After selecting the relevant appearances, the philosopher needs to set out the puzzles or dilemmas which the appearances raise. *Id.* at 246. This includes bringing out the conflicting opinions to the surface. *Id.* Then, these should be reconciled. *See id.* at 247.

But appearances may also be misleading. Ironically, Aristotle’s mistakes in assessing several issues in biology and physics were the result of not taking account of appearances. The most famous one was the notion that motion of bodies near the earth is linear. *See* BERTRAND RUSSELL, A

made in relation to the appearances and with the knowledge that comes from experience and from experiencing particular moments.<sup>66</sup> Such practical deliberation cannot be scientific because it would be impossible to approach particular problems only through predetermined rules.<sup>67</sup> As Aristotle explains, we lack a comprehensive understanding of the world.<sup>68</sup> “We cannot organize it for ourselves, explain in a perspicuous fashion its salient features,” or come prepared to it.<sup>69</sup> Rather we are vulnerable to the particularities, because they can always take us by surprise.<sup>70</sup>

Many modern scholars follow Aristotle in taking the view that moral decisions cannot be made in the abstract but only in context.<sup>71</sup> From a jurisprudential point of view, an *ex post* perspective enables decisionmakers to make informed moral decisions and to seek perfect answers. The *ex post* perspective consists of the experience that comes from judging in particular moments in time. It offers the only way for reaching just solutions.

An *ex post* perspective of torture provides for a particularistic decision, tailored to the complete facts known only in retrospect. The *ex post* perspective toward torture avoids the need to set *ex ante* authorization for torture contemplating all of the complexities involved. Moreover, addressing the ticking bomb dilemma from a particularistic perspective, allows for the benefits of hindsight. It enables the decisionmaker to reach the appropriate solution without the risk of over- and under-inclusion.<sup>72</sup> This is especially valuable in the context of torture because an *ex post* perspective on the issue of torture will also prevent the slippery slope effects that may follow an abstract determination of the issue at the outset.

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HISTORY OF WESTERN PHILOSOPHY 205–06 (Simon & Schuster 1972) (1945). He also thought that the sun revolves around earth, although several Greek scholars had concluded already to the opposite. *See id.* at 206. Aristotle also mistakenly suggested that men have more teeth than do women or that men have only eight ribs. *See* 2 WILL DURANT, THE STORY OF CIVILIZATION: THE LIFE OF GREECE 531 (1939).

<sup>66</sup> This realization goes hand in hand with Aristotle’s idea of practical deliberation. According to Nussbaum, practical wisdom is the ability to recognize and respond to certain salient features of a complex situation, an ability which is gained through experience. *See* NUSSBAUM, *supra* note 47, at 305. The person of practical wisdom is a person who has internalized certain ethical values and a certain conception of life. *Id.* at 306.

<sup>67</sup> This concerns the problem of incommensurability of values. As Nussbaum explains, “the values that are constitutive of a good human life are plural and incommensurable.” *Id.* at 294. Aristotle explains that we pursue more than just pleasure, such as seeing or remembering or having the excellences. *Id.* Thus, if everything was commensurable, we could have replaced everything for one thing. *Id.* at 196.

<sup>68</sup> *Id.* at 298.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See, e.g.,* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1602 (1990). For the analysis of this method in judging, see Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997).

<sup>72</sup> *See, e.g.,* Moore, *supra* note 20, at 343 (supporting a necessity defense based on this consideration).

*Deterrence.* Hand in hand with the ability to set particularistic decisionmaking, an ex post perspective sends the most deterring signal against an otherwise unwanted behavior. By limiting certain issues to ex post determination, the law can send the signal that they are completely banned ex ante.

Subjecting the issue of torture under the ticking bomb circumstances to an ex post review sends the signal that it will be reserved to the stingiest conditions and therefore deters its abuse. An ex post perspective has the merit of creating a wedge between a ban on torture and approval of torture in exceptional cases; it creates uncertainty with respect to the availability of ex post ratification. Indeed, one of the advantages of a model of disobedience is that it creates uncertainty with respect to whether the public will in fact excuse the employment of torture after the fact, thereby deterring officials from using torture in the first place.<sup>73</sup>

*Protection of the Scaffold of the Law.* A related issue is that ex post analysis protects the scaffold of the law by prohibiting an “off the books” approach. The possibility of ex post determination of the legitimacy and legality of torture in the ticking bomb case may provide a reasonable way out of the difficult dilemma of choosing between the protection of security and the formal authorization of the use of means which may lead to undermine the values of democracy. While absolute prohibition on torture is not flexible enough to accommodate exceptional cases, an ex post determination of the issue through established institutions (based on a necessity defense compared to a model of official disobedience) provides the legal cover for protecting those who disregard the law out of necessity.<sup>74</sup> It addresses the issue of torture through legal means and at the same protects the scaffold of the legal ex ante prohibition on torture.

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What is lost by following an ex post perspective? Perhaps many things:

*No Guidelines.* Ex post analysis, in its extreme, is always intended to be particular without any framework and limits over future decisions. By offering latitude for an ex post defense of conduct that otherwise would be unauthorized without ex ante democratic approval, ex post analysis leaves to some totality of the circumstances the resolution of future cases, without any guidelines and framework on which to determine such cases.

The problem of particularity is especially troubling in the issue of torture under the ticking bomb circumstances. The interrogating officer—who risks his future for the security of others—is left with no guidelines to

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<sup>73</sup> See Gross, *supra* note 2, at 1530–32.

<sup>74</sup> See Moore, *supra* note 20, at 283–84.

guide his actions going forward.<sup>75</sup> Ultimately such officers will have to make a difficult choice that will affect the character of their society, hoping that the public or courts approve of their actions after the fact. An ex post perspective means not only that there is a normative void ex ante but also that the decision will be taken by an officer in the heat of the moment rather than through a deliberate ex ante review of the issue.

If the decision reaches a formal institution like a court, the court may still find it difficult to determine whether a necessity defense, assuming it is available, applies. Even after the fact, the particularity of ex post analysis offers too much latitude to officials and institutions. Should a court take account of the information available after the fact, such as whether the torture accomplished its alleged purpose, or put itself entirely in the position of the interrogator before the fact? Is a decision on necessity in the ticking bomb situation similar to any other particular decision of necessity, like that of a person killing another who threatened to kill a third person?

As long as the decision on the issue of torture is particular the outcome will depend on the institution examining the particular circumstances ex post. Particular justice—though often praised as the highest form of justice—may sometimes be unjust because it is confined to the particularities.

*Ex Ante Effects.* Often times, ex post analysis is considered good because it is meant to be equitable. But even the most exceptional ex post determinations have ex ante effects on laws and institutions looking forward. The ability to anticipate mercy or punishment offered by certain institutions ex post has ex ante effects on individuals acting at the outset.<sup>76</sup>

Anticipating ex post review, certain institutions might refrain from acting ex ante, leaving it to those institutions that determine cases ex post to resolve the cases based on their particulars.

The ex ante effects of ex post analysis has grave implications in the issue of torture. The possibility of ex post excuse for torture may send the message that torture is permitted ex ante. In Israel, for example, the Israeli Supreme Court held that torture is not allowed ex ante and that such authorization should be specifically enacted by the legislative body.<sup>77</sup> But

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<sup>75</sup> This is a cost on the official as well, who may not know how to act. See Press Release, McCain Statement on Detainee Amendments (Oct. 25, 2005), available at [http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content\\_id=1611](http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1611) (noting that soldiers have written him that they need clear guidance with respect to the U.S. policy toward detainees).

<sup>76</sup> Economic analysis of law stressed this point as the basis for following policy analysis in particular cases. Louis Kaplow, for example, points out that any deviation from a strict enforcement of the no compensation policy for legal transitions will lead people to over invest at the outset, anticipating further exceptions ex post. See Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL. ISSUES 161, 179 (2003).

<sup>77</sup> H CJ 5100/94 Pub. Comm. Against Torture v. Israel [1999] 53(4) P.D. 817, reprinted in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, JEWISH VIRTUAL LIBR.,

the court also held that a necessity defense, which is available in the criminal code, might be available to the specific officer ex post in particular cases.<sup>78</sup>

This decision might have provoked the Israeli Parliament, which subsequently enacted the General Security Services Statute, which did not address the issue of the use of physical means in interrogations.<sup>79</sup> This outcome is problematic because, as the court noted, the issue of torture should be left to the legislature.<sup>80</sup>

The interplay between institutions working ex ante and ex post brings out general tensions that law should consider: should a court refrain from following an ex post perspective on a subject just because another institution failed to act ex ante? Which institution should make the choice between ex post and ex ante perspectives on torture? Which institution should determine whether one of these viewpoints is not available anymore?

*Costs of Biased Decisions.* Obviously, particular decisionmaking is expensive and requires resources. But it is costly also because ex post judgments may be unduly affected by their particularity. While ex post analysis offers the opportunity for particular justice, ex post decisions may be biased toward the particulars. Particular circumstances may seem unique, but they may also represent a misconceived assessment of a situation, which is generic rather than exceptional. Justice Holmes dissenting in *Northern Securities Co. v. United States* famously explained that, “Great cases like hard cases make bad law” because they are the result of “some accident . . . which appeals to the feelings and distorts the judgment.”<sup>81</sup>

What seemed intuitive to Justice Holmes is today supported by social psychology: people’s assessment of problems or questions presented to them will often be unduly influenced by the particular case presented to them.<sup>82</sup> Decisionmakers often act with less than perfect rationality when

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[http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism\\_law.pdf](http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism_law.pdf) (English translation by Israeli Supreme Court).

<sup>78</sup> *Id.*

<sup>79</sup> Following the Supreme Court’s decision in *Public Committee*, it was reported by Israeli media that the Knesset Committee on Foreign Affairs and Security has deliberated over whether physical methods in interrogations should be prohibited explicitly. A formal decision was not reached and it remains an open question whether ex post the necessity defense will be available. The Knesset might need to explicitly ban the availability of the necessity defense after the fact, a possibility not likely to emerge.

<sup>80</sup> *Pub. Comm. Against Torture*, 53(4) P.D. 817, ¶ 37.

<sup>81</sup> *N. Sec. Co. v. United States*, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

<sup>82</sup> See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al., 1982); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY, *supra*, at 178 (“There is much evidence showing that, once an uncertain situation has been perceived or interpreted in a particular fashion, it is quite difficult to view it in any other way. Thus, the generation of a specific scenario

making assessment of general policy based on particular cases because of heuristics and biases they employ in the decisionmaking process. For example, people tend to overestimate the probability of certain events that have occurred being influenced by the outcome that actually transpired,<sup>83</sup> or they tend to assume that some events are more available than others.<sup>84</sup>

These cognitive psychological findings apply to both the judicial and legislative aspects of lawmaking<sup>85</sup> and they are especially troubling in the issue of torture. Decisionmakers might be so impressed by the successfulness of torture in preventing a ticking bomb from exploding that they will tend to discount the long-term effects of the use of torture on society. Moreover, the events that actually transpire may focus the discussion on the actual events that happened discounting other important concerns that may be relevant to other cases as well.

*Slipping Toward Arbitrariness.* Ex post analysis creates arbitrariness because it provides those who happen to determine the case ex post the power to decide whether and how a certain legal issue will be determined. Leaving important decisions to ex post analysis usually puts the decision in the hands of the minority, rather than the majority. This is especially true with respect to judges, who are not only few, but also unaccountable to the people. To this extent, the more the ex post perspective is applied the more it may lead to moral rootlessness and instability.<sup>86</sup>

These problems are especially serious with respect to models of official disobedience, under which public officials should act outside the legal system asking for absolution of their actions after the fact.<sup>87</sup> In what form is this public debate going to be? How should the public decide this issue after the fact? An unframed public debate—as just as it may rhetorically sound—risks becoming a Kafka trial.<sup>88</sup> There is no guarantee that such a public debate will be truthful or fair toward the officer or those

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may inhibit the emergence of other scenarios, particularly those that lead to different outcomes.” (internal citations omitted); see also Ellen Langer, *The Illusion of Control*, 32 J. OF PERSONALITY & SOCIAL PSYCH. 311 (1975) (finding that the more people are concerned with what they know the more confident they become). As applied to law, see, for example, Jeffrey J. Rachlinski, *The Uncertain Psychological Case For Paternalism*, 97 NW. U. L. REV. 1165, 1165–66 (2003).

<sup>83</sup> Rachlinski, *supra* note 82, at 1171 (referring to the representativeness heuristic, under which people compare a certain event to others they recall). People also suffer from hindsight bias, outcome bias and other biases. See Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante—Determining Liability in Hindsight*, 19 J. OF HUMAN BEHAVIOR 89 (1995). Nevertheless, sometimes learning an outcome should cause people to update their estimates of events. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHIC. L. REV. 571, 571 (1998).

<sup>84</sup> See Rachlinski, *supra* note 82, at 1170–71.

<sup>85</sup> *Id.* at 1195.

<sup>86</sup> The more judges accept arguments about the need to change the law, the greater cost and less certainty in guiding behavior. Kaplow, *supra* note 33, at 617.

<sup>87</sup> For the model of official disobedience, see Gross, *supra* note 2, at 1481, 1489, 1519–26.

<sup>88</sup> FRANZ KAFKA, *THE TRIAL* (New York 1974) (1925), which opens with this revealing sentence: “Someone must have been telling lies about Joseph K. for without having done anything wrong he was arrested one fine morning.”

subject to interrogation. Indeed, it is most unlikely that a public debate will eventually be held.<sup>89</sup> Often times, amnesty might be granted so that the public debate becomes irrelevant.<sup>90</sup>

Ex post ratification of the employment of torture may lead to a very dangerous slippery slope. If the idea of official disobedience is good for torture, why should it not be good for other areas of law when catastrophic situations occur? Why not officially disobey the law and ask for a public debate after the fact? Why not breach a contract and ask forgiveness ex post? Why not ignore procedure and ask for a second chance? Indeed, we do not put such issues in the hands of the public but rather in the hands of courts. Otherwise, the disobedience practice may not be used only for good purposes but for evil ones.<sup>91</sup> A public debate after the fact might be arbitrary and unjust even if the public has all the information and even if the official gets a sufficient stage to present his case.

#### B. *The Temporality Problem in Other Areas of Law: Contracts and Civil Procedure*

The choice presented by the ex ante and ex post perspectives is not unique to torture. In this section, I briefly discuss the ex ante and ex post distinction in contracts and civil procedure.<sup>92</sup>

##### 1. *Ex Ante Agreements and Unanticipated Circumstances*

How does the choice between the perspectives present itself in contract law? Let's take an example. Suppose I promise my friend to make her a wedding gown for the cost of \$1000 and it costs me only \$900 to perform.

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<sup>89</sup> In Israel, for example, the Landau committee investigating the employment of "moderate physical means" in interrogations recommended that no legal or administrative proceedings will be instituted against people who employed methods unacceptable by the Committee's report because of the need to rehabilitate the General Security Services. Mordechai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service*, 23 ISR. L. REV. 216, 274–75 (1989); see also DERSHOWITZ, *supra* note 4, at 162:

[N]o FBI agent who tortured a suspect into disclosing information that prevented an act of mass terrorism would be prosecuted—as the policemen who tortured the kidnapper into disclosing the whereabouts of his victim were not prosecuted. In the absence of a prosecution, there would be no occasion to judge the appropriateness of the torture.

<sup>90</sup> This problem is demonstrated by H CJ 428/86 Barzilai v. Gov't of Israel [1986] 40(3) P.D. 505, reprinted in SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, 1, 63 (1988), available at [http://elyon1.court.gov.il/files\\_eng/86/280/004/z01/86004280.z01.pdf](http://elyon1.court.gov.il/files_eng/86/280/004/z01/86004280.z01.pdf). In this case, presidential clemency was granted to members of the General Security Service in Israel with respect to their involvement in their trial, having tampered with evidence blocking the ability to find out what had really transpired in the tragic terrorist attack on Bus No. 300, in which the two officials allegedly murdered two of the terrorists.

<sup>91</sup> This Machiavellian point was discussed in IGNATIEFF, *supra* note 1, at 25.

<sup>92</sup> In a recent essay Peter Margulies points out the resemblance between ex ante and ex post approaches in torture and other security issues such as constitutionalism in wartime and the post conviction exercise of mercy. See Peter Margulies, Essay, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 311 (2006).

Under an ex ante perspective of contracting, promises should be kept or damages paid for not performing.<sup>93</sup> Following this default rule after the fact makes people act responsibly when entering contracts, which is what private parties would agree to ex ante.<sup>94</sup> It respects the parties' autonomy to make contracts, whether they turn out to be good or bad for them. But suppose that the cost of making the gown turns out to be \$5000 because I need to travel to China to get the fabrics. Should the ex ante perspective of contracting be enforced on me regardless of the ex post outcome of the case? Does it matter if the cost increased because of market changes or government regulations or just because I miscalculated the actual cost ex ante?

From an ex ante perspective, contract law doctrines should achieve whatever the parties wanted ex ante by filling gaps in the parties' incomplete agreements, enforcing on them ex post what they would have agreed to had they the time to consider the uncertainties ex ante.<sup>95</sup> It is premised on consent and freedom of contract. It enables parties to make rational choices based on forward looking criteria. But following the ex ante perspective, no matter what the consequences turn out to be ex post, may sometimes seem unjust and arbitrary. I may argue that it is unjust to enforce on me the contract regardless of consequences, whether I assumed the risk of price increases ex ante or not. Contract law should be concerned with outcomes and their implications for future cases and not only with ex ante agreements. The ex post perspective presents an opportunity for particular justice in resolving disputes arising out of an agreement which could not have addressed all possible contingencies in advance. It reflects the humility of knowing that contracting parties are always fragile to the particulars that take them by surprise. At the same

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<sup>93</sup> This is the traditional view of contract law, which is premised on the principle of *pacta sunt servanda*, i.e. promises should be kept. Contracts scholars most commonly agree that the best remedy for breach of contracts is expectation damages, but on little else. See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981); KAPLOW & SHAVELL, *supra* note 8, at 160–61 (referring to similar positions held by other theorists).

<sup>94</sup> Economic analysis has produced scholarship on contract law as ex ante default rules. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729 (1992); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 *YALE L.J.* 615 (1990).

<sup>95</sup> For the general recognition of incompleteness of contracts, see Alan Schwartz, *Incomplete Contracts*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* (J. Eatwell et al. eds., 2000); see also STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW*, 291–367 (2004); Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 *VA. L. REV.* 821 (1992); David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 *MICH. L. REV.* 1815, 1819 (1991); Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 *COLUM. L. REV.* 1710, 1712 (1997).

time, it might be biased and arbitrary,<sup>96</sup> undermining contract law's stability and the credibility of contracts in future cases.

Impracticability cases present the choice between the two perspectives clearly. Under the impracticability doctrine, contracts should be excused if an onerous contingency occurs that renders performance impracticable.<sup>97</sup> While parties usually allocate the broader risk of price increases to the promisor,<sup>98</sup> the impracticability doctrine allocates the risk to the promisee. But, how should courts determine that the risk that materialized was not included in the package of risks allocated *ex ante* to the promisor? Is a 100% price increase necessary compared to a 10% one? Impracticability cases demonstrate that courts' decisions turn on an explicit choice between *ex ante* and *ex post* perspectives of the case.<sup>99</sup> In short, following an *ex*

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<sup>96</sup> For example, it is very difficult to predict when courts will excuse performance due to impracticability. Sometimes courts excuse performance in situations of risk of physical harm or in situations of mere increase in the expense of performing. Other times, courts deny excuse even if the financial loss is enormous. *See, e.g.,* *La. Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981) (failing to excuse performance because the only loss caused to defendant was the financial loss of \$428,500, bringing its overall profit on the plant to \$589,500, half of its anticipated profit); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 140 (N.D. Iowa 1978) (an increase in seller's costs by 52.2% resulting in the seller's loss of about 2.5 million dollars did not constitute commercial impracticability because such percentage increases did not usually constitute excuse); E. ALLEN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 595–603 (3d ed. 1999).

<sup>97</sup> U.C.C. § 2-615 (2002); RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). Similarly, under the frustration of purpose doctrine performance is excused where the purpose of the contract is frustrated by an event the non-occurrence of which was basic to the contract. *See* RESTATEMENT (SECOND) OF CONTRACTS § 265. The doctrine is applicable to contracts for the sale of goods through principles of equity. *See* U.C.C. § 1–103. For a general review of the doctrines, see FARNSWORTH, *supra* note 96, at 595–603.

<sup>98</sup> *See, e.g.,* *Ne. Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 278 (7th Cir. 1986) (finding that a fixed-price contract allocates the risk of market price increases explicitly to the seller and market price decreases to the buyer); *Publicker Indus. v. Union Carbide Corp.*, 1975 WL 22890 (E.D. Pa. Jan. 17, 1975) (noting that a specific provision which puts a ceiling on contract price increases resulting from a rise in the cost of Ethylene is an indication that unforeseeable price increases in the cost of Ethylene would be born by the seller).

<sup>99</sup> Courts consider three requirements in determining impracticability doctrine cases. The first is that the contingency was a basic assumption of the contract. The second is that the party asking to be excused did not assume the risk of such a contingency. The third is that performance is “impracticable.” *See* FARNSWORTH, *supra* note 96, at 643–44. Both the Restatement and the Uniform Commercial Code include these requirements. *See* U.C.C. § 2-615; RESTATEMENT (SECOND) OF CONTRACTS § 261. The first two requirements are an investigation into the *ex ante* perspective. Courts question whether the parties in their *ex ante* agreement included the prospect of the contingency and therefore need to adhere to their *ex ante* agreement even if it turned out to be unfair from its *ex post* perspective. The third requirement is an investigation into the *ex post* perspective. It is difficult, however, to anticipate how courts will balance between the different considerations. *See* *Maple Farms v. City Sch. Dist.*, 352 N.Y.S.2d 784, 790 (1974) (“There is no precise point, though such could conceivably be reached, at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to ‘impracticability’ in a commercial sense. However, we cannot say on these facts that the increase here has reached the point of ‘impracticability’ in performance of this contract in light of the risks that we find were assumed by the plaintiff.”). Norman R. Prance, *Commercial Impracticability: A Textual and Economic Analysis of Section 2–615 of the Uniform Commercial Code*, 19 IND. L. REV. 457, 474 (1986).

post perspective may lead to a resolution different from what the parties would have agreed to ex ante.<sup>100</sup>

Almost every contractual dispute arising after the fact can be analyzed in light of both perspectives.<sup>101</sup> After all, in many cases it is very difficult to know what the parties would have wanted ex ante.<sup>102</sup> Moreover, some of the parties' interests may not even exist at the time of the transaction and accordingly ex ante analysis will not be able to address them sufficiently.<sup>103</sup> Courts have to determine the extent to which the parties' ex ante wishes should dictate the result compared to an ex post evaluation of the case. But how should courts make this choice? Which remedy—compensation, specific performance, or equity—is more appropriate for

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<sup>100</sup> See Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1046 (1992) (explaining the impracticability doctrine as depending on the contract law principle of strict liability); Steven Walt, *Expectations, Loss Distribution and Commercial Impracticability*, 24 IND. L. REV. 65, 107 (1990). Sometimes the equities of the case will dictate the result, despite any ex ante agreement. See *Asphalt Int'l v. Enter. Shipping Corp.*, S.A., 667 F.2d 261, 266 (2d Cir. 1981) (discharging owner's duty to repair the ship because the cost of restoring the vessel would have exceeded its fair market value prior to the collision); *Chase Precast Corp. v. John J. Paonessa Co.*, 566 N.E.2d 603, 603–05 (Mass. 1991) (releasing a promise to purchase concrete median barriers because a third party cancelled his agreement with purchaser and supplier did not suffer any out of pocket loss as a result of excuse); Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94, 101 (1953).

<sup>101</sup> LON L. FULLER, *BASIC CONTRACT LAW* 297–98 (1947) (quoting George K. Gardner, *Observations on the Course in Contracts* (1934) (unpublished)). Gardner suggested that contract doctrines represent conflicting ideas: on the one hand contract doctrines follow the bargain idea premised on what the parties wanted before the fact; and on the other hand, attempt to correct whatever outcomes came out of this agreement after the fact. For a discussion of Gardner's ideas, see Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 166 (2000). For a recent suggestion of the relevance of both perspectives for contract analysis, see Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 430. Kreitner argues that there are three kinds of relevant considerations for any type of contract dispute: ex post governance (i.e., norms of cooperation and trust focusing on the parties to the dispute); welfare considerations; and institutional considerations. *Id.* at 459. For the normative justifications for ex post considerations in the framework of contracts see *id.* at 466–74.

<sup>102</sup> See generally Victor P. Goldberg, *Price Adjustments in Long-Term Contracts*, 1985 WIS. L. REV. 527 (claiming that parties entering contracts do not in fact seek to allocate risk); Sheldon Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for the Wisdom of Solomon*, 135 U. PA. L. REV. 1123, 1172–73 (1987) (noting that disputes often arise when parties disagree, making it harder to know what the parties would have wanted ex ante); Daniel T. Ostas & Frank Darr, *Understanding Commercial Impracticability: Tempering Efficiency With Community Fairness Norms*, 27 RUTGERS L.J. 343, 352–53 (1996) (noting that the unambiguous cases turn out to be the exception); George G. Triantis, *Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability*, 42 U. TORONTO L.J. 450, 477 (1992) (arguing that the ex post inquiry into the parties' relative risk abilities will sometimes be pointless when parties do not anticipate the risk in the first place).

<sup>103</sup> Roy Kreitner, *Frameworks of Cooperation: Competing, Conflicting and Joined Interests in Contract and Its Surroundings*, 6 THEORETICAL INQ. L. 59–60 (2005) (demonstrating, through several examples such as acquisitions and bankruptcy that the interests arising out of the contract may often be different than the parties' interests when entering the contract, leading to an overall preference for ex post analysis over ex ante one).

which perspective?<sup>104</sup> Should courts approach the choice between the perspectives differently in contract law compared to other areas of law, such as war on terror? Should courts be the institutions to make this choice in contract law or maybe another institution? The contract law example and the ticking bomb problem therefore have much to offer each other.<sup>105</sup>

## 2. Procedure and Just Outcomes

Civil procedure offers the most straightforward example of the dual availability of the ex ante and ex post perspectives, as it reflects an obvious tension between form and substance.<sup>106</sup> On the one hand, procedure sets

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<sup>104</sup> Few scholars suggest that the appropriate remedy is equitable. See, e.g., Comment, *Apportioning Loss After Discharge of a Burdensome Contract: A Statutory Solution*, 69 YALE L.J. 1054 (1960). Others suggest that courts should supervise inter-party settlement. See, e.g., Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985).

<sup>105</sup> The current scholarly approach toward these questions is unfortunately constrained to the specific area of contract law, not taking advantage of how the ex ante and ex post distinction is addressed in other areas of law. In the impracticability context scholars debate which approach, fairness or economics, is most appropriate for determining disputes arising out of unanticipated contingencies. For the economic approach, see John Eloffson, *The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests*, 30 COLUM. J.L. & SOC. PROBS. 1 (1996) (critiquing the classical economic approach, and advancing a return to foreseeability test based on economic analysis); Subha Narasimhan, *Of Expectations, Incomplete Contracting and the Bargain Principle*, 74 CAL. L. REV. 1123 (1986) (suggesting a theory for assessing which risks were not allocated in the contract and how to allocate those risks); Jeffrey M. Perloff, *The Effects of Breaches of Forward Contracts Due to Unanticipated Price Changes*, 10 J. LEGAL STUD. 221 (1981); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 86 (1977); Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 J. LEGAL STUD. 43 (1990) (inquiring whether impracticability enhances contracting parties' ex ante welfare by replicating in rough fashion the distribution of risk that they would negotiate for themselves); Michelle J. White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 J. LEGAL STUD. 353 (1988) (suggesting that courts should simply apply expectation damages in cases where parties are risk neutral). For the fairness approach, see Robert Hillman, *An Analysis of the Cessation of Contractual Relations*, 68 CORNELL L. REV. 617 (1983).

<sup>106</sup> The most noted articulation of this choice is Martha Minow, *Politics and Procedure*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 79 (David Kairys ed., 3d ed. 1998). Minow poses that procedure is a battleground for conflicting ideals. *Id.* at 79. On the one hand, procedure represents justice so procedural rules should not bend in the face of temporary situational concerns. *Id.* On the other hand, procedure serves justice, so procedural rules should not stand in the way of just results in particular contexts. *Id.* Minow offers the example of *Walker v. Birmingham*, 388 U.S. 307 (1967), in which the U.S. Supreme Court enforced contempt citations against individuals, including Rev. Martin Luther King Jr., who disobeyed a state's court contemporary restraining order which was later struck down on First Amendment grounds. The Supreme Court chose the ex ante value of equal treatment of litigants under procedure despite the unconstitutionality of the order at issue and the incorrect outcome ex post. *Walker*, 388 U.S. at 321.

Recently, a new articulation of the tension was suggested by Solum, *supra* note 8. Solum suggested that procedure poses a tension between ex ante perspective of procedure as action guiding at the outset and ex post perspective of procedure which centers on accurate results. *Id.* at 188–89. Another temporality problem in civil procedure concerns the question whether parties ex ante preferences to a certain procedure should also be upheld ex post, even though after the occurrence of a dispute, these preferences might change. See, e.g., Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997) (suggesting that ex ante preferences should be enforced also ex post). For a treatment of this problem in contract modifications, see, for example, Christine Jolls,

the framework through which to address substantive claims. Following these rules in particular cases provides equal opportunity to litigants and represents a fair process for the substantive determination of cases. Procedure, as form, should be kept even at the cost of unjust substantive results. It is therefore by definition substantively an *ex ante* enterprise. On the other hand, procedure is simply a tool for achieving just outcomes. Procedure is intended to obtain substantively just results across cases. Procedural rules should therefore not stand in the way of just results.

Indeed, the idea of *ex post* “justice” often carves out exceptions to otherwise applicable procedural rules.<sup>107</sup> Suppose, for example, that five litigants file a claim of price-fixing against a department store in a federal court, which is dismissed on procedural grounds. Three of them appeal but the other two file a different suit in the state court, which is also dismissed because of lack of jurisdiction. On appeal, the first federal court’s decision is reversed and the three litigants who appealed win on the merits. The other two litigants file suit again but their suit is rejected based on *res judicata*.<sup>108</sup> This result will not shock anyone familiar with procedure. The two litigants who lost took a risk by not appealing the first decision in the first case. The incorrect outcome is therefore one of the normal risks of following procedure, which they chose to take. But suppose that instead of the above facts, the litigants are African Americans turning to courts to stop segregation or busing prior to *Brown v. Board of Education*<sup>109</sup> and

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*Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203 (1997).

<sup>107</sup> Many procedural rules set judgments aside in face of “mistake,” “newly discovered evidence,” or other reasons. For example, preclusion rules are not applicable to change of law exceptions. See RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f, § 26 cmt. e (1982) (a change in law may justify an exception because it will create inequity in the implementation of a constitutional scheme). There are also broad grounds of public interest concerning the fair and equitable implementation of a statutory or constitutional scheme, *id.* § 26(1)(d), and other extraordinary reasons or conditions having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy. *Id.* § 26(1)(f). Under these exceptions the procedural framework of the first litigation was—other things being equal—appropriately upheld. Thus, there is no justification within the framework of the doctrine not to apply to the case, but *ex post* considerations lead to a different result.

There are also equitable exceptions to issue preclusion following from a potential adverse impact of the determination on the public interests of persons not themselves parties, *id.* § 28(5); see also, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979), from legal change, or from otherwise inequitable administration of the laws. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2)(b). The “changed law” exception is applied more liberally under issue preclusion compared to claim preclusion. See *Staten Island Rapid Transit Operating Auth. v. Interstate Commerce Comm’n*, 718 F.2d 533 (2d Cir. 1983).

<sup>108</sup> This situation is reflected in *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (holding that a failure to appeal directly on the judgment cannot be cured by the *ex post* creation of an exception to the doctrine of rule preclusion). A similar approach was followed in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987), in which the majority opinion held that a plaintiff was not entitled to a retrial of his 1981 claims in a jury trial because he did not challenge the lower court’s decision to continue with a judgment of Title VII without jury. This approach was distinguished in *Jonathan Woodner Co. v. Adam*, 534 A.2d 292, 295 n.6 (D.C. 1987).

<sup>109</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

their suit is dismissed because they do not stipulate correctly their constitutional claim. After *Brown v. Board of Education* they file a new suit. Should law hold that the litigants chose not to appeal the first litigation and therefore took the risk of the unjust result in their case? Are these the normal and just results of procedure? In this latter case, law should follow an ex post perspective of the case, rather than whatever outcomes result from enforcing the ex ante perspective of procedure also after the fact.<sup>110</sup>

Many other cases bring out a similar choice between ex ante and ex post perspectives.<sup>111</sup> Following the ex ante perspective of procedure across cases in spite of particular injustices has value independent of substantive law. It promotes equal treatment between litigants. It ensures that everyone has their day in court in a timely fashion and on similar terms. But sometimes outcomes should matter as well. Without consideration of outcomes, procedure will become a technical and mechanic tool, farther and farther away from its purpose as a framework for a just determination of disputes. The ex post perspective of the case is important not only for particular cases but also for shaping procedure for future cases. Why and when should particular outcomes outweigh the general adherence to procedure across cases?<sup>112</sup> Who should decide when exceptions should

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<sup>110</sup> *Christian v. Jemison*, 303 F.2d 52, 54–55 (5th Cir. 1962) (“The wisdom of the rule which exempts such cases from the doctrine of res judicata is clearly revealed in this instance. *It would be a senseless absurdity to sanction in Baton Rouge segregated seating under a law patently unconstitutional while everywhere else in the country segregated seating is prohibited. The Constitution is not geared to patchwork geography. It tolerates no independent enclaves.*” (emphasis added)).

<sup>111</sup> Courts consider both ex ante and ex post considerations in reaching their decision. *See, e.g., Reed v. Allen*, 286 U.S. 191, 209 (1932) (Cardozo, J., dissenting) (arguing that a rigid enforcement of procedure does not always serve decisional values in all cases); *Ferrell v. Pierce*, 785 F.2d 1372, 1385 (7th Cir. 1986) (concluding that issue preclusion will not be applied retroactively to contempt proceedings against the U.S. Department of Housing and Urban Development because it will result in too large payments to past mortgages); *Bronson v. Bd. of Educ.*, 525 F.2d 344 (6th Cir. 1975) (change in law not sufficient to grant relief where there is full and fair opportunity to litigate); *Title v. INS*, 322 F.2d 21, 24 (9th Cir. 1963) (allowing plaintiff to introduce new evidence despite collateral estoppel to prevent a harsh outcome in a petitioner’s denaturalization case); *Trapnell v. Sysco Food Servs.*, 850 S.W.2d 529, 541 (Tex. App. 1993) (finding that collateral estoppel did not apply in a products liability death action suit, because there was no “full and fair” opportunity to litigate at the outset, the first litigation being only against several of possible injurers).

The choice between ex ante and ex post perspectives considerations is especially clear in certain criminal proceedings. *See ROBERT COVER ET AL., PROCEDURE* (1988) (pointing out that sometimes convictions based on confessions result from an appreciation of a situation before the fact, while after the fact circumstances demonstrate that other possibilities were available.) As the authors conclude:

[I]t is very difficult to determine—especially after the fact—whether the failure to proceed in a certain way could fairly be characterized as a litigant’s ‘choice.’ In the absence of a reliable reconstruction about what . . . [the party] and his attorney knew when they failed to challenge the confession, should the claim of unconstitutional conviction be heard?

*Id.* at 1601.

<sup>112</sup> Courts have developed several rules to help them answer this question. For example, courts consider whether the second litigation involves quantitatively larger stakes than those litigated in the first instance. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 (1979) (“[A] second argument

prevail over otherwise ex ante procedural rules? Can these questions be settled ex ante through a theory of procedural justice?<sup>113</sup>

### C. *Reconsidering Torture and Timing*

The ex ante and ex post perspectives are two available perspectives for analyzing legal issues. Almost every legal incident can be viewed ex ante and then reevaluated ex post. What the examples of contracts, civil procedure, and torture demonstrate is that the ex ante and ex post distinction is not available in only one setting.<sup>114</sup> It is a general choice in law.

Given this generality, it is very difficult to know ex ante when an issue will arise that would require reconsideration of the ex ante perspective. This limit may only be known ex post. But leaving such examination to ex post determination also has stakes, which are often under evaluated. We think that ex post analysis is exceptional or in the periphery or is based on equity, so we don't worry too much about leaving difficult issues to ex post analysis instead of facing them and addressing them ex ante. The torture example demonstrates that this is a problematic intuition. Ex post analysis

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against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable.”); *Hardy v. Johns Manville Sales Corp.*, 681 F. 2d 334 (5th Cir. 1982) (holding that a judgment of \$68,000 against manufacturers of asbestos bearing insulation for a worker who developed asbestosis could have no preclusive effects in a multimillion dollars asbestos lawsuit).

Another consideration is whether the exception concerns the preservation of “public” as opposed to “private” rights. See generally *Christian v. Jemison*, 303 F.2d 52 (5th Cir. 1962); *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178, 1182 (E.D. Va. 1969) (rejecting a *res judicata* claim because it would have created an unequal protection of constitutional rights after the change in law occurred). See also RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(d) & illus. 6. On the institutional aspect of these cases, see Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 84 (1984).

<sup>113</sup> For such an attempt, see Solum, *supra* note 8, at 184. The theory is premised on Dworkin's theory of integrity. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* (1986); DWORKIN, *supra* note 56, and suggests the ideals of accuracy and participation for justifying an ex ante system of procedure. See Solum, *supra* note 8, at 309–11. Under this approach, in order for proceedings to serve as a legitimate source of authority a right of participation must be afforded to those bound by judicial proceedings.

But in fact the theory does not resolve the ex ante and ex post distinction but rather the general/particular problem. See, e.g., Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 399–400 (1994). In any case, as a coherence theory that is based on integrity it is always bound to lead to a preference of an ex ante principle whatever the outcome ex post. See generally Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 299–300 (1992) (suggesting that coherence theories always present the dilemma of whether to follow their view of coherence or adopt the morally best outcome).

<sup>114</sup> The choice between ex ante and ex post perspectives has also recently arisen in the context of family law. Divorce agreements stating spousal support are usually considered a final determination of the parties' obligations toward each other. Nevertheless, following the enactment of the new Divorce Act in 1985, the Supreme Court of Canada held in *Miglin v. Miglin*, [2003] S.C.J. No. 21, SCC 24, that changing circumstances following the divorce agreement which were not contemplated by the parties during negotiations, may give rise to a reconsideration of the divorce settlement ex post.

always has ex ante effects on laws and institutions looking forward and on the rule of law. The question is how we choose between the perspectives, given the actual stakes and uncertainties involved. More importantly the question is who should decide this issue if it arises ex post and how should that particular actor whether it is a court or an agent working under pressure, make its decision.

### III. THEORETICAL VIEWS ON THE PROBLEM OF TEMPORALITY IN LAW

In light of the similarity between the ex ante and ex post distinction in the issue of torture and the ex ante and ex post distinction in other areas of law, it may be beneficial to explore how legal scholarship addresses the ex ante and ex post distinction more generally in order to evaluate these theoretical approaches in the context of torture.

I address two main approaches. The first theoretical view is premised on choosing which perspective—ex ante or ex post—is preferable *a priori* for legal analysis in different legal fields, whether it is contract law, civil procedure, or torture, based on considerations of rational choice models. Proponents of the rational choice model often point out that an ex ante perspective to policy analysis is preferable. The opponents of this first approach largely reject the rational choice model as an exclusive basis for setting legal policy, and therefore suggest that an ex post perspective is important for legal policy in different legal settings. The second approach compares ex ante and ex post choices to the rules/standards distinction. Accordingly, the choice between the two perspectives is almost identical to determining whether legal directives should be cast as rules or standards.

Both of these approaches fall short of offering a satisfying analysis of the problems the ex ante and ex post distinction brings about in the issue of torture, as in other areas of law.

#### A. *Ex Ante Policy versus Ex Post Consideration of Bad Outcomes*

Is an ex ante perspective preferable to an ex post perspective toward legal issues? Is an ex ante perspective preferable to an ex post one in the issue of torture under the ticking bomb circumstances? Legal scholars debating whether an ex ante approach is superior to an ex post approach often frame the problem in terms of whether law should offset bad outcomes or bad luck that materialized ex post.<sup>115</sup> For example, should contract law consider the effects that ex post increases of prices of gowns have on the person who promised to deliver the gown at a certain price ex ante? In the civil procedure example, should litigants' decision to forgo

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<sup>115</sup> A similar problem concerned economists in the 1980s. See, e.g., Peter Hammond, *Ex Post Optimality As A Dynamically Consistent Objective for Collective Choice Under Uncertainty*, in SOCIAL CHOICE AND WELFARE 175 (P.K. Pattanaik & M. Salles eds., 1983).

appeal stand in the way of correcting an unjust outcome that materialized out of this decision? In the issue of torture, should a necessity defense be applied to excuse torture when the use of torture was needed to prevent a catastrophic situation from occurring even though the situation could have been anticipated *ex ante*?

In all of these examples, an *ex post* perspective would take account of the bad outcome that materialized after the fact in determining whether or not to offset whatever legal rule governed the case *ex ante*. Those advocating for following an *ex ante* perspective in these cases usually point out that the optimal policy for handling uncertainty in law is that of rational decisionmaking. People make rational choices *ex ante* and they should be held to their decisions, even when they are made under uncertainty. Offsetting bad outcomes *ex post* will only lead to sub optimal results in the long run, because people will not have optimal incentives to make correct decisions at the outset.

This debate received new focus in Barbara Fried's article entitled *Ex Ante/Ex Post*.<sup>116</sup> Fried pointed out that approaches toward policy compensation for legal transitions divided between *ex ante* and *ex post* approaches, presenting an outright conflict.<sup>117</sup> According to Fried, the best example for the *ex ante* approach is the welfare economics approach to law. Indeed, Louis Kaplow and Steven Shavell in their recent book *Fairness Versus Welfare* claim that welfare economics is premised on an *ex ante* approach.<sup>118</sup> Welfare economics is concerned with analyzing legal

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<sup>116</sup> Fried, *supra* note 7.

<sup>117</sup> See *id.* at 124–25. Legal transitions raise the question of whether it is appropriate, for reasons of efficiency or fairness or any other reasons for government to offset changes in wealth occasioned by changes in legal regimes. For example, if there is a new tax policy, should government offset any influence the new policy might have on investors who conducted their business based on the previous policy? See *id.* at 126–27.

In this context, the debate between *ex ante* and *ex post* seems irreconcilable. Compare DANIEL SHAVIRO, WHEN RULES CHANGE: AN ECONOMIC AND POLITICAL ANALYSIS OF TRANSITION RELIEF AND RETROACTIVITY (2000) (rejecting compensation for legal transitions based on *ex ante* arguments), Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47 (1977), Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986), Kaplow, *supra* note 76, Louis Kaplow, *Government Relief for Risk Associated with Government Action*, 94 SCANDINAVIAN J. ECON. 525 (1992), and Daniel Shaviro, *When Rules Change Revisited*, 13 J. CONTEMP. LEGAL ISSUES 279 (2003), with Richard A. Epstein, *Beware of Legal Transitions, A Presumptive Vote for The Reliance Interest*, 13 J. CONTEMP. LEGAL ISSUES, 69, 84 (2003) (cautiously endorsing an *ex post* approach requiring compensation for those harmed by legal transitions since it might restrain government opportunistic behavior), Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000), Logue, *supra* note 127, at 225–26, 238–39, and Wonnell, *supra* note 126, at 303. Fried noted that both welfare economics and luck egalitarians share an *ex ante* approach because both these approaches view the *ex post* outcome as a risk knowingly undertaken by individuals *ex ante* thereby not justifying legal compensation *ex post*. Fried, *supra* note 6.

<sup>118</sup> See KAPLOW & SHAVELL, *supra* note 8, at 436–43.

policy in terms of how it will affect individuals' well being.<sup>119</sup> Legal policy, they suggest, should be premised on how it affects individuals' behavior at the outset rather than whether particular events turned out to be good or bad for individuals.

Following an ex ante perspective under welfare economics is important for several independent reasons. First, ex ante analysis offers a broader picture of the issue concerned, because it takes into account all possible scenarios and how legal policy will affect ex ante incentives, regardless of whether the particular outcome turned out to be good or bad.<sup>120</sup> In contract law, for example, excusing performance when prices unexpectedly increase ex post might seem fair, but it may nonetheless undermine parties' incentives in entering contracts at the outset, because private parties will not be able to rely on contracts being enforced. An ex ante approach premised on welfare economics takes account of the ex ante effects ex post decisions may have on laws and institutions looking forward.<sup>121</sup>

According to welfare economics, ex post analysis may often lead to suboptimal results.<sup>122</sup> For example, if courts create exceptions to procedure whenever litigants wrongly choose not to appeal, litigants will not have optimal incentives to litigate fully or effectively ex ante, anticipating their ability to appeal to judges' sense of fairness ex post. Ex post exceptions to procedure may therefore lead to unwarranted litigation because parties will try to re-litigate their cases after the fact. Following an ex ante perspective also after the fact not only ensures a fair process but also reduces risks of uncertainty associated with unpredictable policies and protects the credibility of legal policy.<sup>123</sup>

Those advocating for an ex post perspective point out the limits of following the rational choice model in uncertain environments.<sup>124</sup> They note that people often wrongly assess the probabilities of future events,<sup>125</sup>

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<sup>119</sup> See SHAVELL, *supra* note 95, at 1–5. Generally, individual well-being, which is determined by expected utility, incorporates in a positive way everything that an individual might value. See KAPLOW & SHAVELL, *supra* note 8, at 15–28.

<sup>120</sup> See KAPLOW & SHAVELL, *supra* note 8, at 439–40.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 7–10.

<sup>123</sup> Kaplow, *An Economic Analysis of Legal Transitions*, *supra* note 117, at 557–60. Although sometimes it is optimal to depart from previously announced policies doing so may undermine government's credibility in keeping its policy. Kaplow also notes that failure to specify certain policies in advance creates a needless additional risk. *Id.* at 559.

<sup>124</sup> These positions were mainly raised with respect to the legal transitions context. On the ex ante and ex post analysis of legal transitions, see Fried, *supra* note 7. In an article that came to my attention just before publication, Matthew Adler and Chris Sanchirico raise a new critique based on an ex ante and ex post distinction, claiming that welfarism requires an ex post approach which conflicts with the principle of ex ante Pareto superiority in some choice situations. See Matthew D. Adler & Chris William Sanchirico, *Inequality and Uncertainty—Theory and Legal Application* (Research Paper No. 06-05, 2006), available at [http://ssrn.com/abstract\\_id=886571](http://ssrn.com/abstract_id=886571).

<sup>125</sup> These suggestions are premised on the famous work of Daniel Kahneman & Amos Tversky. See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*,

and sometimes even if they can assess the risk appropriately they are unable to avoid it.<sup>126</sup> According to behavioral law and economics, people often do not act like the rational human being assumed in classical economic analysis, because of various phenomenon, such as the endowment effect or the certainty effect (people overweigh certainty on both the gains and losses side).<sup>127</sup> Individuals tend to underweight high probability events, to ignore low probability events, “or if the events survive editing, to overweight them.”<sup>128</sup> Moreover, individuals’ “intuitive probability judgments are often inconsistent with (known) objective probabilities and systematically vary with the descriptions of a particular event.”<sup>129</sup>

What policy conclusions follow from these observations is, however, not as clear.<sup>130</sup> Even if people often misconceive probabilities it does not follow that an ex post perspective is superior. Sometimes, ex ante regulation may be required to correct cognitive biases and to protect people against their own irrationality.<sup>131</sup> Nevertheless, as the government’s or courts’ decisions are often sub-optimal, the ex post perspective provides the appropriate opportunity for reconsidering policy in light of its

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in CHOICES, VALUES, AND FRAMES 159, 167 (Daniel Kahneman & Amos Tversky eds., 2000); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, in CHOICES, VALUES AND FRAMES, *supra*, at 17; Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representations of Uncertainty*, in CHOICES, VALUES AND FRAMES, *supra*, at 44; Amos Tversky & Daniel Kahneman, *Introduction*, in CHOICES, VALUES, AND FRAMES, *supra*, at 7–8; Amos Tversky & Craig R. Fox, *Weighing Risk and Uncertainty*, in CHOICES, VALUES, AND FRAMES, *supra*, at 93; Amos Tversky & Peter Wakker, *Risk Attitudes and Decision Weights*, 63 *ECONOMETRICA* 1255, 1269–74 (1995).

<sup>126</sup> Sometimes the risk is too costly to avoid or is bundled in other choices that are desirable in themselves apart from risk. See Fried, *supra* note 7, at 145. Insurance may not always be effective because of the adverse selection problem. See Christopher Wonnell, *The Noncompensation Thesis and its Critics: A Review of this Symposium’s Challenges to the Argument for Not Compensating Victims of Legal Transitions*, 13 *J. CONTEMP. LEGAL ISSUES* 293, 303 (2003).

<sup>127</sup> Jeffrey J. Rachlinski, *The Uncertain Psychological Case For Paternalism*, 97 *NW. U. L. REV.* 1165 (2003). In the legal transitions context, see Fried, *supra* note 7, at 147; Kyle D. Logue, *Legal Transitions, Rational Expectations and Legal Progress*, 13 *J. CONTEMP. LEGAL ISSUES* 211, 222 (2003).

<sup>128</sup> Fried, *supra* note 6, at 147; Logue, *supra* note 127, at 223.

<sup>129</sup> Fried, *supra* note 7, at 147. Fried also notes that often times, people tend to change their minds after a long period of time, terming this “the problem of past selves binding future selves.” *Id.* at 149–50. On this phenomenon in the contract law context, see generally Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 *J. LEGAL STUD.* 203 (1997).

<sup>130</sup> Because it is difficult to predict how private parties are going to be affected by which bias in which direction, the case for a adopting a certain norm that requires individuals to rationally anticipate the law seems reasonable without further concrete assessment of these biases in different contexts. For this argument in the legal transition context, see Logue, *supra* note 127, at 227.

<sup>131</sup> See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law* 1–2 (Univ. of Chi. Sch. of Law, John M. Olin Law and Econ., Working Paper No. 225, 2004), available at [http://papers.ssrn.com/abstract\\_id=590929](http://papers.ssrn.com/abstract_id=590929) (suggesting that the legal system can debias either by insulating legal outcomes from their effects on boundedly rational behavior or “by steering legal actors in more rational directions”). In the legal transitions context, Christopher Wonnell supports this position. See Wonnell, *supra* 126, at 297.

application to particular cases after the fact. With it, the ex post perspective offers the chance for reaching correct and better decisions in the long term.

The scholarly positions for and against the ex ante and ex post perspectives present an outright conflict, which reappears in various contexts.<sup>132</sup> The question is whether this conflict is helpful for resolving the choice between the two perspectives in the issue of torture.

Under the rational choice model, an ex ante perspective on torture is important in order to set the appropriate incentives for officials looking forward. By setting an ex ante perspective on torture, the public is educated about the circumstances under which torture is tolerated and people can devise their actions accordingly. Moreover, if officials know that ex post defenses are available they will factor this knowledge into their understanding of the law, and their incentives to act in accordance with the ex ante law (whether prohibiting or authorizing limited use of torture) would be undermined.<sup>133</sup> Thus, an ex ante perspective is preferable for deterring unwarranted use of torture. On the other hand, if policy concerning torture is sub optimal because it does not concern all possible situations or because it allows too much use of torture, ex post analysis may be preferable in order to reach better and more tailored solutions. By leaving the determination of the issue of torture to ex post analysis, governments can avoid costly errors of allowing too much use of torture at the outset.<sup>134</sup> Finally, assuming people do not act as rationally as the model anticipates, government officials may use torture outside its ex ante authorization anticipating mercy after the fact based on other examples in which the public forgave those who acted illegally to protect the security of others. Ex post authorization will therefore solve this problem.

The debate between ex antism and ex postism does not offer a clear answer to which perspective is preferable. Comparing the issue of torture to the examples of contract law and civil procedure may be helpful in this

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<sup>132</sup> One such context is the debate between fairness and welfare approaches to law. Louis Kaplow and Steven Shavell argue that ex ante welfare positions are superior to fairness analysis which they associate with the ex post perspective. See KAPLOW & SHAVELL, *supra* note 8, at 437–39. For example, in contract law fairness analysis might lead to excuse performance when increase of prices occur because it will take account of the outcome that in fact materialized, whereas a welfare approach would consider how such a decision will also affect private parties deciding whether or not to contract in future cases. *Id.* at 439–40. Kaplow and Shavell further suggest that the ex ante perspective seems compelling in the welfare economics setting presented in their book because it is premised on consent, equality and a just social order. *Id.* at 440–44. However, these arguments may also support ex ante fairness approaches. Indeed, Rawls' theory of justice is a fairness theory that is premised on ex antism because the choice people make under the "veil of ignorance" is a choice made ex ante and adhered to after the veil is raised. See JOHN RAWLS, *A THEORY OF JUSTICE* 118 (rev. ed. 1999).

<sup>133</sup> Posner & Vermeule, *supra* note 6, at 674 (suggesting that the use of coercive interrogations methods be subject to the same type of ex ante regulations as other official violations).

<sup>134</sup> See Posner, *supra* note 5, at 297–98.

respect. Just as in the issue of torture, ex post exceptions to procedure or the default rules of contract law may undermine certainty and damage optimal incentives. If private parties anticipate mercy after the fact, they will be less inclined to act optimally ex ante, for example by not litigating fully or by taking too many risks in contracting. Even so, the effects of such distorted incentives may not be so great in these areas of law compared to torture, because their impact on society is not as profound. In torture, on the other hand, whatever happens ex post may have enormous effect on the values of our democratic society and the extent to which these values are upheld. The connection between the ex ante and ex post distinction in other areas of law with that of torture offers important insights not only to torture but also to the ex ante and ex post distinction more generally.

Whatever the correct position is on the issue of torture, it is important to note that choosing only one of the perspectives is not the only option. There is room for more complex designs which will incorporate both perspectives through different institutions or in different settings. As much as ex post analysis may ignore important aspects of ex ante behavior, following an ex ante perspective without regard to particular cases may ignore important insights that the new case brings with it.<sup>135</sup> The ex post perspective is important not only because of the limits of an ex ante model premised on rational choice, but primarily because it offers a competing viewpoint, one that is not always available or predictable at the outset.<sup>136</sup> The existence of such cases becomes clear when examined against the backdrop of examples from contract law and civil procedure. The question is whether choosing one of the perspectives exclusively over the other is a price worth paying. In the issue of torture under the ticking bomb circumstances, this may be a reasonable price. After all, leaving important decisions to ex post analysis in an issue such as torture may be too costly because of the implications it will have on the rule of law. Ex post analysis may set an informal standard under which the use of torture may be allowed without setting clear formal guidelines for officials and institutions determining cases ex post.

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<sup>135</sup> See discussion *supra* Part II.B.

<sup>136</sup> See Epstein, *supra* note 117, at 76. In the legal transitions context, Epstein provides the following example:

It would not make sense to allow, without compensation, a rule that prohibited further construction in a given city region when all owners except one have built-out their properties, such that they benefit from a restriction that has a single concentrated loser. Similarly, it would not make sense to allow a rule that forced people who had not built on their property and did not participate in the democratic process to pay for the pollution caused by people who had already built and thus were in a position to shape the local rules to their advantage through the political process.

*Id.* at 75.

Particular justice and tailored perfect solutions are available *ex post*. Choice and responsibility is often achieved by following an *ex ante* perspective. The two perspectives—reflecting ideals of choice and particular justice—are both available for decisionmakers in different settings. Rather than viewing the two perspectives as presenting an outright conflict, what is needed is a way to address their dual availability in different settings, allowing for a more complex interrelation between them through their allocation to different institutions in diverse settings.

#### B. *Are Rules Ex Ante and Standards Ex Post?*

The distinction between *ex ante* and *ex post* perspectives is sometimes addressed as a choice between casting legal directives as rules or standards. But rules and standards are not easily defined.<sup>137</sup> Rules are considered more “formally realizable” limiting discretion to one or several clear factors.<sup>138</sup> In contrast, standards require the discovery of “the facts of a particular situation” and the assessment of “the purposes or social values embodied in the standard.”<sup>139</sup>

For example, the legal directive that “only people older than 18 can vote” is a rule because the rule applier is supposed to consider only the factual determination of age and not the policy underlying the rule. In contrast, the legal directive that “only mature people can vote” is a standard because it prescribes a general policy that the decisionmaker will apply to cases based on their particular circumstances. It follows that one differentiating factor between rules and standards, is the extent of discretion afforded to the decisionmaker under rules compared to standards.<sup>140</sup> A rule represents a solution to an underlying problem through a balance of some background principles, but the decisionmaker is supposed to confine her decision to the applicability of the entrenched meaning of the rule to the facts, rather than turn to the substantive considerations and values underlying the rule.<sup>141</sup> A standard “tends to collapse decisionmaking back into the direct application of the background

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<sup>137</sup> The defining works in the area include MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15–17 (1987); SCHAUER, *supra* note 33, at 104; Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Kaplow, *supra* note 33, at 557; Kennedy, *supra* note 37, at 1685; Radin, *supra* note 36, at 783–90; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592–93 (1988); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); and Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 61 (1992).

<sup>138</sup> Kennedy, *supra* note 35, at 1687–88. Rules are more general and forward looking. See Schauer, *Rule and the Rule of Law*, *supra* note 33, at 649, 652.

<sup>139</sup> Kennedy, *supra* note 37, at 1688 (internal citation omitted).

<sup>140</sup> See KELMAN, *supra* note 131, at 15. Dworkin, for example, distinguishes between rules and principles. Standards like ‘reasonableness’ are applied to cases by drawing on the principles and policies lying beyond them. Nevertheless, they still restrict discretion. See DWORKIN, *supra* note 56, at 22–28.

<sup>141</sup> Sullivan, *supra* note 137, at 58.

principle or policy to a fact situation.”<sup>142</sup> Standards allow decisionmakers to take into account the totality of the circumstances.<sup>143</sup> As a result, rules often produce errors of over- and under-inclusiveness.<sup>144</sup> Standards decrease errors of under- and over-inclusiveness compared to rules because they provide decisionmakers with more discretion than do rules.<sup>145</sup>

It follows that the distinction between rules and standards can be seen as being premised on ex ante and ex post perspectives.<sup>146</sup> Rules are associated with an ex ante perspective because they generally receive their content in advance before particular cases arise.<sup>147</sup> By contrast, standards are associated with an ex post perspective, because they entrust decisionmakers with the power to apply it to the case based on the particularities of the case after the fact. While rules provide general justice, they cause over- and under-inclusiveness. Standards offer particular justice but they do not offer concrete guidance ex ante as do rules.

If one adopts a rules versus standards viewpoint to the ex ante and ex post distinction, then the choice between ex ante and ex post perspectives is premised on whether rules or standards are better suited for governing behavior, and more specifically whether legislatures (which resolve issues ex ante) or courts (which resolve cases ex post) should determine certain legal issues at the outset.<sup>148</sup> Rules are usually considered more appropriate when frequent behavior is concerned, because they enable people to plan their behavior at the outset. Standards are comparatively better for addressing exceptional cases, because the decisionmaking process

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<sup>142</sup> *Id.* (citing Kennedy, *supra* note 35, at 1687–88).

<sup>143</sup> *Id.* at 59.

<sup>144</sup> SCHAUER, *supra* note 33, at 135.

<sup>145</sup> Sullivan, *supra* note 137, at 58–59. The over- and under-inclusiveness is also the power of rules, because decision-makers have to follow them even when direct application of the policy to the facts would produce a different result. *Id.* at 58.

<sup>146</sup> Kaplow, *supra* note 33, at 559–60 (observing that the choice between rules and standards is often defined in terms of “whether the law is given content ex ante or ex post”). Following an economic analysis approach, Kaplow suggests that the choice between rules and standards should be determined based on which of the two—rules or standards—will lead to optimal behavior ex ante. *See id.* at 585. Among the factors to consider are how the determination of the content of the law will affect individual actions ex ante, the administrative costs associated with ex ante versus ex post determination of the legal rule, the costs of advice concerning the content of the legal rule ex ante versus ex post and so forth. *Id.* at 568–70, 577. Another consideration is the level of detail of rules versus standards because the decision “whether a complex standard is preferable to a simple rule depends on the combined effects of complexity and promulgation of the law as a rule versus as a standard.” *Id.* at 589; *see also* Schlag, *supra* note 137, at 423.

<sup>147</sup> Kaplow, *supra* note 33, at 559–60.

<sup>148</sup> This approach was originally taken by the legal process school of thought. Hart and Sacks explained in their materials that the choice between rules and standards reflects the legislature’s decision to allocate responsibility between the legislative branch (rules) and the courts (standards). *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at xciii–xciv (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

proceeds based on the characteristics of the exceptional case, once they are known.<sup>149</sup>

When applied to the issue of torture, arguments for supporting rules or standards may lead in different directions. Rules may seem superior because they offer guidance for officials looking forward and also frame their discretion in advance, subjecting officials' actions and their decisions to scrutinized review. But rules are often general and cause mistakes of over-and under-inclusiveness. They may lead to too much use of torture and consequently to unnecessary infliction of pain.<sup>150</sup> Even though rules may be better at guiding behavior at the outset, the use of torture may be better governed by standards, which allow decisionmakers to take the particular circumstances into account in order to avoid errors in employing torture unnecessarily. The common intuition would be that standards are superior because the use of torture in interrogations is bound to be exceptional, so there is no point in regulating it *ex ante*. This consideration gains additional importance as *ex ante* regulation might send the signal that such behavior is allowed rather than saved for extremely exceptional cases. On the other hand, the use of standards may lead officials to underestimate the costs associated with the use of torture in every case and overestimate the benefits, eventually leading to too much use of torture.<sup>151</sup>

The choice between rules and standards will ultimately have to be premised on an assessment of the empirical consequences of which legal directive will generate better results in the long term. This applies to contract law or civil procedure as much as it does to torture. Standards might be more appropriate for exceptional contractual circumstances or exceptions to procedural rules because such cases do not arise often and are difficult to anticipate in advance,<sup>152</sup> but rules might be better for setting clear guidelines for both procedure and contractual relations so that private parties can better devise their actions. In torture, whether rules or standards are preferable will similarly turn on which of these legal directives will lead to minimal employment of torture and to minimal threat to democratic values in the long term.

But the rules and standards distinction does not seem to capture the dual availability of the *ex ante* and *ex post* perspectives in these settings. Indeed, rules and standards are distinguished not only through the time

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<sup>149</sup> Legal directives are somewhere in the continuum between pure rules and pure standards. See Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–29 (1991); Sullivan, *supra* note 137, at 61. Sometimes rules may be corrupted by exceptions to the extent that they resemble standards. *Id.*

<sup>150</sup> Posner & Vermeule, *supra* note 6, at 683–84.

<sup>151</sup> See Gross, *supra* note 2, at 1507. But Posner and Vermeule question the empirical basis of this concern. In any case, they rightly suggest that this concern may be a general one with respect to officials' discretion rather than a unique one for the issue of torture. Posner & Vermeule, *supra* note 6, at 687.

<sup>152</sup> On the impracticability doctrine, see *supra* notes 97–100 and accompanying text.

dimension (whether a decision is made *ex ante* or *ex post*) but also through their formal realizability, complexity or breadth.<sup>153</sup> As a legal form, both rules and standards are meant to restrain discretion at the outset, whether the discretion is conferred on courts, legislators or any other administrative institution. Standards like reasonableness, fairness, or good faith constrain the decisionmaker in determining particular cases after the fact, and to this extent reflect *ex ante* reasoning rather than an *ex post* one. Thus, even standards are going to be vulnerable to unanticipated circumstances.<sup>154</sup> As Dworkin explains:

Words like ‘reasonable’, ‘negligent’, ‘unjust’, and ‘significant’ often perform just this function. Each of these terms makes the application of the rule which contains it depend to some extent upon principles or policies lying beyond the rule, and in this way makes that rule itself more like a principle. But they do not quite turn the rule into a principle, because even the least confining of these terms restricts the *kind* of other principles and policies on which the rules depends. If we are bound by a rule that says that ‘unreasonable’ contracts are void, or that grossly ‘unfair’ contracts will not be enforced, much more judgment is required than if the quoted terms were omitted. But suppose a case in which some consideration of policy or principle suggests that a contract should be enforced even though its restraint is not reasonable, or even though it is grossly unfair. Enforcing these contracts would be forbidden by our rules, and thus permitted only if these rules were abandoned or modified.<sup>155</sup>

The choice of legal form, either as rules or standards is a choice made *ex ante*.<sup>156</sup> Thus, the rules versus standards debate can assist in choosing between *ex ante* and *ex post* perspectives at the outset.<sup>157</sup> Nevertheless, the

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<sup>153</sup> Schlag, *supra* note 137, at 382 (“Thus, the opposition of rules and standards is one dimension of the form of a legal directive.”).

<sup>154</sup> See *supra* notes 47–50 and accompanying text. Fredrick Schauer offers a similar observation, SCHAUER, *supra* note 33, at 36–37; see also *id.* at 83–84 (discussing the possibility that a rule might incorporate all relevant factors but still be vulnerable to unanticipated events).

<sup>155</sup> See DWORKIN, *supra* note 56, at 28.

<sup>156</sup> Legislatures and courts can design their laws, precedents, or regulations either through rules or standards. With respect to courts, see generally Sullivan, *supra* note 137. There is however a more general and philosophical question of whether decisionmaking based on rules or standards is at all possible independently of outcomes. See, e.g., Frank I. Michelman, *Book Review*, 93 J. PHIL. 307 (1996) (JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996)).

<sup>157</sup> Given that the distinction between rules and standards is premised on timing, the arguments for rules and standards can offer a way to think about the choice between *ex ante* and *ex post* perspectives at the outset.

Substantively, the arguments for rules and standards rest on whether rules are better at promoting liberty and equality compared to standards. While rules promote equality of opportunity

dual availability of the ex ante and ex post perspectives brings out further problems, which the rules versus standards debate cannot resolve. Specifically, it requires determining the circumstances under which ex post considerations should lead, after the fact, to modify the ex ante legal directive, whether it is a rule or a standard.<sup>158</sup>

Let us return to the context of torture. The issue of torture may be regulated ex ante by either a rule or a standard. For example, the law may have a rule of absolute prohibition against torture, but the law may also have a standard prohibiting torture unless a catastrophic event occurs or a rule allowing torture but only under strict conditions (for example, approval of a certain official). All these legal directives exemplify ex ante reasoning, because the legal directive governing the issue of torture is determined in advance. In contrast, suppose torture is absolutely prohibited or allowed under strict conditions but courts or other administrators excuse the use of torture ex post despite the ex ante legal directive. For instance, when the Israeli Supreme Court determined that a necessity defense may be available in future cases based on ex post considerations, it also recognized that torture was prohibited ex ante and

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and are said to make decision-makers treat like cases alike, standards are said to promote substantive equality by taking into account the attributes of cases or their equities. Kennedy, *supra* note 37, at 1745–51; see Sullivan, *supra* note 131, at 62–63. Similar arguments are relevant with respect to the ex ante and ex post distinction. Under this substantive dimension, the choice between ex ante and ex post perspectives centers on whether equality is achieved through opportunities or outcomes. The ex ante perspective is associated with equality of opportunity but the ex post perspective brings to the foreground the limits of any universal rules that attempts to determine ex ante the distribution of resources over particular cases.

At the institutional level, the arguments for rules and standards are premised on which legal form is better suited for the proper balance between the legislature and the judiciary. Rules restrict judicial discretion. See Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989); Sullivan, *supra* note 137, at 64. But standards afford judicial accountability because they make judges confront their value judgments. See Sullivan, *supra* note 137, at 67. Similarly, rules allow legislatures to set policy in advance. See Kaplow, *supra* note 33, at 608–09, but when legislative agreement is difficult to reach, standards might be preferable. The choice between institutions is clearer however under the ex ante and ex post distinction. The ex ante perspective represents the democratic legislative process, which is almost always achieved before cases arise (except, for example, for administrative decisions). On the other hand, judges almost always determine cases ex post whether based on rules or standards.

Finally, under the functional dimension the choice between rules and standards is dependent on the various functional attributes of deciding cases ex ante versus ex post. Depending on the cost of promulgation and costs of learning and enforcing the law, rules may be better than standards in given contexts. For example, learning about rules may be cheaper, so when frequent behavior is concerned, a rule might be preferable. See Kaplow, *supra* note 33, at 585–93. The functional arguments for and against rules and standards are also relevant for the choice between ex ante and ex post perspectives at the institutional level. For example, the more information is available ex post the stronger the institutional argument that decision-makers should have discretion ex post compared to the alternative that the legislature should be the one to determine the case ex ante.

<sup>158</sup> If the particular question is governed by a standard, it will be easier to accommodate these unanticipated changes because the standard allows the decision-maker to take these changes into account more easily compared to a rule.

that the law did not allow torture through a necessity defense.<sup>159</sup> The German Federal Constitutional court also suggested that the lack of ex ante authorization to shoot down a plane due to a terrorist attack, might not prevent the absolution of a criminal liability arising under such circumstances.<sup>160</sup> Similarly, under the models of disobedience, decisionmakers are asked to consider whether the merits of the particular case justify disobedience of the rule of law as it is determined ex ante.<sup>161</sup> These models exemplify ex post reasoning independently of whether the legal directive is cast as a rule or a standard.

While the rules versus standards distinction helps resolve the choice between ex ante and ex post perspectives at the outset,<sup>162</sup> the dual availability of the ex ante and ex post perspectives poses further and more general problems to legal analysis: to what extent should outcomes lead to the reconsideration of the ex ante prescription of the law through rules or standards? To what extent should law be concerned with prescriptions guiding ex ante incentives and to what extent with achieving the just result right now? Who should decide when outcomes should set exceptions to either rules or standards? Who should decide “who should decide”? The rules versus standards debate can only help resolve the choice between the ex ante and ex post perspectives at the outset. What the ex ante and ex post distinction brings to the foreground is the capability to simultaneously see two possible perspectives toward legal questions not only ex ante but more importantly ex post.

#### IV. IS JUSTICE IN LAW OR DOES LAW SERVE JUSTICE?

##### A. *Three Dilemmas in Thinking About Torture and Timing*

The foregoing analysis demonstrates that both ex ante and ex post perspectives are applicable in almost every circumstance. As time passes, so does our perspective of the case changes. Thus, a legal question can usually be analyzed through both ex ante and ex post lenses. With regard to the issue of torture, whether there is an ex ante absolute prohibition on

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<sup>159</sup> HCJ 5100/94 Pub. Comm. Against Torture v. Israel [1999] 53(4) P.D. 817, *reprinted in Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, JEWISH VIRTUAL LIBR., ¶¶ 57–58, [http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism\\_law.pdf](http://www.jewishvirtuallibrary.org/jsource/Politics/terrorism_law.pdf); *see also supra* notes 58–59 and accompanying text.

<sup>160</sup> *See* Press Release, *supra* note 60.

<sup>161</sup> On the official disobedience model, *see supra* note 29 and accompanying text.

<sup>162</sup> Indeed, both the rules versus standards terminology and the welfare economics analysis of the ex ante and ex post distinction offer important insight for the choice between ex ante and ex post perspectives. It is therefore important to examine the similarities and differences between these approaches toward the ex ante and ex post distinction more generally. For example, while the rules versus standards debate focuses on the divide of institutions (e.g., courts versus legislatures) the welfare economics approach focuses on the ability of the law to reach optimal outcomes given individuals’ ex ante incentives in the long run. However, such an inquiry is beyond the scope of this Article.

the use of torture or limited authorization through a torture warrants model, ex post review will always bring with it a competing viewpoint of whether torture is justified based on the particular circumstances as they transpired. A similar problem occurs in contract law and civil procedure as in other areas of law.

In each field of law, whether it is contracts or civil procedure or security, law faces a choice between ex ante and ex post perspectives. On the one hand, following an ex ante perspective is about doing what is “just”: justice is achieved by following whatever determination was agreed to ex ante, also after the fact. Only by following our ex ante determinations can we be true to ourselves and act fairly toward others. In other words, the justice is *in* the law, part and parcel of it.

On the other hand, any ex ante perspective of law may return unjust results in particular cases or across cases over time; despite our attempts to seek just laws ex ante, they may sometimes fail to achieve just results ex post. As such, law only serves justice because even if justice can only be imagined ex ante, it must be achieved in decisions as they are applied ex post.

The dual availability of both ex ante and ex post perspectives suggests three dilemmas that also arise in the context of torture.

*Normative Concerns.* The first dilemma concerns the normative approach toward a particular field of law. Which perspective is more appropriate for which legal fields? Should torture be regulated ex ante or excused ex post? In this normative dilemma, whether we do or should prefer incentive arrangement to justice in particular instances is as much a question about policies as a question that should reflect the facts on the ground. We should therefore ask: do incentives actually work in a war-on-terror context compared to a contract context? What effects will ex post determinations of the issue of torture have on officials looking forward or on society at large? Which types of ex ante or ex post positions toward torture should be followed: torture warrants, necessity defenses or an official disobedience models? These questions require consideration of the moral psychology, and sociology of relationships, as well as assessment of the purposes underlying the issue at hand.<sup>163</sup>

The normative dilemma arising out of the ex ante and ex post distinction forces the choice between the perspectives at the outset, and requires us to imagine the choice between the perspectives as it will appear ex post. Indeed, most scholarship on the ex ante and ex post perspectives of the issue of torture concerns this normative dilemma. On the one hand, ex post analysis may seem like a plausible way to address the issue of

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<sup>163</sup> Roscoe Pound was one of the first to suggest that the design of legal directives should depend on the assessment of purposes behind the law. See generally Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923).

torture in the ticking bomb circumstances in light of the slippery slope argument. But the ex ante effects of excusing torture ex post exemplify what remains troubling with ex post analysis. News of the use of torture “off the books” demonstrates the consequences of lack of ex ante oversight.<sup>164</sup> It raises concerns that torture is not used in a limited way or in exceptional cases. This phenomenon supports the need to regulate the use of torture—either prohibiting or authorizing it—already ex ante. While adopting an ex ante approach to torture may be costly because of its effects on society, this argument loses its bite once the lack of ex ante framework leads to the use of torture without review or outright public responsibility.

We can examine this conclusion in light of the examples of contracts and civil procedure. In these examples, the ex post perspective is important because new cases bring with them new insights, just as experience offers wisdom. Yet, ex post determinations may be less worrisome in these areas of law compared to torture. The stakes in torture are higher because ex post determinations may lead officials to believe that torture is allowed ex ante, when in fact it is prohibited. Choosing at the normative level only an ex ante perspective in the issue of torture may well be the correct moral and legal answer in democratic countries. But it comes with the cost of saying no to ex post analysis, despite the temptation, which will become increasingly difficult to resist in truly catastrophic cases.

Whatever we choose at the normative level with respect to torture, we should, however, avoid the pretense that at any given moment only one perspective is available for this choice.

*Institutional Concerns.* The second dilemma concerns the choice of institutions. What institutions are good or even capable of taking which perspectives? Who should decide between the two perspectives in the issue of torture? Legislatures and administrative officials are usually better ex ante players than ex post. Courts and the public often proceed ex post, but it does not automatically follow that they would also be better at considering the ex post perspective of torture. How one views this layer depends largely on how one evaluated the practical results over the long run of the exercise of this power. Do we think certain institutions are better at it than others? Do we approve of courts’ development of the impracticability doctrine or exceptions to res judicata or a necessity defense in response to torture allegations?

The answers to these questions may be different than those given at the first normative level. While some may believe that the best normative

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<sup>164</sup> “The Guantánamo detainees . . . have reportedly faced physical and psychological coercion described by International Red Cross observers as ‘tantamount to torture.’” See Minow, *supra* note 1, at 2135.

solution to the issue of torture under the ticking bomb circumstances may be to leave the determination to ex post analysis, such a solution also leaves the institutional determination of which institution should decide the issue to such ex post time. As a result the choice of institutions is taken out of the hands of the legislature and is put in the hands of those institutions, which have the opportunity to consider the issue ex post, whether they are courts or other public forums. It is then also more difficult to devise guidelines and framework for decisionmakers in those institutions to guide their decisions. This may be particularly worrisome if the issue that is determined ex post is one of torture because of the implications of torture on the character of society.

Yet the Israeli example has shown that these worries may be exaggerated especially if the decision to apply a necessity defense is made by the court. In Israel, the Supreme Court held that although the issue of physical means needs to be regulated ex ante by the legislature, the court may find a necessity defense in the appropriate circumstances after the fact absolving the otherwise criminal liability of a particular officer.<sup>165</sup> While this decision may have had ex ante effects on the Israeli legislature which had not previously regulated the issue, it also created good consequences over the long term. Following the Supreme Court's decision, the physical means reviewed by the court have not been systematically used.<sup>166</sup>

The institutional dilemma complicates the issue further by posing the question whether it is courts or other institutions that should review officials' actions when the case arises ex post. While courts usually proceed ex post, courts may be less suitable for authorizing torture warrants or for determining that a necessity defense applies post factum. First, courts are usually viewed as the protectors of human rights and dignity, so allocating the responsibility of approving the use of torture to courts is likely to taint the judicial system. Moreover, judges often defer to officials' discretion so courts are not likely to be the best guard against the exaggerated use of torture.<sup>167</sup> Finally, public opinion can and should make a difference. By leaving the review of torture to other accepted institutions, such as a public committee or special presidential approval with subsequent judicial review, there is a chance for an immediate public scrutiny of the use of torture rather than a slower review through the regular procedure of courts. On the other hand, courts may be best suited for protecting human rights, and history has shown that sometimes courts

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<sup>165</sup> See *supra* note 159 and accompanying text.

<sup>166</sup> *Public Committee* has had a significant impact on General Security Services interrogation practices. Amnesty International has admitted that systematic use of interrogation methods under review has ceased after the decision. See John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture be an Option?*, 63 U. PITT. L. REV. 743, 760 (2002).

<sup>167</sup> See *supra* note 23.

have had an important role in fostering such protection.<sup>168</sup> An appropriate solution might therefore divide the *ex ante* authorization and the *ex post* examination between two different courts.<sup>169</sup> Whether this may be true or not in the issue of torture may well depend on the particular court as well as the particular country.<sup>170</sup>

The institutional dilemma may lead to different answers in different areas of law. The relevant considerations may depend on the functionality of different institutions in different areas and their ability to process each perspective and comprise appropriate solutions, but also on the subject or substance of an issue. While courts may seem more appropriate for determining cases *ex post* in contracts, they may be less suitable for determining cases *ex post* in torture. The difference may turn on our normative conviction that torture should be addressed by legislatures rather than courts. Substance follows the choice of institutions just as substance often follows the choice of form.<sup>171</sup>

*Personal Concerns.* Finally, the third dilemma involves the actors acting within institutions. These include administrative authorities and agents but also judges. Every institutional actor faces an institutional dilemma which is also a personal dilemma: Should she follow whatever determination was made *ex ante* to resolve the case at the outset or rather follow whatever she believes is the appropriate *ex post* perspective of the case? If so, under what circumstances should she opt for an *ex post* perspective? If there is no *ex ante* determination, should she take responsibility *ex post* and make the decision instead of the otherwise authorized institutions?

On the issue of torture this dilemma seems relevant both for officials determining whether to employ torture outside the law and for courts reviewing such decisions after the fact. Assume that the use of torture is prohibited without authorization from a high ranked official. A case arises in which an interrogator believes that he is faced with a ticking bomb situation but cannot find the high ranked official to receive authorization for employing torture. Should this official act without authorization?

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<sup>168</sup> One of the major contributions of the Warren Court was promoting equality. See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 77 (1998).

<sup>169</sup> In Germany, for example, the Federal Constitutional Court determined whether the Aviation Security Act authorizing the shoot down of planes used for the purpose of a terrorist attack was constitutional. See, Press Release, *supra* note 60. However criminal liability arising out of such a shooting might be discussed in a criminal court and will reach the constitutional court only if such a case raises a constitutional claim. See *id.*

<sup>170</sup> See Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. REV. 51 (2006) (comparing the approaches of the Israeli Supreme Court and the U.S. Supreme Court on judicial review of executive actions in war on terror, and noting that the Israeli Supreme Court was more inclined to review executive actions of security matters).

<sup>171</sup> See generally Kennedy, *supra* note 37 (noting that we often attach to our choice of form substantive positions).

Should the court, reviewing his decision, determine that such behavior should be excused based on some legal concept, such as necessity? For the official this is both a personal and professional dilemma. He is supposed to uphold the law but also to protect security. He may feel that taking the law into his own hands is important regardless of whether his actions are excused after the fact. He may also feel betrayed were he to sacrifice his future by taking action only to learn that he received no forgiveness after the fact.

For the courts, the stakes may be higher. The court's decisions will affect not only the officer standing trial but also the institution in which the officer worked as well as law more generally. The court, entrusted to determining a case *ex post*, has to consider whether or not to set a new *ex ante* regime based on the choice between the two perspectives, as it appears to the court after the fact. If the court approves of the exception, it creates a basis for other similar exceptions in the future. If the court does not absolve the criminal liability of the interrogator, it may undermine the public's faith in law, signaling that law is inflexible and blind to truly catastrophic situations. The legislature may be overworked or incapable of reaching a decision, and the court may find it necessary to fill its institutional role by offering a just solution, even though we often think the legislature should devise a solution because a society's use of torture directly affects the character of our democratic society. Yet, courts create *ex post* exceptions in other areas of law, such as contracts or civil procedure in order to reach particular justice. It seems appropriate for courts to set *ex post* exceptions to civil procedure in order to protect the constitutional scheme that followed *Brown v. Board of Education*.<sup>172</sup> Similarly it seems correct for courts to excuse performance to accommodate truly unanticipated circumstances.<sup>173</sup> Why should our position be different when the issue before the court is the use of torture rather than *ex post* exceptions to contract law or civil procedure?

#### B. *Tools for Choice Ex Post*

The extent to which courts should set a new *ex ante* regime *ex post* may depend not only on the legal field at hand, but also on the particular case before the court. Although it may be impossible to develop tools that will be helpful in all situations, the foregoing analysis suggests several guidelines for judges determining whether to follow the *ex ante* determination or to modify it *ex post* based on the particular case before them.

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<sup>172</sup> See *supra* notes 1–9 and accompanying text.

<sup>173</sup> See *supra* notes 97–98 and accompanying text.

The most straightforward way to approach this problem is through categorization. Categorization helps identify groups of cases in which ex post considerations may have an important role. Categorization may take account of the type of legal issue at hand, but also of the type of relationships between the parties or the institutional capacities of the possible decision makers. For example, in contract law courts may be at the convenient position to determine those cases in which exceptions should be made to accommodate fair market transactions, especially if one views contract law as a regime for cooperation that is made also ex post.<sup>174</sup> Moreover, even if courts exaggerate their intervention, private parties can agree differently in their contracts thus signaling back to the courts. Similarly, in civil procedure cases, courts are likely to be able to assess whether an ex post exception is warranted given that they oversee most procedural disputes in a wide variety of cases.

Another important consideration is the ex ante effects courts' decisions may have on future cases and private parties looking forward. While ex ante effects of ex post exceptions may not seem too worrisome in contract law or civil procedure, they may be detrimental when approaching an issue such as torture. A correction of a court's decision in an issue such as torture may need to involve legislative agreement, which is more difficult to achieve. Moreover, it may be more difficult for courts to assess the long term effects of their decisions on society and its security.

One way to address this problem is by conditioning ex post exceptions on the ability to universalize the decision to other future cases. The decision of an interrogator whether to uphold the law or to proceed with the employment of torture despite the law is a decision that may not affect future cases. Courts' decisions, on the other hand, may have a broader impact. Consequently, it may be helpful to consider whether an exception in one particular case should also be upheld if it was universalized to other cases. If the decision cannot be upheld in other cases, it may seem to be arbitrary and undermine its legitimacy. Finally, given the difficulties associated with ex post analysis, courts should refrain from employing an ex post perspective without a particular case before them. After all, the benefits of an ex post perspective are premised on the information and knowledge that comes from particular cases. Waiting for the particular case may therefore demonstrate why it was worthwhile.

How should a court determine whether to create a new ex ante regime after the fact in the issue of torture based on these guidelines? Such a difficult question can best be answered when an actual case arises. But more can be said. Courts are usually those protecting rights in face of government officials seeking to limit these rights in the name of security

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<sup>174</sup> See Kreitner, *supra* note 101, at 464–65 (discussing, among other things, the benefits of employing the category of transaction type).

concerns. They are the gatekeepers of democracy. Thus, courts involvement in ex post analysis is most justified when courts protect and enhance freedoms in particular cases against the attempts of government officials to narrow these rights and freedoms. Courts have a duty to protect democracy and human rights as well as achieve particular justice. Courts should utilize their power for ex post analysis in order to increase freedoms and rights through particular justice. For this reason too, it may be best for courts to insist that the use of torture be regulated by the legislature ex ante.

As for the more general resolution of the ex ante and ex post distinction in torture, in my own view, the normative, institutional and personal dilemmas in the issue of torture all lead to a preference for an ex ante resolution of the issue of torture rather than an ex post one. Although the examples of other areas of law demonstrate the importance of both perspectives for determining legal issues justifying complex legal designs, involving both perspectives, these suggestions are inappropriate for torture. Governments need to be accountable by facing up to the choice of using torture at the outset, or deciding to forgo its use, offering a clear message that this ex ante determination is not made in a vacuum but with the understanding of the costs associated with choosing ex ante and not allowing for excuse through courts ex post. If governments decide to make torture illegal, then it should be illegal in the particular case, and we should not undermine that message by absolving the criminal liability of those who employed torture after the fact without a legal basis.

Whatever happens in torture, the important lesson is that we need to avoid the pretense that we can get rid of the dual availability of both perspectives by choosing an ex ante perspective that ignores the choice between the perspectives and then subject it to ex post exceptions, hoping that these exceptions will not have consequences in future cases. Officials acting in dire situations have to choose between the two perspectives. Judges often face a similar choice when confronted with the review of those officials' actions. The ex post perspective presents the opportunity for particular justice. However it has real consequences on law and institutions that should not be ignored. We should not avoid the choice between the perspectives hoping that ex post analysis will be reserved to equity or exceptional cases. The stakes are just too high.

## V. CONCLUSION

This Article has examined the ex ante and ex post distinction in law. It addressed the stakes and benefits of both perspectives in the issue of torture against the breadth of examples from other fields of law, such as contract law and civil procedure. This examination demonstrated that the ex ante and ex post distinction is a general problem in law, which raises normative, institutional and personal dilemmas. These dilemmas cannot be

completely resolved but can only be managed over time and this Article offered several tools for managing these dilemmas with a particular application to the issue of torture. Whatever the solution in a particular case, the general conclusion of this Article is that neither the ex ante perspective of a legal issue, nor its ex post perspective should always be master. We need to avoid the pretense that one is better than the other. The question is how to choose the proper perspective in a given scenario or context.