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INTRODUCTION

Coercive interrogation is now a live subject, thanks to 9/11. At one time, coercive interrogation played a role only in philosophical disputes about consequentialism, in which scholars asserted or denied that the police could interrogate an individual in order to extract the location of a ticking nuclear bomb. None of the participants in those debates seriously considered the possibility that coercive interrogation could be justified except in extreme circumstances never likely to be met. Today, U.S. officials appear to engage in coercive interrogation or something very similar to it; so do other western governments; and the possibility that coercive interrogation may be justified in nonremote circumstances has entered mainstream debate.[1] The task for legal scholars at this point is to understand how this practice fits into legal norms and traditions, and how it ought to be regulated.

Let us define some terms, and delimit the topic. "Coercive interrogation," we will say, involves (1) the application of force, physical or mental (2) in order to extract information (3) necessary to save others.[2] Coercive interrogation can range from the mild to the severe. At some point of severity, coercive interrogation becomes a species of "torture," which is flatly prohibited by domestic and international law.[3] Coercive interrogation and

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1. *See* Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013 (2003). Levinson's important paper supplies evidence for the first two claims in text and constitutes evidence for the third. For other recent debate about torture, see TORTURE, A COLLECTION (Sanford Levinson ed., 2004) (collecting major essays on the practical, philosophical and moral considerations surrounding the historical and contemporary use of torture). For a recent media report, see Eric Lichtblau, *Justice Dept. Opens Inquiry Into Abuse of U.S. Detainees*, N.Y. TIMES, Jan. 14, 2005, at A20.

2. The last clause excludes the use of coercive interrogation to extract confessions to be used in later prosecution. We define coercive interrogation strictly as a police practice used to prevent harm to others, rather than as a prosecutorial tool.

3. The principal legal sources of the prohibition on "torture" are: the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985); the U.S. Senate reservations to the convention, which adopted a more restrictive definition of "torture," U.S. Reservations, Declarations, and Understandings and Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment II(1)(a), 136 CONG. REC. 36, 193 (1990); 18 U.S.C. § 2340A (2000) (criminalizing torture committed outside the United States by U.S. nationals and persons later found in the United States); Torture Victim Protection Act, 28 U.S.C. § 1350 (2000) (providing a civil remedy against torturers acting under color of the law of a foreign nation); and Supreme Court decisions holding that "police interrogation practices that severely infringe on a suspect's mental or physical autonomy violate the due process clause regardless of whether they produce statements that are admitted against the suspect." John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 62 U. PITT. L. REV. 743, 751 (2002). In sum, "[t]orture is prohibited by law throughout the United States." U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE (1999), *available at* http://www.state.gov/www/global/human_ rights/torture_articles.html, *cited in* Parry & White, *supra*, at 753. A complication, which we will ignore, is the claim by some Bush administration officials that statutory and treaty restrictions on certain forms of coercive interrogation should be narrowly construed, and might even be unconstitutional to the extent they prohibit the President from using coercive interrogation in the exercise of the Commander in Chief power. Memorandum for Alberto R. Gonzales, Counsel, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, at 31–39 (Aug. 1, 2002), *available at* http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf; WORKING GROUP

torture are thus partially overlapping concepts; neither is a proper subset of the other. Mild coercive interrogation does not amount to legal "torture," which requires that a threshold of severity be met. And there are forms of torture that are not coercive interrogation—for example, when torture is used as a means of political intimidation or oppression, indeed for any purpose other than extracting information necessary to save third-party lives. Our interest is in the overlapping area of these two concepts: coercive interrogation that (by virtue of its severity) counts as torture. Henceforth, we will use "coercive interrogation" to denote this subset.

Given these stipulations, our inquiry is normative. We ask what legal regime should govern coercive interrogation. Should it ever be permissible? If so, what legal rules should be used to sort permissible from impermissible cases? Among legal academics, a near consensus has emerged: coercive interrogation must be kept "illegal," but nonetheless permitted in certain circumstances.[4] How is this trick accomplished? There are two popular suggestions. First, interrogators can use the necessity defense, which would permit government agents to argue in specific cases that violating the laws against coercive interrogation was necessary to discharge their duty to protect the public from an imminent terrorist threat. Second, interrogators can throw themselves at the mercy of the political process, and seek a pardon, or a favorable use of prosecutorial discretion, or some similar political immunization. The idea is to make coercive interrogation such an unattractive option for officials—they will be personally liable unless the strict conditions of necessity are met or the political process smiles on them—that they will use it only as a last resort. And this regulatory structure is meant to have an expressive dimension: maintaining the "illegality" of coercive interrogation expresses a moral commitment to human dignity and autonomy, while the possibility of defenses and pardons allows its use where appropriate.

The whole idea is puzzling. Police are allowed to use deadly force in order to prevent dangerous suspects from harming other people. Killing a person is also a serious harm to dignity and autonomy; although we will see arguments holding that coercive interrogation is worse than killing in some respects, there are other respects in which killing is worse than coercive interrogation. To prevent officials from engaging in unjustified killings, governments take the conventional route of enacting laws that describe the conditions under which a police officer may use deadly force, making the

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REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Mar. 6, 2003), *available at* http://www.ccr-ny.org/v2/reports/docs/PentagonReportMarch.pdf.

4. *See* Jean Bethke Elshtain, *Reflection on the Problem of "Dirty Hands"*, *in* TORTURE: A COLLECTION, *supra* note 1, at 86–87; Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1520 (2004); Levinson, *supra* note 1, at 2048; Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION, *supra* note 1, at 297–98; Henry Shue, *Torture*, 7 PHIL. & PUB. AFF. 124 (1978). Exceptions to this view—scholars who think law should permit coercive interrogation under some circumstances—include Alan M. Dershowitz, WHY TERRORISM WORKS 156–60 (2002) [hereinafter DERSHOWITZ, WHY TERRORISM WORKS]; Michael S. Moore, *Torture and the Balance of Evils*, 23 ISR. L. REV. 280 (1989).

police liable only if they violate these rules in bad faith. Why shouldn't the same system be used for coercive interrogation? Or, conversely, why not prohibit police killings on the theory that such a prohibition would ensure that police would kill only when they anticipate that, after they are charged for murder, they can successfully plead the necessity defense or obtain a pardon?

Or consider the use of force during war. The laws and usages of war permit soldiers to kill other soldiers, and civilians as well. Although the killing of civilians is generally regarded as a moral evil, it is justified and permitted when civilian deaths are not disproportionate given a legitimate military target.[5] If governments can authorize the killing of civilians in order to accomplish legitimate military objectives—which are all means to the end of national security—why can't government authorize coercive interrogation for the same purpose? Or, conversely, why not prohibit the killing of civilians and require soldiers to seek a pardon or some other form of political forgiveness, before or after they are tried for murder?

In short, the view that coercive interrogation should remain illegal assumes that coercive interrogation is special in a way that distinguishes it from police killings and other serious harms that officials are licensed to inflict; but what makes coercive interrogation special?

The answer, in our view, is that coercive interrogation is not special at all. If it is agreed that coercive interrogation is justified in certain circumstances, even narrow circumstances, there is no sense in treating it as "illegal" but subject to ex post political or legal defenses. It should be made legal, albeit subject to numerous legal protections—again, in this way like police shootings, wartime killings, preventive detentions, capital punishment, and other serious harms. The law should treat coercive interrogation the way it typically treats coercive governmental practices. Such practices are subject to a standard set of regulations defined ex ante: punishment of officials who use these instruments without a good justification, official immunity when they are used in good faith, various restrictions on the type of instrument that may be used, ex ante protections such as warrants,[6] and so forth. Our argument is that coercive interrogation should be treated in the same way.

Part I provides a brief and selective overview of the first-order philosophical issues. Our purpose here is to delimit the topic in two critical ways. First, we bracket and ignore the claim that coercive interrogation is deontologically impermissible per se, whatever the facts. With a very few exceptions, this is a view nobody holds; most mainstream philosophers—both consequentialists and deontologists—agree that coercive interrogation may be morally justified under certain conditions. Second, we outline the rule-consequentialist view that the harms of coercive interrogation are so great, the occasions for its justified use so infrequent, and the risks of deci-

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5. *See* GEOFFREY BEST, WAR AND LAW SINCE 1945, at 323 (1994).

6. The idea of ex ante warrants for torture is taken from Alan Dershowitz. *See* DERSHOWITZ, WHY TERRORISM WORKS, supra note 4.

sionmaker error so high, that coercive interrogation should never be permissible. The rule-consequentialist view turns on empirical and institutional premises that we discuss in Parts II and III. The only philosophical point is that, for either deontologists or consequentialists who believe that coercive interrogation can sometimes be permissible, there is no philosophical justification for thinking that coercive interrogation should be considered special, and regulated differently from the other serious, coercive harms that government inflicts.

Part II addresses second-order empirical and institutional arguments for treating coercive interrogation as special in the legal system (that is, regulating coercive interrogation by a different legal regime than applies to other serious harms government may inflict). These arguments rely on various tropes of second-order argument—rules versus standards, slippery slopes, institutional failure, corruption, and so forth—that in this case turn out to rest on implausible empirical premises. Our more precise point, however, is that if these arguments were accepted for coercive interrogation, many other common practices would have to be prohibited as well—for example, the shooting of armed suspects.

In Part III, we argue that banning a practice and then asking officials to engage in it (when justified) and ask for public forgiveness is not a plausible strategy for giving officials the right incentives. All of the rule of law reasons for creating a set of ex ante regulations that govern official conduct—rather than regulating official conduct ex post—apply as much to coercive interrogations as to other forms of law enforcement. Moreover, a regime of ex ante illegality and ex post license is conceptually unsustainable. If officials and citizens know that ex post defenses and forgiveness are available, they will factor their knowledge into their understanding of what the law is, diluting the material and expressive effects of the "ban" on coercive interrogation. Part III also provides our proposed framework for regulating coercive interrogation. It emphasizes three elements: (1) rules that state what is permitted and what is not permitted, (2) immunity for officials who obey the rules and punishment for those who violate the rules, (3) ex ante regulations such as warrants.

If coercive interrogation is not special, why is it so often swept up in a larger condemnation of "torture"? Part IV speculates briefly about why coercive interrogation is taboo. Possible mechanisms include faulty generalization that condemns coercive interrogation by reference to morally indefensible torture, and by reference to salient historical episodes; the reliance on moral heuristics; and widespread herding or judgment falsification, the former causing individuals to condemn coercive interrogation because others do so, the latter causing them to condemn coercive interrogation in public even if they privately approve it in some circumstances. A brief conclusion follows.

I. First-Order Considerations: Moral Limits on Coercive Interrogation

Coercive interrogation is a stock subject in moral reasoning. We will outline some standard philosophical positions about coercive interrogation, put some off the table, and argue that the remainder turn crucially upon suppressed empirical and institutional premises, rather than the sort of conceptual claims that fall within the philosopher's distinctive expertise. Our aim is to set up the discussion in Parts II and III, in which we criticize the empirical and institutional premises necessary to sustain the view that coercive interrogation should be regulated differently than other serious coercive harms.

Let us begin by looking at the following standard views; we will offer some brief remarks on each.

A. *On Deontological Grounds, Coercive Interrogation Is Flatly Impermissible*

One might hold that coercive interrogation is absolutely impermissible, as a violation of rights rooted in human dignity or autonomy. This position is held by very few moral philosophers, if any. Here the ticking-bomb hypotheticals are important: while it is possible to argue that such cases are so rare that they should be ignored by a rule-consequentialist calculus ex ante, an argument we consider below, it is fanatical to argue on deontological grounds that rights against coercive interrogation should not be overridden to prevent serious harms to others. That position denies that there can ever be such a thing as a justified violation of rights, or a necessary evil. Thomas Nagel seems to offer a brief defense of absolutism, saying that in standard cases where A sacrifices or harms B to save C, A can justify his conduct to B; but in the case of torture, no such justification is possible.[7] But this view is a nonstarter, even on its own terms, for Nagel is equivocating about what "torture" means. If coercive interrogation that aims to save lives is at issue, rather than sheer sadistic cruelty, the structure of justification tracks the standard cases of harming B in order to save C.[8]

Put differently, coercive interrogation presents a "tragic choice."[9] A view holding that coercive interrogation is sometimes permissible need not deny

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7. Thomas Nagel, *War and Massacre*, *in* War and Moral Responsibility 3, 17 (Marshall Cohen et al. eds., 1974).

8. Levinson, *supra* note 1, at 2032.

9. Martha Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, *in* Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives (Matthew D. Adler & Eric A. Posner eds., 2001). Where tragic choices are involved, Nussbaum suggests, decisionmakers should at a minimum take pains to commemorate the values, rights, or interests that are overridden in the service of other commitments. That commemoration can presumably occur in a variety of ways, from compensatory payments to public apologies and memorials. Nussbaum also suggests that decisionmakers should think dynamically, with a view to anticipating and reducing the number of future occasions that present tragic choices. We fully agree, and see nothing inconsistent with our views in that insight.

that coercive interrogation is a grave moral evil; of course it is. But sometimes evils, even grave ones, are also necessary. The absolutist deontological view fails to come to grips with the inevitability of tragic choices. In what follows, then, we will put the absolutist deontological view off the table. Anyone who genuinely holds it may ignore our argument, but we do not think there are many such people.

B. *On Deontological Grounds, Coercive Interrogation Is Impermissible Except to Prevent "Catastrophic Harms"*

Position Two is far more common. Charles Fried argues, as have many others, that it is permissible to kill an innocent person to save a whole nation from annihilation.[10] If so, coercive interrogation would be permissible a fortiori in those circumstances.

But why only *those* circumstances? Let us motivate the puzzle by imagining that a catastrophe principle governs the standard practice in which police officers may use necessary force, including lethal force, against persons who threaten harm to others. In this imagined regime, government officials may kill one person only to save (say) one thousand other people. No legal system adopts such a regime, nor is there any obvious reason to recommend it. Standardly the permissible ratio[11] is 1 to 1: where relevant restrictions are met, government may kill A to save B, not merely one thousand Bs. Obviously we can add further specification to either the coercive-interrogation case or the extrajudicial-killing case: we might require that the threatened harm be "imminent," that the force used be no more than necessary, and so on. What is quite mysterious, however, is why the sheer catastrophic *size* of the threatened harm should matter. The obvious alternative is to say that the harm prevented must simply be greater than the harm inflicted. It will not do to say that "harms cannot be aggregated across individuals" or "we must take seriously the differences between persons." The catastrophe exception is already in the business of aggregating harms across persons. Oddly, however, the catastrophe exception builds in a threshold below which the harms are of insufficient weight to override deontological restrictions, and above which they are sufficiently weighty to do so.[12]

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10. CHARLES FRIED, RIGHT AND WRONG 10 (1978).

11. We bracket the question whether the catastrophe threshold is best understood as a ratio, as opposed to some other sort of function. *See* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 898–900 (2000).

12. Michael Moore responds to this point in the following way:

> [T]he worry may be that any point we pick for a threshold beyond which consequences determine the rightness of action may seem arbitrary.... [But] this is no more than the medieval worry of how many stones make a heap. Our uncertainty whether it takes 3, or 4, or 5, etc., does not justify us in thinking there are no such things as heaps. Similarly, preventing the torture of two innocents does not justify my torturing one, but destruction of an entire city does.

Moore, *supra* note 4, at 332. Moore's point would be responsive if the question were a linguistic and conceptual one: how many stones make a "heap," and how many deaths make a "catastrophe." It is not responsive to the different question we raise in text: why, as a matter of substantive morality,

What typically animates a catastrophe exception is a complex of empirical and institutional considerations: the moral theorist is worried about the decisionmakers who will assess whether coercive interrogation is justified, and about the collateral effects of licensing those decisionmakers to make those very decisions. In this sense, the deontologists who build in a catastrophe exception are often second-order consequentialists with particular institutional sensibilities.[13] They do not want to prescribe fanatical respect for rights in scary cases, but they also worry that the exception will expand so as to swallow the rule; they are worried about institutional and empirical phenomena like slippery slopes and the effects on public attitudes of permitting coercive interrogation. Such worries are perfectly sensible in principle, although we argue in Parts II and III that they are much overblown in fact, and cannot justify distinctive treatment of coercive interrogation. This complex of institutional concerns, moreover, is not one about which philosophers as such have anything distinctive to say.

Consider Henry Shue's famous argument against the moral permissibility of torture.[14] On this view, the central evil of torture—what makes it worse than extrajudicial killing of a menacing criminal, or (Shue's comparison case) the killing of enemy combatants—is that torture violates the "prohibition against assault upon the defenseless."[15] Torture is worse than killing, from the standpoint of concern with dignity and autonomy, because torture "fail[s] to satisfy even [the] weak constraint of being a 'fair fight.'"[16]

This is slippery moral philosophy, even without regard to the offsetting benefits of coercive interrogation. Torture is worse than, say, killing enemies or armed criminals because the tortured captive is defenseless (ex post, at least). But killing enemies or armed criminals is worse than torture on another margin: killing, unlike torture, utterly extinguishes the victim and forever denies him any future possibility of exercising autonomy or enjoying human dignity. The victim of coercive interrogation may not get a fair fight, but at least he lives to fight another day. Shue has picked out the dimensions that put torture in the worst light so he can argue that it is worse

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there should be any such catastrophe threshold in the first place. Why exactly do the deontologists want to say that saving a mere, say, two or three lives does not justify a single act of coercive interrogation? Moore's final sentence restates the catastrophe view, but does nothing to justify it.

13. We do not claim that only institutional considerations can justify a threshold-based approach—for example, a norm against killing that can be overridden to save one hundred lives, but not two lives. A strictly first-order moral justification for such thresholds might be that the deontological injunction not to kill does not have infinite weight, and at some point is overbalanced by other moral obligations. *See* Moore, *supra* note 4 (arguing that consequences always count, even below the catastrophe threshold, but that consequences are outweighed by the deontological prohibition unless and until the threshold is reached—just as a buildup of water will eventually overspill a dam); *see also* SHELLY KAGAN, NORMATIVE ETHICS 78–84 (Norman Daniels & Keith Lehrer eds., 1998). For acute first-order criticisms of this sort of justification for the threshold approach, see Alexander, *supra* note 11. Our narrower claim is just that, in fact, many opponents of coercive interrogation who subscribe to some sort of threshold-based approach tend to do so because of the second-order institutional and empirical concerns discussed in Part II.

14. Shue, *supra* note 4, at 125–30.

15. *Id.* at 125.

16. *Id.* at 130.

than other, commonplace practices. The opposite tack would be to pick out the dimensions that put torture in a better light than other, commonplace practices. Neither approach seems obviously superior.

Still, what is of interest for our purposes here is that Shue is reluctantly willing to entertain exceptions. "[T]he avoidance of assaults upon the defenseless is not the only, or even in all cases an overriding, moral consideration."[17] Shue then adduces a string of brief empirical and institutional arguments against permitting coercive interrogation. First, it will be difficult to define the limited set of conditions under which coercive interrogation would be permitted. Second, such limiting conditions will predictably be violated even if they can be defined, because all torture has a "metastatic tendency."[18] "[A]ny practice of torture one set in motion would gain enough momentum to burst any bonds and become a standard operating procedure. . . . If it were ever permitted under any conditions, the temptation to use it increasingly would be very strong."[19]

The natural conclusion to these empirical and institutional concerns would be a flat prohibition on coercive interrogation, a prohibition justified on rule-consequentialist grounds. We take up that possibility shortly. Shue flinches from this implication, however, concluding in the end that the best legal regime would both "prohibit" coercive interrogation ex ante and yet also contain some sort of ex post mechanism for allowing justified interrogation to escape punishment: "The torturer should be in roughly the same position as someone who commits civil disobedience. . . . If the situation approximates those in the imaginary examples in which torture seems possible to justify, *a judge can surely be expected to suspend the sentence*."[20]

But the last idea makes the account more puzzling than ever. Given Shue's pessimism about the possibility of defining circumstances under which interrogation should be permitted, how can law define the circumstances in which the judge should suspend the sentence? Or is the judge's decision to suspend the sentence ex post a wholly discretionary exercise? On Shue's empirical premises, why will not the anticipated availability of ex post relief inexorably expand into a general legal blessing for coercive interrogation? In what sense is coercive interrogation even "illegal" in such a regime? On a Holmesian account of law, what matters is that the interrogator will not, in the end, go to jail. Most striking of all is that Shue's whole discussion of justified interrogation is untethered from moral theory, his area of presumptive expertise. The latter part of Shue's argument is entirely empirical, but Shue gives the reader little beyond a set of stylized assumptions

17. *Id.* at 137.

18. *Id.* at 143.

19. *Id.* at 141.

20. *Id.* at 143 (emphasis added).

about what the legal, political and social effects of interrogation simply *must* be.[21]

C. *On Rule-Consequentialist Grounds, Coercive Interrogation Is Impermissible*

The deontological parts of Shue's argument establish a moral presumption against coercive interrogation, subject to a consequentialist override; the subsequent move, one that Shue introduces on the quiet, is a prediction about the costs and benefits[22] of coercive interrogation across a range of cases. Here all views short of strict deontology—both ordinary consequentialism and the modified deontological position that admits a catastrophe exception—must assess the first-order and second-order consequences of coercive interrogation.[23]

Putting aside Shue's modified deontological view, the assessment of consequences can proceed in either an act-consequentialist or a rule-consequentialist framework.[24] For act-consequentialists, the important issue is whether the benefits of coercive interrogation exceed the costs in particular cases. Rule-consequentialists, by contrast, ask which (set of) rules about coercive interrogation will produce the greatest net benefits. We have already seen the straightforward act-consequentialist argument for permitting coercive interrogation, especially in the standard ticking-bomb hypotheticals discussed above, so we will focus here on the rule-consequentialist alternative. We address here the second-order arguments for adopting a flat rule-consequentialist ban on interrogation, and find those arguments implausible. In Parts II and III we proceed to ask whether there is any good reason to have a legal regime that differs from the moral regime.

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21. For his large propositions about the nature and effects of torture, Shue cites two documents from Amnesty International. *See* Shue, *supra* note 4.

22. Here and throughout, we mean nothing philosophically contentious by the terms "cost" and "benefit." Any consequentialist view needs a value theory that labels some consequences as good, others as bad; we label the good consequences "benefits" and the bad consequences "costs." (Note that, as discussed below, violations of rights might themselves count as bads, to be compared to other goods and bads). In particular, we do not mean to invoke cost-benefit analysis in the technical sense; we do not suggest that costs and benefits must be monetized through a willingness-to-pay measure.

23. The distinction between deontology and consequentialism does not track the distinction between rights-based and welfarist moral theories. One may hold a consequentialist view in which the effects of actions on rights are themselves among the consequences to be evaluated, in which case the welfare consequences of actions are not the only consequences of interest. *See* Amartya Sen, *Rights and Agency*, 11 PHIL. & PUB. AFF. 3 (1982). This possibility is orthogonal to our discussion here, but nothing we say is inconsistent with it. The non-welfarist consequentialist, who counts rights violations as bads, either does or does not admit some rate of tradeoff between the goal of avoiding rights violations and other goals. If the rate of tradeoff is zero, we will label the position "deontological," strictly to simplify our terminology. If there is some positive rate of tradeoff, we label the position "consequentialist," again for simplicity. In the latter case, rights violations count as a "cost" in the sense defined above, and are folded into the cost-benefit calculus.

24. There is also a possible motive-consequentialist approach, on which actors attempt to develop the character or disposition that will tend to produce the actions with the best overall consequences. We will ignore this variant in what follows.

We suggest that there is none; the legal system should authorize interrogation in some narrow range of circumstances, suitably defined and regulated ex ante.

The rule-consequentialist argument against coercive interrogation emphasizes second-order considerations. Perhaps cases in which coercive interrogation is justified to prevent greater harms are in fact extremely rare; perhaps front-line moral decisionmakers would be prone to commit error by using coercive interrogation in cases where its costs outweigh its benefits; perhaps there are important dynamic effects, such as the risk of a slippery slope from tightly regulated coercive interrogation to widespread casual torture. On this approach, coercive interrogation is declared morally impermissible on an ex ante cost-benefit calculus, not because there are no cases in which coercive interrogation would be justified from an ex post perspective—the rule-consequentialist agrees that there are—but because it is predictable ex ante that licensing decisionmakers to attempt to identify such cases will do more harm than good. We comment on the empirical merits of similar second-order arguments in Parts II and III, suggesting that arguments for prohibiting all coercive interrogation because of concerns about the decisional capacities of officials in the legal system are unduly pessimistic. Here we will confine ourselves to some remarks about the presuppositions of the rule-consequentialist approach.

It is important to acknowledge that a rule-consequentialist prohibition on coercive interrogation might turn out to be correct, in light of the facts. The great strength of this approach is that it cannot, by its nature, be ruled out of bounds in the abstract. Everything depends on the actual values of the second-order variables that the rule-consequentialist argument identifies.

Yet it is equally important to recognize that the rule-consequentialist approach purchases this immunity from abstract critique for a price: the rule-consequentialist approach is hostage to the facts as they actually turn out to be, in whatever empirical domain is at issue. Because the relevant facts vary over time and across domains of morality and law, it is extremely implausible (although not logically impossible) that the rule-consequentialist calculus will counsel a flat prohibition on coercive interrogation always and everywhere. At some times, the harms that coercive interrogation might prevent will be greater and more likely to occur than at other times, and the rule-consequentialist must take this into account. So too, in some polities, under some circumstances, coercive interrogation may be justified on this approach even if it cannot be justified in other polities under other circumstances. The faithful rule-consequentialist cannot subscribe to any timeless and universal prohibition on coercive interrogation.

A related point is that from the rule-consequentialist standpoint a flat prohibition on coercive interrogation is a kind of extreme or corner solution, and as such suspect. For any such rule, there will generally be a more permissive substitute, such as a rule-with-exceptions that permits some coercive interrogation under circumstances that can be clearly defined ex ante. Consider a rule-with-exceptions that bans coercive interrogation unless officials know with moral certainty that one thousand people will

imminently die. More generally, the rule-consequentialist is obliged to consider a range of intermediate regimes short of a flat prohibition on coercive interrogation. The corner solution is salient but not superior, unless that salience itself produces some consequentialist benefit.

The final point is one we will emphasize in Parts II and III. The second-order arguments that support a prohibition on coercive interrogation are, in many cases, pitched at a level of generality that would also condemn other standard practices in which officials are legally licensed to inflict serious harms, such as extrajudicial killing. The rule-consequentialist who subscribes to a prohibition on coercive interrogation bears the burden of confronting those practices, either by extending the prohibition to include them, or by offering some empirical consideration that makes coercive interrogation special. We subsequently argue that no such consideration can be shown to exist. Whatever the merits of our answer, however, the rule-consequentialist cannot avoid the question.

To summarize the ground covered so far: we will bracket and ignore genuinely absolutist deontological arguments that coercive interrogation is impermissible per se. This position is very rarely defended, in light of cases suggesting that coercive interrogation is at least sometimes necessary to prevent third-party harms. Far more common are positions that incorporate consequences in some way. Of these, the two most prominent are (1) a modified deontological position that incorporates an exception or override to a baseline deontological prohibition, where coercive interrogation can prevent "catastrophic" harms; and (2) a rule-consequentialist prohibition.[25] Both positions turn crucially upon empirical and institutional premises or assumptions, especially a set of predictions about the second-order effects of the possible legal regimes. We now turn to those second-order questions.

II. Second-Order Considerations: The Empirical and Institutional Context

In this Part, we assume that the consequentialists and the nonabsolutist deontologists are right—that, at least in limited circumstances, coercive interrogation is morally justified. This assumption, however, provides only a starting point for making policy choices. The further question is whether coercive interrogation can be justified in light of what we call second-order considerations about the legal system, and about the institutional context in which coercive interrogation would take place. Some critics of coercive in-

25. We also bracket the possible view that coercive interrogation is not merely morally *permissible* but indeed morally *required*, where lives are in the balance. Where coercive interrogation might save third-party lives, to fail to interrogate might be seen as itself a morally objectionable choice, a sort of moral squeamishness not justified by any plausible version of the distinction between acts and omissions. (Thanks to Cass Sunstein for this point). *See also* Elshtain, *supra* note 4, at 87 ("Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person."); Winfried Brugger, *May Government Ever Use Torture? Two Responses from German Law*, 48 Am. J. Comp. L. 661, 669–71 (2000) (arguing that under the German constitution, which requires government to aid individuals, torture may be constitutionally obligated).

terrogation—even those who acknowledge first-order moral arguments for permitting coercive interrogation in catastrophic scenarios—argue that the second-order considerations are decisive with respect to real legal systems: they argue, in essence, that even if a perfect government that made no errors should have the power to engage in coercive interrogation in extreme cases, no real world government should have such a power. In the real world, government officials make mistakes, and actions that may be justified on a narrowly instrumental calculus have unforeseeable institutional or systemic effects that render them unjustified in general.

We address three groups of second-order considerations,[26] and argue that they are exceptionally weak. Second-order considerations do not justify a flat ban on coercive interrogation.

A. *Rules and Standards*

The first argument is that catastrophic scenarios are too rare to justify authorizing police to engage in coercive interrogation. Suppose that you think that coercive interrogation can be justified only to save more than one thousand lives, and even then that coercive interrogation would be justified only if it was reasonably certain that the subject would provide the relevant information that could be used to save the lives. Outside of war, such scenarios are extremely rare; indeed, we can think of only one, in the United States or any other western country, in recent history: the September 11 attack—and even here it seems unlikely that the authorities would have been able to stop the attack if they had had the power to engage in coercive interrogation.[27] Thus, the benefits of allowing coercive interrogation would be vanishingly small.

At the same time, the costs could be high. If officials are allowed to engage in coercive interrogation, then no doubt they would make errors and sometimes employ this measure against people who have no information about a pending terrorist attack or have information only about small-scale attacks whose seriousness does not justify the use of coercive interrogation. Unnecessary infliction of pain is an intrinsic cost, whether the suspects are innocent or guilty of some crime. If the benefits of permitting coercive interrogation are low in an ex ante sense, and the costs are high because of unavoidable error, then a flat ban on coercive interrogation would be justified.[28]

This argument is a familiar point about rules and standards. Rules are simple and easy to administer but are overinclusive and underinclusive, and thus produce results that deviate from the normative optimum that the rules

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26. They have been recently summarized by Oren Gross, though he sees six; several, though, are versions of others. Gross, *supra* note 4, at 1501–11.

27. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 254–77, 339–57 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf (indicating that the problem was not that the authorities could not extract information from suspects, but that they were unprepared for the type of terrorist activity that would occur on 9/11).

28. *See, e.g.*, Parry & White, *supra* note 3, at 761–62.

are supposed to approximate. Standards directly incorporate the normative ideal, or approximate it more closely than rules do, but, because they are harder to understand, are more likely to result in error by decisionmakers. Rules are likely to be better than standards when decision costs are high relative to error costs.

The rule-consequentialist argument against coercive interrogation amounts to the claim that a bright-line rule—a blanket prohibition on coercive interrogation—is superior to a standard that permits coercive interrogation in "extreme circumstances" or the like; or, for that matter, a slightly vaguer rule such as one that permitted coercive interrogation "only when it is reasonably certain to save more than one thousand lives." The reason is that high decision costs under a standard or a vaguer rule would produce high costs—instances of unnecessary coercive interrogation—without producing large enough benefits to justify these costs, given the rarity of extreme circumstances. This argument is conceptually coherent, and superficially attractive; but we believe it to be flawed in point of fact.

Let us begin with the simplest question, whether coercive interrogation works (where by "works" we mean "produces information that saves lives, in a nontrivial range of cases"). If coercive interrogation does not work, if it is all cost and no benefit, then there are no tradeoffs to be made, and both the moral and institutional questions are easy. This is a tempting view,[29] but it runs aground on the evidence.

We will focus on the Israeli evidence. Much of that evidence is anecdotal or impressionistic, but it strongly suggests that coercive interrogation saves lives. The Landau Commission found that:

> [E]ffective activity by the [General Security Service, or GSS] to thwart terrorist acts is impossible without use of the tool of the interrogation of suspects, in order to extract from them vital information known only to them, and unobtainable by other methods.
>
> The effective interrogation of terrorist suspects is impossible without the use of means of pressure, in order to overcome an obdurate will not to disclose information and to overcome the fear of the person under interrogation that harm will befall him from his own organization, if he does reveal information.[30]

In a report submitted to the United Nations, Israel represented that GSS investigations had foiled ninety planned terrorist attacks, including suicide

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29. One can eliminate the need to address difficult moral and legal questions by insisting that coercive interrogation is ineffective either because it produces no information or because it radicalizes one's enemy. *See, e.g.*, PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR 109–12 (2003). We are skeptical about this approach for reasons given by Levinson. *See* Levinson, *supra* note 1, at 2028–31.

30. ISR. GOV'T PRESS OFFICE, COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY 78 (1987), *reprinted in* 23 ISR. L. REV. 146, 184 (1989) [hereinafter LANDAU REPORT].

bombings, car bombings, kidnappings, and murders.[31] Although the Israeli Supreme Court later held that GSS practices of coercive interrogation violated rights of human dignity, and thus required clear legislative authorization, the Court acknowledged that coercive interrogation works. Here is one example the Court gave:

> A powerful explosive device . . . was found in the applicant's village . . . subsequent to the dismantling and interrogation of the terrorist cell to which he belonged. Uncovering this explosive device thwarted an attack . . . . According to GSS investigators, the applicant possessed additional crucial information which he only revealed as a result of their interrogation. Revealing this information immediately was essential to safeguarding state and regional security and preventing danger to human life.[32]

Many people are reluctant to believe that coercive interrogation works, not only because they convince themselves that morally bad practices must also be ineffective, but also because they have in the back of their minds a picture of rogue police beating suspects in a haphazard or indiscriminate effort to gain information. As the Israeli experience shows, however, coercive interrogation can be done well or poorly. GSS interrogators work, or worked, under elaborate guidelines concerning the amount and types of coercion that can be used, and under the constant supervision of superiors who must provide administrative approval for the application of particular methods.[33] Professionalism and training can increase the benefits of coercive interrogation, by increasing the chances of obtaining useful information, and decreasing the harms to those interrogated.

If coercive interrogation is effective, then the cost of a bright-line rule that bans it in all circumstances is high. This cost consists of the lives lost because information was not obtained before the bomb explodes. Against this cost, we must compare the benefit of the ban: the avoided cases where government agents unjustifiably engage in coercive interrogation. Here, we can revert to the philosophical literature and the Israeli experience, both of which suggest that the benefits can be greater than the costs, at least in certain circumstances. The only issue is whether the error costs are so extreme that only a bright-line ban can be justified.

There are two main reasons for thinking that the answer to this question is no. First, the question, as posed, assumes an implausibly simple policy choice: either a flat ban or a vague standard that will be easily abused. But there are many alternatives that fall between these extremes. Coercive interrogation could be limited to cases where a certain number of

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31. U.N. COMM. AGAINST TORTURE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION, SECOND PERIODIC REPORTS OF STATES PARTIES DUE IN 1996, ADD., ISR., para. 24, at 7 U.N. Doc. CAT/C/33/Add.2/Rev.1 (Feb. 17, 1997) [hereinafter U.N. REPORT].

32. HCJ 5100/94 Public Committee Against Torture in Israel v. The State of Israel [1999] IsrSC 46(2) 150, *reprinted in* 38 I.L.M. 1471, 1474 (1999) (S. Ct. Isr.) [hereinafter *Public Committee Against Torture in Israel*].

33. U.N. REPORT, *supra* note 31, at 3–4.

lives are at stake—say, one thousand. It could be limited to cases where the subjects are known to be members of Al Qaeda or another group that has proved its hostility and lethalness. It could be subject to special ex ante controls, its use could be limited to specially trained and monitored groups within the government, the type of coercive interrogation could be circumscribed so that only "moderate" measures are used, and so forth. We will discuss these design options in more detail below;[34] for now, it is sufficient to point out that the policy choices are more nuanced than supporters of the complete ban allow.

Second, ordinary and rarely criticized law enforcement practices already assume that the cost of unjustified coercive interrogation is not extremely high. Existing policy—which permits police interrogations but bans coercive interrogation—already accepts the possibility that police will err and use unjustified coercion. The distinction between coercive and noncoercive interrogations is fuzzy and subject to much debate and litigation. Even a decisionmaker acting in good faith can cross the line, and engage in coercion. If we cared so much about preventing torture that we were unwilling to tolerate even a single instance of it, then we ought to restrict even noncoercive interrogations. A prophylactic ban on all interrogations, for example, would eliminate coercive interrogation.

But no government is willing to go so far; presumably, the reason is that the benefits of noncoercive interrogation are high enough to justify a fuzzy rule or standard, even one that results in occasional erroneous decisions to coercively interrogate, and that the costs of coercive interrogation are, though high, not as high as people might initially claim. But then it follows that unless coercive interrogation is known to be ineffective—an implausible assumption, as we have argued—it may be appropriate to permit it with a fuzzy rule or standard that limits it to cases where the benefits exceed the costs.

The comparison with police shootings is again instructive. The costs of police shootings are extremely high—people are wounded or killed, unnecessarily when the police make errors, as they unavoidably do—but the benefits are also high: innocent lives are saved. Rather than banning police shootings because of the high costs of error, governments regulate them. And rather than using very clear rules, the regulations are replete with standards—references to "justified" force, or force that the officer "reasonably believes to be necessary," are common.[35] Why shouldn't the government use the same system of regulation for interrogations?

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34. *See infra* Part III.

35. While state statutes list some specific circumstances when deadly force is allowed, such as acting as the executioner at the orders of a competent court, they also create more general standards for when force is "justified." *See, e.g.*, ALA. CODE § 13A-3-27 (1994) ("A peace officer is justified in using deadly physical force upon another person when and to the extent that he believes it necessary . . . [t]o defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly force."); 720 ILL. COMP. STAT. 5/7-5 (2002) ("A peace officer . . . is justified in the use of any force which he reasonably believes to be necessary to effect the arrest and of any force which he reasonably believes to be necessary to defend himself or another from bodily

To be sure, it may be that the cost-benefit calculus is different for coercive interrogation and for extrajudicial killings. Perhaps extracting information is not as important as preventing immediate violence; extrajudicial killing will often save another life with high probability, while extracting information is a more speculative enterprise and will less frequently save lives. On the other hand, when coercive interrogation *does* save lives, it may often save more lives than would extrajudicial killing. The cost-benefit calculus must consider not only the probability of averting harm, but the magnitude of the harms averted. Overall, then, it is hardly obvious that the net cost-benefit calculus is different in the two cases; and even if there is a difference, it is unlikely that the difference is great enough to justify a complete ban on coercive interrogation alone. We will return to the possibility of an empirical distinction between police killings and coercive interrogation below, in III.D.

What we have said so far applies, with the same force, to the many subtle variations on the rule/standard argument that can be found in the literature. For example, it has been suggested that if officials must balance the costs and benefits of coercive interrogation on a case by case basis, they will inevitably underestimate the costs and overestimate the benefits.[36] It is not clear why this would be true though it is possible: maybe officials underestimate the costs because they don't sympathize with the subject, or because the officials themselves become dehumanized by their involvement in coercive interrogation and lose the ability to perceive the impact of their actions on the subject; or maybe they overestimate the benefits because they have personal or institutional reasons for exaggerating the likelihood of threats. But, putting aside the fact that all of these worries are speculation unencumbered by serious empirical support, they apply with equal force to noncoercive interrogation; they are simply an aspect of police or intelligence work. If they are valid concerns, then they provide a general case for restricting the police or intelligence services, subjecting them to public oversight, and so forth; but they do not apply specially to coercive interrogation, justifying a flat ban where other areas seem appropriately governed by standards or soft rules.

Taken together, these considerations suggest that the critics of coercive interrogation have not yet provided a justification for an absolute ban. Most police and intelligence work is governed by standards or soft rules; unless there is something special about coercive interrogation, the same approach should be used for that measure.

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harm while making the arrest."); UTAH CODE ANN. § 76-2-404 (2003) ("A peace officer . . . is justified in using deadly force when . . . the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person."). State statutes are not the last word, of course. In *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court found unconstitutional a statute that authorized deadly force against a fleeing suspect who was neither armed nor dangerous. Most state statutes, however, already comply with *Garner*'s rules.

36. Gross, *supra* note 4, at 1507.

B. *Slippery Slopes*

The slippery slope argument holds that even if coercive interrogation survives a narrow assessment of its advantages and disadvantages—one that compared the immediate benefits from obtaining information and the harms to the subject of the interrogation—it is nonetheless unjustified because of its more remote effects. Once we allow coercive interrogation, the argument goes, we won't be able to stop: torture will be used to punish convicted criminals, to extract information from suspects and even witnesses in routine criminal cases, and to intimidate political opponents.[37]

Slippery slope arguments identify a possible unintended negative consequence of a particular policy; if this consequence is likely enough, then it ought to count as a cost in the cost-benefit calculus used to evaluate the rule.[38] But the fact that bad consequences are possible is not itself a sufficient reason for banning an activity. Proponents of a slippery slope argument bear the burden of showing that the unintended consequence is likely enough that it should be included in the calculus; this involves (1) identifying a mechanism by which the initial policy choice might lead to the adverse consequence, and (2) providing some evidence that this mechanism operates in fact.[39] Proponents of a flat ban on coercive interrogation have not met this burden.

The first argument is that once the taboo against coercive interrogation is shattered, the psychological constraints against inflicting pain will fall away, brutalizing the law enforcement officials who use coercive interrogation. Police who justifiably use coercive interrogation in one setting—the prevention of catastrophic terrorist attacks—will start using it to extract information or even confessions from petty criminals and even innocent bystanders who are thought to be withholding information about a crime that they have witnessed.[40] Alternatively, even if the shattering of the taboo does not itself increase police brutality, sadists may self-select into police work at greater rates than they otherwise would.

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37. *Id.* at 1508–09; Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 278 (2003); 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, 254–57, 261–62 (1989); Parry & White, *supra* note 3, at 763.

38. See Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

39. See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

40. Kremnitzer, *supra* note 37, at 261–62.

These arguments are not supported by evidence.[41] One could make the same argument about police shootings: if the government allows police to shoot people, then police will be morally corrupted and treat suspects with unnecessary brutality, or would-be Rambos will self-select into police work in large numbers. But this does not appear to have occurred, or, if it has, this adverse consequence of permitting the police to use deadly force is universally seen as justified by the need to protect crime victims. And if people who routinely inflict pain on others lose their capacity to sympathize with their subjects, there are a variety of institutional mechanisms[42] that can be used to confine coercive interrogation to the appropriate setting, just as training, contractual incentives and criminal penalties, citizen oversight, and other institutional arrangements are used to prevent police shootings from slipping out of control.

A second and related argument is that society as a whole is brutalized if police engage in coercive interrogation. The shattering of the taboo against coercive interrogation would result in the public and the government acquiring a new enthusiasm not just for this measure, which could result in its routine use as an instrument of law enforcement, but also for torture, as a device for punishing criminals, intimidating political opponents, and demonstrating the power of the state.

The problem with this argument is the same as the problem with the first: it is pure speculation, belied by our experiences with other measures. Take capital punishment. One could argue that killing convicted criminals is just as likely to brutalize society as torturing them. Yet the trend has been in the opposite direction. Historically, nations have cut back on capital punishment rather than expanding it; this has been driven by revulsion against its use against minor criminals or political opponents. In the United States today, there appears to be little pressure to expand the death penalty—to, say, ordinary murders or robbery or rape.

The argument recalls the various "ratchet" theories, which hold that the adoption of new law enforcement measures that restrict civil liberties inevitably become entrenched, and thus the starting point when new emergencies generate pressure for aggressive law enforcement, so that there is always a downward pressure on civil liberties. These theories have never been adequately defended.[43] In the context of torture, there have been many examples

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41. One scholar argues that the CIA contributed to the destabilization of the Philippines and the overthrow of the Shah of Iran by training officers in the techniques of psychological torture. *See* Alfred W. McCoy, *Cruel Science: CIA Torture and U.S. Foreign Policy*, 19 NEW ENG. J. PUB. POL'Y 209, 228–31 (2005). But his evidence is exceedingly weak, and consistent with the opposite conclusion: that the Philippines would be less stable, and the Shah's government would have collapsed earlier, had they not used torture. As McCoy concedes that these countries would have used torture even without the CIA's help, and as he argues only that the CIA's contribution consisted of training foreign police in the techniques of *psychological* torture, his evidence does not support the claim that the use of torture by the CIA "metastasized," resulting in unintended injury to friendly governments.

42. We discuss these mechanisms below in Part III.

43. Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003).

of western countries adopting coercive interrogation and similar aggressive practices as temporary measures to deal with a particular emergency—France in Algeria, Britain against the IRA—and then abandoning them when the emergency is over.[44] Israel uses coercive interrogation against suspected terrorists; this practice has not spread to other settings, as far as we know.[45] Far from desensitizing the public to violence and pain, the use of coercive interrogation and similar measures can inspire revulsion, and a renewal of a commitment not to use them except in extreme circumstances.[46]

Capital punishment, coercive interrogation, the use of deadly force against dangerous suspects, and similar law enforcement devices are used, or not used, as circumstances warrant. It is possible that they have unpredictable second-order effects on public psychology, but we do not know the direction of these effects, and the historical record does not support the claim that harsh police tactics cannot be controlled but must inevitably become harsher. Here again, we emphasize that everything depends on what the facts turn out to be. Because arguments about policies such as coercive interrogation and capital punishment are hostage to what the facts show, in particular domains, there is no slope at all, just a series of discrete policy problems all arrayed on a level. Support for coercive interrogation need not commit policymakers to support for punitive torture or slavery or any other horror.

A third concern is that once coercive interrogation is authorized, officials will, over time, become more and more expert in using it effectively. As this happens, one of the main objections to coercive interrogation—that it is ineffective, or is often used when it is ineffective—will disappear, and thus coercive interrogation, according to the cost-benefit calculus, will be used more often. Although this theory may be right, it implies only that coercive interrogation will become more common, not that it will be used in an unjustified fashion or produce some other adverse consequence.[47]

C. *Symbolism*

Several arguments in the literature can be placed under the heading of symbolism. These arguments often are hard to distinguish from slippery

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44. *See* BENJAMIN STORA, ALGERIA: 1830–2000: A SHORT HISTORY 49–51 (Jane Marie Todd trans., 2001) (describing the use of torture by French forces to defeat an insurrection in Algiers); Kreimer, *supra* note 37, at 280 n.10 (discussing the British use of coercive interrogation in Northern Ireland in the 1970s).

45. For example, it has not spread from interrogation to confession. LANDAU REPORT, *supra* note 30, at 152 ("[T]he GSS is very scrupulous about not accepting from persons under interrogation false confessions concerning untrue facts.").

46. *See* STORA, *supra* note 44, at 87–93 (describing the reactions of the French public to the use of torture in Algeria).

47. Similarly for the idea that the permissibility of coercive interrogation will dampen police incentives to engage in research and development of new technologies for discovering information. If coercive interrogation works well, there is little reason for law to expend large resources stimulating such research and development. Any technique that works also dampens the search for substitute techniques, but that is no objection from a normative point of view.

slope arguments but we consider them separately because their force does not depend on slippery slope concerns being valid.

First, one might argue that coercive interrogation is in tension with the "symbolism of human dignity and the inviolability of the human body," in the words of Oren Gross.[48] We just don't understand this argument. Imprisoning criminals and using violence and deadly force against them when they threaten others also are inconsistent with human dignity and the inviolability of the human body, but they are nonetheless tolerated because of their benefits. Gross also argues that a flat ban on coercive interrogation gives "notice that fundamental rights and values are not forsaken."[49] But this giving of notice is, or ought to be, parasitic on the underlying substantive decision. If we allow coercive interrogation, we don't want to give notice that we are not allowing coercive interrogation, or endorse values that are inconsistent with it.

Second, the ban on coercive interrogation might have an "educational function."[50] It teaches both Americans and foreigners about human dignity and the value of human rights. But if coercive interrogation—like imprisonment, or police shootings—is justified, and thus consistent with our values, then we shouldn't want to teach people that coercive interrogation is wrong; quite the contrary. If coercive interrogation is justified, a ban on coercive interrogation might teach people to overvalue the avoidance of pain and undervalue human life.

Third, Jeremy Waldron argues that the ban on coercive interrogation is a "legal archetype" that expresses "the spirit of a whole structured area of doctrine, and does so vividly, effectively, and publicly, establishing the significance of that area for the entire legal enterprise."[51] The policy expressed by the ban is that "*[l]aw is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror . . . .*"[52] Other legal archetypes, according to Waldron, are the writ of habeas corpus, the holding in *Brown v. Board of Education*, the rule of adverse possession, and the doctrine of consideration.[53] As the last two examples make clear, Waldron holds that a legal archetype is a sort of heuristic device that "expresses or epitomizes the spirit of a whole structured area of doctrine"[54] and thereby helps people organize a body of doctrine around its dominant principles.

Heuristics may have instrumental value, but Waldron exaggerates their significance if he is claiming that the elimination of a heuristic will

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48. Gross, *supra* note 4, at 1504.

49. *Id.*

50. *Id.*; *see also* Parry & White, *supra* note 3, at 763.

51. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1723 (2005). Waldron actually casts his argument as a condemnation of "torture," but he focuses almost exclusively on what we call coercive interrogation, and we address his argument only to that extent.

52. *Id.* at 1726 (emphasis added).

53. *Id.* at 1723–26.

54. *Id.* at 1723.

undermine, or even result in serious confusion about, an area of law or policy. Just as we could eliminate the doctrine of consideration without losing "contract law's commitment to market-based notions of fairness,"[55] we could eliminate a ban against coercive interrogation without losing the criminal justice system's commitment to minimizing brutality. Here Waldron makes a typical philosopher's mistake by attempting to derive concrete conclusions from premises that are too general or abstract to cut between policy choices on the ground. The commitment to minimize law's brutality is on both sides of this argument. Where coercive interrogation can save lives, *not* engaging in it might seem the more brutal choice, especially to those whose lives are at stake. Those people might reasonably hold that there is a sort of brutal callousness, a self-absorbed moral preciosity, in the decision to preserve the law's archetypal integrity by permitting third-party deaths to go unprevented.[56]

Like many second-order arguments, Waldron's account trivializes the policies that he is trying to invest with significance. Consider how his argument might apply to the debate about capital punishment. The reason that critics oppose capital punishment is not that it expresses brutality; the reason is that it kills people. Similarly, the only strong argument against torture is that it causes pain. When we object to brutal laws, we object because they are brutal, not because they "express brutality." If we nonetheless tolerate them because they produce some good, their symbolic meaning falls by the wayside, in part because that meaning is qualified: a brutal law that does good no longer expresses brutality in unambiguous form. Indeed, such laws do no more than symbolize the government's willingness to produce the greatest possible good overall. On this view, a system of regulated coercive interrogation would have the same symbolic effect as the use of deadly force by police and the laws of war that permit the killing of civilians in the course of destroying a legitimate military target.

There seems to be a strong feeling that if the United States abandons its ban on coercive interrogation, the rest of the world will not only imitate U.S. policy—which, of course, is not objectionable if U.S. policy is correct, as we are assuming for the sake of argument. The rest of the world will do worse; seeing that the United States endorses the infliction of pain for the purpose of interrogation, other countries will use it for punishment, show trials, and so forth.[57]

This argument rests on the assumption of U.S. exceptionalism, the notion that, in Ronald Reagan's words, the United States is a "shining city on a hill" that the rest of the world looks up to and emulates.[58] Once the United

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55. *Id.* at 1726. The consideration doctrine does not exist in Civil Code countries, which are committed to market principles.

56. *See* Moore, *supra* note 4, at 329; Elshtain, *supra* note 4, at 86–87.

57. Levinson, *supra* note 1, at 2052–53; Parry & White, *supra* note 3, at 763.

58. Ronald Reagan, *Farewell Address to the Nation (Jan 11, 1989), in* 2 PUBLIC PAPERS OF RONALD REAGAN 1988–89, at 1718, 1722 (quoting John Winthrop) (Off. of the Fed. Reg. ed., 1990–91).

States is shown to be a "normal" state, its ideals will cease to inspire others. There are many reasons for doubting this account. First, the United States is not as exceptional as it once was: there are many liberal democracies today; the United States is just one. Second, the United States increasingly has a reputation as a conservative, religious, punitive, and even militaristic country; its use of coercive interrogation in limited circumstances would have no more than a marginal effect when the United States is already heavily criticized for policies that are not going to change anytime soon—capital punishment, ungenerous social welfare policies, aggressive use of its military, disinclination to cooperate in international organizations, and so forth. Coercive interrogation is just one more item on this list, unlikely by itself to change the reputation of the United States. Third, the United States' reputation rests not only on its commitment to liberal principles, but on its lack of dogmatism about them, and especially the pragmatic way that it has relaxed them when necessary to counter internal or external threats. Liberal countries that collapse into chaos, that cannot protect their citizens, or that are bullied by authoritarian countries or terrorist organizations, are not attractive role models.

Another argument that is sometimes made is that a ban on coercive interrogation "facilitates the government's claim to the moral high ground in the battle against terrorists."[59] This argument recalls the old cold war arguments that the United States should take the moral high ground in international relations in order to win the propaganda war against the Soviet Union.[60] These arguments had force then, and ought to have force now. Even if coercive interrogation is justified in some settings, its use will almost certainly be a public relations setback—just as the Abu Ghraib scandal was—and fodder for those who want to portray the United States as corrupt and immoral. Part of the problem for the United States is to persuade the undecided living in Muslim countries that they should throw in their lot with the West and not with Islamic radicalism. If the law enforcement methods of the United States are no more attractive than the law enforcement methods espoused by Islamic radicals, then a valuable propaganda tool is lost.

But there are countervailing considerations. The West must project an image of strength as well as virtue; undecided Muslims and Arabs will not cast their lot with governments that cannot protect themselves and their people, as we noted before. But whatever the force of these arguments, they only identify one cost that must be balanced against the benefits of coercive interrogation. The public relations effect of coercive interrogation is just one factor among many. It may justify restricting coercive interrogation more than the narrow instrumental calculus suggests; but it is hard to see how it could justify a flat prohibition.

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59. Gross, *supra* note 4, at 1505.

60. *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

III. Legal Regulation of Coercive Interrogation

A. *Outlaw and Forgive*

In Part II, we criticized the argument that there should be a total legal ban on coercive interrogation. But, as we noted, many critics of coercive interrogation believe that there should be a kind of political escape valve, so that coercive interrogation will occur, despite the legal ban, if there is a catastrophic scenario. The standard view seems to be that we should simply maintain the status quo: coercive interrogation remains illegal and officials who nonetheless employ it may seek public vindication, including a pardon.[61] This "outlaw and forgive" ("OAF") approach, as we shall call it, comes in two flavors. The first places the responsibility to forgive with political officials such as prosecutors, governors, or presidents. The second places the responsibility with judges or juries.

1. *Popular Justice*

The first version of OAF holds that courts should convict government agents who engage in coercive interrogation, but if the coercive interrogation was morally justified, then the defendant should be pardoned, or perhaps not tried in the first place via the exercise of prosecutorial discretion. One might even imagine the public taking matters in its own hands and hiding or protecting the defendant,[62] or electing him or her to office, or reelecting the defendant if he or she is already an elected official.[63]

The peculiar feature of this argument is the assumption that public officials will act correctly if they are told that correct action is against the law. Why wouldn't they just say to themselves, as they must every day: "I could get the truth out of this suspect by banging him up but for whatever reason I'm not allowed to do this, so I won't"? The implicit assumption is that the public official will act correctly when enough lives are at stake,[64] but why should we assume that a police officer would be willing to risk his career and his freedom to save the lives of others? Of course, there are many heroes who would do this, but we don't normally, when designing legal

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61. Gross, *supra* note 4, at 1520; Levinson, *supra* note 1, at 2048; Shue, *supra* note 4, at 127. A related view can be found in Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists*, 8 Eur. J. Int'l L. 596 (1997).

62. *Cf.*, Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975) (describing protection of fugitive slaves in the North).

63. Lincoln's reelection can be interpreted as vindication of his various extraconstitutional acts. This idea of emergency prerogative can be traced back to Locke. *See* Arthur M. Schlesinger, Jr., The Imperial Presidency 60–64 (1973). Our focus, however, is not on the president (for whom the OAF approach may have a stronger basis) but on ordinary government agents.

64. *See* Gross, *supra* note 4, at 1529–34. Gross argues that the danger that the public will not ratify the official's illegal but justified use of coercive interrogation is a good thing, as it will ensure that the official will not act except in an emergency. He doesn't acknowledge that the same danger may ensure that the official will not act even in an emergency. Given his premise that the use of coercive interrogation in an emergency can be justified, we don't find his argument persuasive.

restrictions on the activities of government agents, base the law on the assumption that agents will act heroically.

Let us try to think about this problem from the perspective of a police officer who has custody of a member of Al Qaeda, a person who, the officer suspects, knows about plans for a major terrorist attack. Under OAF, the officer should anticipate that if he uses coercive interrogation, he will be convicted of a crime, but there is a chance that the public will forgive him, and that he will be pardoned or not charged in the first place or acquitted by a jury. But how will he know if the public will forgive him? The public might be grateful, but it might also be outraged. The public might make the correct moral calculus or it might make the wrong moral calculus.

In general, there is no reason to think that OAF will produce optimal deterrence. Ex post politics will sometimes forgive interrogation when it shouldn't be forgiven, and sometimes punish interrogation when it shouldn't be punished. If an OAF regime does happen to produce optimal deterrence, it will be but a lucky coincidence, for there is no general mechanism that acts to align the incentives produced by OAF with optimal incentives. Moreover, even if the happy coincidence does occur, the optimal OAF regime is unlikely to prove stable for very long, as we discuss below.

The argument against OAF is identical to the argument in favor of the rule of law, an argument that appears to be decisive in every other setting, including the regulation of ordinary police practices such as the use of deadly force. Although prosecutorial discretion, jury nullification, and the pardon power are important features of contemporary law enforcement, these phenomena are generally accepted as either unavoidable (in the case of prosecutorial discretion and jury nullification) or as safety valves for correcting injustices that occur in anomalous cases, not as the chief tool for ensuring that people are given the right incentives against a background where desirable behavior is, for whatever reason, illegal. We need not rehash all the rule of law arguments against such a system. It is sufficient to recall that there are good reasons of fairness and incentives to tell government agents in advance what they should do, and what they shouldn't do. Regulating ex post through public opinion, even if mediated by political officials such as prosecutors or elected leaders, makes officers dependent on their abilities to prognosticate the public mood, which can sometimes seize on factors that are irrelevant to the decision in question. Excessive caution is the most likely result.

OAF regimes can be found in other areas of criminal law.[65] Laws that prohibit sodomy, fornication, adultery, and euthanasia are frequently cited examples of laws that are on the books but that are not enforced or (in the case of euthanasia) tacitly are permitted under special circumstances. But none of these examples provides support for an OAF regime for coercive interrogation.

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65. They have a family resemblance to the notion of acoustic separation. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

Most of these OAF regimes—for example, sodomy and adultery laws—arose inadvertently, not as a result of deliberate policy. The regime is an unintended or accidental byproduct of changes in norms or behavior, changes that temporarily outrun changes in law; and the OAF regime is precarious and often collapses in relatively short order, as the contradiction between official rule and actual practice becomes ever more widely understood. Indeed, "forgiveness" in these cases is automatic; people are almost never convicted for these crimes, and no one would defend laws against sodomy on the ground that they cause people to engage in sodomy only in the conditions when it is morally justified and not otherwise! Experience with these laws suggests an OAF regime for coercive interrogation would likely be infeasible, because unstable in the medium and long term, as it became widely understood that officials were awarding ex post licenses to interrogators.

The best example of an OAF regime that may seem functional is that of euthanasia. Many people acknowledge that mercy killing may be morally justified in narrow conditions, but prefer to maintain an absolute ban on euthanasia, with the tacit understanding that doctors may be spared prosecution and punishment if circumstances are pressing enough. But, as a result, the practice of euthanasia is shrouded in secrecy. We know very little about euthanasia in the United States; perhaps doctors practice euthanasia at the right times, but perhaps they do not. When abortion OAF regimes existed prior to *Roe v. Wade*, wealthier women could sometimes rely on their doctors, while poorer women resorted to back alley abortions. Perhaps, today doctors provide euthanasia to those who can afford high-quality health care, and others provide back alley euthanasia to those who cannot.

Recent accounts from the Netherlands paint an unattractive picture of OAF. There, consensual euthanasia is legal, but infant euthanasia is illegal and yet nonetheless practiced. "Behind the scenes paediatricians [sic] in the Netherlands have been making tacit deals with local prosecutors' offices for years, promising to report cases of 'life-ending treatment for newborns' in return for guarantees that the doctors will not find themselves hauled into the dock facing charges of murder."[66] Secrecy and lack of public accountability are the result. Doctors have recently demanded that the government issue regulations; despite the tacit deals, doctors fear criminal liability and are reluctant to continue the practice of infant euthanasia without an explicit legal license.[67] The Dutch OAF regime for euthanasia, then, does not seem

66. *See* Ian Traynor, *Secret Killings of Newborn Babies Trap Dutch Doctors in Moral Maze*, GUARDIAN, Dec. 21, 2004, *available at* http://www.guardian.co.uk/uk_news/story/0,,1377808,00.html.

67. *Id.* The predictable result of the OAF regime in the Netherlands is that doctors refuse to divulge information about their infant euthanasia practices. *See* Henk Jochemsen & John Keown, *Voluntary Euthanasia Under Control?, Further Empirical Evidence from the Netherlands*, 25 J. MED. ETHICS 16, 18 (1999). By contrast, they have complied with reporting requirements for a significant fraction of cases involving adult euthanasia, which is legal (forty-one percent in 1995). *Id.* at 19. Interestingly, Jochemsen and Keown, who are critics of Dutch euthanasia, argue that legalization has resulted in a slide down the slippery slope because the Dutch now condone some types of non-voluntary euthanasia. *Id.* at 21. But the authors cannot trace this change in attitude to legalization—legalization may have followed changes in attitudes—and in any event the change in

to provide good incentives, prevents public debate and accountability, and is unstable.

The euthanasia OAF regimes, here and elsewhere, arose spontaneously, as a result of civil disobedience by doctors. No one proposed that these regimes be put in place. Accordingly, it is distinctive, and distinctly odd, to propose that coercive interrogation should *intentionally* and *avowedly* be regulated by means of an OAF regime. The public statement of the proposal—after all, proponents of an OAF regime publish their writings—gives it a self-defeating character, undermining the proposal itself. OAF regimes may often represent "states that are essentially by-products,"[68] which can happen to come into being as the byproduct of changes in norms outpacing changes in law, but which cannot be deliberately brought into being through intentional and publicly avowed policy choice. The publicity of the debate is crucial here. It is perfectly coherent for a group of legal elites secretly to approve of the twin facts that coercive interrogation is used and that the public does not generally understand that it is used; but presumably that is not the sort of thing the OAF proponents mean to be defending.

2. *The Necessity Defense*

Israeli law bans coercive interrogation, and yet Israeli security has used this measure, apparently because officials who use coercive interrogation may be shielded by the necessity defense (as well as prosecutorial discretion that is predisposed in their favor).[69] Under the necessity defense, which exists in U.S. law as well, an act that would otherwise be a serious crime—killing, torture—does not give rise to legal liability if it was necessary to prevent a greater harm. Now, in U.S. law the necessity defense would not typically be available to an official who engaged in coercive interrogation because the necessary act must usually prevent an imminent threat.[70] Shooting an armed suspect in order to prevent him from killing a hostage is justified;[71] using physical pressure on the suspect in order to extract the location of a hostage who is about to be killed is not justified. But in Israel, the necessity defense is, in practice, given greater scope.[72]

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attitudes can be attributed to benign causes: exposed to public debate about euthanasia practices, the Dutch view toward euthanasia, unsurprisingly, has evolved.

68. *See* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 102 (1983).

69. LANDAU REPORT, *supra* note 30, at 167.

70. *See* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.1(d)(5), at 129–31 (2d ed. 2003) (saying one must wait until there is absolutely no other option and "[the] hope of survival disappears").

71. *See id.* § 10.5, at 161.

72. Although the Israeli Supreme Court denied that the necessity defense authorizes coercive interrogation, it said, at the same time, that officials could use the necessity defense if they are charged. *Public Committee Against Torture in Israel*, *supra* note 32, at 1486–88. This distinction is a rather subtle one but appears to have led to a reduction in the use of coercive interrogation by Israeli security. Parry & White, *supra* note 3, at 760.

Critics of coercive interrogation who nonetheless believe it should be used in catastrophic scenarios sometimes see the necessity defense as a good compromise.[73] Coercive interrogation remains illegal, but the necessity defense can be used—either in its present form, or broadened somewhat—in order to immunize the official who uses coercive interrogation to prevent a catastrophe. The rationale appears to be that the law's symbolic rejection of torture is maintained, while coercive interrogation can be used when it is justified. A closely related view is that judges should suspend the sentence of convicted torturers whose behavior does not meet the requirements of the necessity defense but was nonetheless justified.[74]

We are puzzled by this argument. As Levinson remarks, reliance on the necessity defense would not avoid legitimizing coercive interrogation;[75] it would avoid legitimating coercive interrogation only when it is not "necessary." The necessity defense is no more likely to maintain the illegitimacy of coercive interrogation than the doctrine of official immunity maintains the illegitimacy of the use of deadly force by police officers. The defense of necessity, like the defense of official immunity, renders legitimate those actions that fall within its scope.

The implicit theory of the advocates of the necessity defense is that a statute that creates liability sends the message to the public, while the statute that provides a defense against liability remains silent. But as the public does not usually pay attention to the law on the books—and when it does, never discriminates between statutes that create liability and statutes that provide defenses—but instead observes police officers either being convicted of crimes or not being convicted of crimes, this theory is dubious. If the public is paying no attention to legal rules, and only looks at outcomes, it will just see interrogators going unpunished in a range of cases. If the public does pay attention to legal rules, why will it only pay attention to the ex ante prohibition and not the ex post license? OAF rests on arbitrary assumptions about the audience for law's expressions.

There is a further point, which is that if it really matters whether the power to use coercive interrogation is located in the statute that creates liability, or in the defense, this can be easily handled; indeed it already is. When a police officer kills a person and a prosecutor charges him with murder, the officer's defense will be official immunity. Whether or not the police officer is convicted turns on the scope of the defense. If the killing was justified under the statute or doctrine that creates official immunity, then it was not murder. Coercive interrogation could be similarly handled, if these formal distinctions were thought to be important.[76]

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73. Parry & White, *supra* note 3, at 764–65. Shue also seems to suggest that the necessity defense may be appropriate. Shue, *supra* note 4, at 143.

74. *See* Shue, *supra* note 4, at 143. These arguments recall Dan-Cohen's theory of acoustic separation. *See* Dan-Cohen, *supra* note 65.

75. Levinson, *supra* note 1, at 2045.

76. This approach would allow the legislature to decide the standard for using coercive interrogation, rather than relying on a doctrine that was never understood to have this purpose (at least,

B. *The Torture Warrant*

Alan Dershowitz has argued that coercive interrogation should be permitted only after officials have obtained a warrant from a judge.[77] This proposal has been criticized on the ground that in the catastrophic scenario there will rarely be an opportunity to consult a judge;[78] but this criticism is overblown. The torture warrant is not meant as a panacea; when there is time to obtain a warrant, the involvement of the judiciary serves its purpose. When there is not time, then either the warrant requirement could be waived—as in the case for ordinary search and arrest warrants when exigent circumstances exist—or else coercive interrogation might be prohibited. In the latter case, the torture warrant serves its purpose only when there are not time constraints, but there is no reason to think that this is the null set.

We don't think, however, that the torture warrant is the end of the story. Just as in the case of searches, a warrant requirement can be only one piece of a much larger regulatory structure, to which we now turn.

C. *A Proposal for Regulating Coercive Interrogation*

In order to deter and investigate crimes, police employ a range of measures, including: surveillance of public places; stops, interrogations, and pat-downs of people who are acting suspiciously; temporary detention; noncoercive interrogation that may, however, involve deception and mild intimidation; the use of force, including deadly force, to protect the lives of third parties such as hostages and crime victims; searches of people and places; and wiretapping and the like. The measures range from the minimally intrusive (surveillance of public places) to the maximally intrusive (use of deadly force), and there are corresponding thresholds that limit the circumstances under which these measures may be employed. There is virtually no limit on surveillance of public places; reasonable suspicion is required before police can stop and question a person; probable cause is needed before a search warrant will be issued; and the threat of imminent harm to a third party is necessary if deadly force is to be used.

What happens when police violate these rules? In some cases, nothing at all. In other cases, courts refuse to admit evidence that is acquired in violation of the rules, and a criminal may go free. In extreme cases, police officers may be sanctioned, fired, or convicted of crimes. For example, a police officer who kills a suspect who did not pose any immediate danger to the public is likely to be penalized and even fired; if the circumstances are egregious, the officer will be prosecuted for murder.

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in U.S. law), and would need to be revised. *See* Alan M. Dershowitz, *Is It Necessary to Apply "Physical Pressure" to Terrorists—And to Lie About It?*, 23 ISR. L. REV. 192 (1989) (discussing problems with using the necessity defense in these circumstances); Kremnitzer, *supra* note 37, at 237–47.

77. DERSHOWITZ, WHY TERRORISM WORKS, *supra* note 4, at 158–59.

78. Gross, *supra* note 4, at 1536.

The reasons for this regulatory scheme are straightforward. Police officers are agents, and as principal-agent models show, a bundle of carrots and sticks is necessary to provide them with the right incentives.[79] Ideally, police officers will use aggressive measures only when the gains to the public safety exceed the costs to the people who are subject to the measures (whether they are innocents who are misidentified or criminals). However, police officers, like ordinary people, do not necessarily have the right incentives to use these measures properly.

The basic problem is this. If police officers are paid a flat salary, and not rewarded for good work, then they may not work diligently to deter crime and capture suspects. The normal solution to this problem is to fire or demote lazy officers, and reward the diligent officers—usually by retaining (and paying) them, and promoting them at intervals, and giving them better working conditions (for example, day rather than night shifts). The problem with this simple scheme, however, is that police officers might act too aggressively. If they are rewarded for arresting a lot of people, then they may be tempted to arrest people who are not clearly guilty, or to use aggressive measures such as searches to find the guilty. In addition, zeal for law enforcement or sympathy for victims may result in excessively aggressive police tactics even in the absence of the normal reward mechanisms.

And so police departments and legislatures try to steer police away from tactics that externalize costs on innocents, or offend our sense of how the guilty ought to be treated. This is why we have rules that prohibit police from shooting people who are unarmed, or engaging in high-speed chases through busy streets, or searching houses without a warrant. These rules refine incentives so that police officers aggressively pursue criminals without creating excessive costs for innocents or otherwise exceeding the bounds of civilized behavior.

Where does coercive interrogation fit in? Traditionally,[80] it was off limits in the same sense as shooting unarmed criminals is; even if a useful police tactic in some cases, it exceeds the bounds of civilized behavior and thus is unacceptable. If philosophers are correct that coercive interrogation may be justified in limited cases, however, and if 9/11 shows that this set of cases may be nontrivial, then coercive interrogation ought to be added to the basket of permissible tactics, albeit subject to the same sorts of safeguards.

As we have already argued, we think that the regulation of the use of deadly force provides a model for regulating coercive interrogation. Just how coercive interrogation should be regulated depends on several factors. To take the extreme case, if coercive interrogation simply does not work or rarely works, then obviously it is sensible to ban it with no exceptions. In what follows, we sketch out a general framework that assumes that coercive interrogation is effective; but the details of this framework will depend on

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79. Eric A. Posner, *Agency Models in Law and Economics*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000).

80. That is, since the Supreme Court invalidated these measures just prior to World War II. *See* Parry & White, *supra* note 3, at 748–54.

just how effective it is, and whether its effectiveness is limited to certain situations.

1. *Thresholds for using coercive interrogation.* It seems sensible to limit coercive interrogation in the same way deadly force is limited. The rule might be: "police may use coercive interrogation only when they are reasonably certain that an individual possesses information that could prevent an imminent crime that will kill at least *n* people," where *n* is some number that reflects the balance of gains and losses from coercive interrogation (One thousand? One hundred? One?).[81] For the consequentialist, *n* may be a relatively low number; for the deontologist, *n* might be very high, the catastrophic scenario; but otherwise, both types of thinker should approve of our rule.

2. *Limits of coercive interrogation: methods.* Just as police are not allowed to carry bazookas, they should not be allowed to use methods of coercive interrogation that are excessive—that will cause too much harm relative to the benefits. The literature refers to "moderate" methods.[82] We do not know what methods these are; perhaps a good starting point would be the methods already used by U.S. agents against high level members of Al Qaeda—sleep deprivation, disorientation, and the like.[83] In any event, a good rule would limit agents to the minimal amount of coercion that is necessary. Interrogation might also be videotaped, for review either by administrative superiors or judicial tribunals or both.

3. *Limits of coercive interrogation: subjects.* It seems reasonable to limit the use of coercive interrogation to members of terrorist groups known to use violent methods against U.S. civilians. The obvious example

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81. Or a vaguer standard might be used, such as that of the Model Penal Code:

> (1) Use of Force Justifiable to Effect an Arrest. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
>
> . . .
>
> (b) The use of deadly force is not justifiable under this Section unless:
>
> (i) the arrest is for a felony; and
>
> (ii) the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
>
> (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
>
> (iv) the actor believes that:
>
> (A) the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
>
> (B) there is a substantial risk that the person to be arrested will cause death or serious bodily injury if his apprehension is delayed.

MODEL PENAL CODE § 3.07 (2001).

82. U.N. REPORT, *supra* note 31, at 2 (referring to the type of pressure used to obtain information from terrorists as being moderate).

83. See Levinson, *supra* note 1, at 2017–28, for Levinson's survey of media accounts.

today is Al Qaeda, but Al Qaeda might disappear and be replaced with some other group. The benefit of such a limit is that it would prevent the use of coercive interrogation against ordinary criminals; the cost is that the limit would prevent the use of coercive interrogation against ordinary criminals where coercive interrogation would be justified (for example, domestic terrorists), against members of new international terrorist groups, and against members of Al Qaeda who are not known to be members of Al Qaeda. It might be that these costs are too high, and the subject limitations should be broader—to include, for example, kidnappers with a violent history who have been captured and refuse to disclose the location of the kidnapping victim.[84]

4. *Warrants.* Dershowitz's warrant idea makes sense when the harm is not imminent, so that there is time to involve a magistrate or judge. The magistrate or judge should issue a warrant only when coercive interrogation will likely yield information that will prevent a crime that will kill *n* people.

5. *Immunities and punishments.* Officers who employ coercive interrogation measures in violation of these rules should be punished in the same way that officers who violate the rules against deadly force are punished. Typically, officers are granted immunity when they act reasonably, or in "objective good faith,"[85] and this may be appropriate for coercive interrogation as well. Even so, administrative sanctions may be appropriate. When officers do not act reasonably, the immunity should be withdrawn, and the officer should be punished for violating laws against battery, torture, and similar uses of force.

6. *Training and expertise.* Nearly all police officers are authorized to use deadly force. An important way of preventing error is through training. Similarly, one might argue that police officers should be trained in coercive interrogation. Alternatively, to the extent that coercive interrogation requires unusual skills, or may corrupt its practitioners or lead them to use it in routine cases, and to the extent that it is not necessary to use it very often, it might make sense to have a special squad of officers who are trained in coercive interrogation, and who are made available when circumstances warrant.[86] However, this can work only when there are minimal time constraints; otherwise, it is subject to the same objections as the warrant requirement.

7. *Review by experts and the public.* One important distinction between deadly force and coercive interrogation is that the first occurs frequently, and each instance is subject to public debate. The latter occurs much less frequently, and when it does, it is either concealed from the public or roundly condemned. As a result, the merits and demerits of

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84. *See* Amnesty Int'l, *Germany's Torturous Debate*, http://web.amnesty.org/web/wire.nsf/April2003/Germany (describing an incident in which a kidnapper disclosed the location of the victim (a child, whom he had killed) after a police officer threatened that force would be used against him).

85. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

86. The Investigators Unit, the GSS unit that uses coercive interrogation, is a small minority of the total GSS personal. *See* LANDAU REPORT, *supra* note 30, at 148.

> coercive interrogation are much more poorly understood than the merits and demerits of deadly force. To correct this imbalance, we think that instances of coercive interrogation should always be carefully analyzed, by special commissions of experts or self-appointed public watchdogs.

This seems obvious, but we mention it because many people in the literature think that the symbolism is a good reason for banning coercive interrogation, or discouraging it; this idea seems to drive the proposal that it should be kept illegal for symbolic purposes even though officials will sometimes be morally justified in violating the law.[87] As we discussed above, we don't think this argument makes sense; a further problem with it is that it will encourage officers to conceal their behavior. After the Israeli Supreme Court rejected the use of coercive interrogation, the GSS officially stopped using it. It is possible that now the GSS has found less objectionable ways to maintain security, but some reports suggest that the use of coercive interrogation has continued with greater secrecy.[88] If so, then the methods may be used with less political oversight and accountability. This would be unfortunate.

What is needed is legality and openness.[89] Explicit rules, which clearly prohibit some forms of pressure and permit others, can be easily evaluated; if outcomes are not acceptable, the rules can be adjusted.

D. *The Burden of Uncertainty*

A proposal for law reform of this kind can rarely be demonstrated to be correct. It remains possible for someone whose empirical estimates differ from ours to claim that coercive interrogation should be flatly prohibited, on rule-consequentialist grounds. Such a person might claim that there are raw empirical differences between coercive interrogation and other coercive practices that law addresses through ordinary ex ante regulation (as opposed to either strict prohibition or the scheme of ex post pardons, nullification, and the like). Perhaps, for example, extrajudicial killing is very often necessary, as a factual matter, while coercive interrogation is rarely so, again as a factual matter. Note also, however, that legal policy should take account of

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87. See, e.g., Gross, *supra* note 4, at 1486–87, 1504–05.

88. *See* Human Rights Watch, *Israel, the Occupied West Bank and Gaza Strip, and Palestinian Authority Territories*, *in* WORLD REPORT 2003, at 459, 464 (2003), http://www.hrw.org/wr2k3/mideast5.html ("On September 4, the Public Committee Against Torture in Israel reported that there appeared to be a 'gradual reversion to the use of torture' despite the September 1999 High Court decision outlawing its use. While the extent of their use was unclear, methods outlawed by the High Court but reportedly used during interrogation included exposure to extremes of temperature, sleep deprivation, the requirement to remain in an enforced position for extended periods, and intense psychological pressure.") The report mentioned above may be found on the Internet at Public Committee Against Torture in Israel, http://www.stoptorture.org.il/eng/publications.asp?menu=5&submenu=1 (last viewed Oct. 31, 2005).

89. *See* Alan M. Dershowitz, *Torture Without Visibility and Accountability Is Worse Than With It*, 6 U. PA. J. CONST. L. 326 (2003); *cf.* Eyal Benvenisti, *The Role of National Courts in Preventing Torture of Suspected Terrorists*, 8 EUR. J. INT'L L. 596, 604 (1997) (arguing that a nominal ban on coercive interrogation could have perverse effects by driving interrogation underground).

the *expected* costs and benefits of official action, which is a function not only of the frequency of relevant events but also of their costs and benefits when they do happen to occur. The expected benefits of coercive interrogation might be equal to or greater than those of extrajudicial killing, if coercive interrogation, while rarely useful, saves many more lives when it is useful.

Given the factual uncertainties, it is incumbent upon those who oppose coercive interrogation to explain why the right regime is either of the alternatives: a flat ban on coercive interrogation, which we have criticized as an implausible corner solution, or the OAF regime of "prohibition" plus ex post relief, which we have criticized as both undesirable and unstable. Even if one believes that coercive interrogation is rarely warranted, the most sensible approach, within the framework of our proposal, would simply be to tighten the relevant standards to the point where the benefits of licensing coercive interrogation exceed the costs. Coercive interrogation could be limited to known members of designated terrorist groups, such as Al Qaeda, or limited to cases in which more than ten lives will certainly be saved if the information is extracted; penalties for officials who violate the rules in unreasonable or bad-faith ways, and who are thus stripped of immunity, could be made more severe.

In the face of empirical uncertainty, the simplest starting point is to assume that law should regulate coercive interrogation within the same type of framework law uses to regulate similar activities. There might indeed be a difference between coercive interrogation and other coercive practices, but there is no a priori reason to assume so, absent proof. Opponents of legalization—in our ordinary sense of legalization, as opposed to the self-undermining OAF sense—bear the burden of showing that coercive interrogation should be treated differently, and they have not carried that burden.

IV. Why Is Coercive Interrogation Taboo?

We have emphasized throughout that coercive interrogation can inflict serious harms; that officials are commonly licensed, in ordinary legal systems, to inflict serious harms under suitable regulation; and that there is no good reason to treat coercive interrogation differently. Our argument has been strictly normative, because it is quite clear that coercive interrogation is indeed treated differently than other serious harms, as a matter of prevailing positive law. Why is this so? Here we offer some brief speculations about why coercive interrogation is taboo.

A. *Mistaken Generalization*

The simplest idea is that the taboo on coercive interrogation is just a conceptual blunder, a kind of mistaken generalization from the moral condemnation of other practices that modern legal systems justifiably

condemn.[90] One sort of faulty generalization might occur across subcategories of "torture." The actual practices of coercive interrogation bear a family resemblance to forms of torture that are used to intimidate, terrorize, or oppress. The failure to draw relevant moral, legal, and policy distinctions between these different practices produces a legal regime that condemns coercive interrogation along with practices that have no conceivable justification.

Another sort of faulty generalization might reflect the emotional force of highly salient historical episodes. The Spanish Inquisition used torture in the service of religious oppression; Nazi doctors used torture in the service of racist ideology. The inference from "these episodes of torture are unjustifiable" to "torture is unjustifiable" is natural, but invalid. Pacifism cannot be derived from the premise that some wars have been unjust; no more can a general ban on torture in the sense of coercive interrogation be derived from the historical use of torture in the sense of sadistic punishment.

B. *Moral Heuristics*

By itself, the idea of mistaken generalization is unsatisfactory. Why exactly do such conceptual errors occur? A possible mechanism here involves *moral heuristics*.[91] In evaluating questions of fact, boundedly rational individuals acting with limited information and cognitive capacities use heuristics, or rules of thumb, that sometimes misfire. By extension, boundedly rational individuals often use heuristics to make moral judgments, and those judgments will sometimes misfire as well. Consider, as one possible moral heuristic, the principle advanced by Henry Shue and discussed in Part I: never inflict pain on a defenseless person. In the run of cases, in which pain is inflicted for sadistic or oppressive purposes, the heuristic works well. In an identifiable subclass of cases, however, where inflicting pain on the defenseless through coercive interrogation saves real lives, the heuristic produces moral results that very few wish to defend.[92]

Here the parallelism with evaluation of fact breaks down; even in this subclass of cases, Shue's principle is not demonstrably wrong in the same way that an error of fact is demonstrably wrong. To say the least, however, the moral arguments that would be needed to justify Shue's principle in that subclass of cases are far more complex, and less impressive, than in the run of cases covered by the heuristic. Even if the heuristic happens to produce morally defensible outcomes across the whole range of cases—and we saw in Part I that even Shue flinches from the implications of his principle when

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90. On morality, consequentialism and mistaken generalization, see Jonathan Baron, *Nonconsequentialist Decisions*, 17 BEHAV. & BRAIN SCI. 1 (1994).

91. *See id.*; Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556 (2004).

92. This seems to be similar to Mark Osiel's view that torture is taboo because people don't want to acknowledge that such horrifying behavior may be socially justified under certain conditions, and that "normal" people are fully capable of it. *See* MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT 155–60 (2001). He does not, however, explain why this should be the case.

lives can be saved by coercive interrogation—it produces those outcomes fortuitously, on morally unsatisfactory grounds. In this sense, the heuristic can be said to misfire even if we bracket large and controversial questions about morality.

C. *Judgment Falsification, Cascades and Herding*

People often say, in sweeping terms, that torture (and by subsumption coercive interrogation) is in some general sense "evil" or "wrong." People want to be well thought of by others, want to be seen to stand on the right side of charged moral questions, and tend to follow the moral judgments of others if they are themselves unsure what morality requires. Perhaps these phenomena are linked. More specifically, we speculate that (1) of those who have thought about the range of possible cases, more people actually approve of coercive interrogation (in some cases) than publicly admit they approve of coercive interrogation; and (2) many people have not really thought about the issues at all, and simply follow prevailing moral codes.

The first possibility is an instance of judgment falsification.[93] The concern for reputation, social influences, and the fear of ostracism produce dynamics that drive a wedge between publicly expressed judgments and privately held judgments. To openly condone coercive interrogation is to condone a form of torture, and no one wants to condone that. In private, however, many of the same people may believe that coercive interrogation should be permitted in some circumstances. Our point is not that privately held moral views are authentic while publicly expressed ones are not, nor that privately held views are more likely than public ones to track what morality indeed requires. But to the extent law tends to reflect publicly expressed judgments more than privately held views, law may condemn torture more strongly, and in more sweeping terms, than do the private judgments of citizens.

The second possibility is an instance of herding, or of opinion cascades.[94] On issues of fact or morality, where people do not know what to think, lack the time or inclination to think for themselves, or know that others may have insights they lack, people may quite reasonably decide to follow the judgments of others. Those others may in turn be following the judgments of others, and so on. Under certain conditions, almost everyone may subscribe to a given moral view that almost nobody has thought through, or would hold on fuller reflection. Coercive interrogation follows this pattern, it seems to us. People's initial judgments about the impermissibility of coercive interrogation, as a matter of morality and law, are sharp and strongly avowed, but tend to become far weaker and more nuanced after discussion and reflection. The sweeping condemnation of coercive interro-

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93. By extension from preference falsification. *See* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 4–15 (1995).

94. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 81 (2000).

gation embodied in current law looks like an artifact of past opinion cascades, and might dissolve rather easily under changed circumstances or upon further debate.

Taboos come and go; none is eternal. A strong taboo once condemned abortion, which no one cared openly to defend; today there are rapidly waning taboos against euthanasia, and against gay marriage. Bracketing the question which of these practices is morally permissible, the constant flux of social taboos rebuts a common presumption that there must be some deep moral logic to taboos, such as the one condemning all forms of coercive interrogation. Perhaps there is sometimes or often no such logic; perhaps taboos often rest on fortuitous constellations of historical circumstances that can be destabilized by new circumstances, or even by reasoned argument.

Conclusion

Our aim is not to praise coercive interrogation, which is a grave evil in any reasonable moral view. All we suggest is that law should treat coercive interrogation the way it treats other grave evils. Law has a typical or baseline regulatory strategy for coping with grave evils that sometimes produce greater goods. That strategy involves a complex regulatory regime of rules-with-exceptions, involving a prohibition on official infliction of serious harms, permission to inflict such harms in tightly cabined circumstances, an immunity regime that requires officials to follow the rules in good faith but protects them if they do so, and review procedures to reduce error and enhance transparency. In this baseline regime, the circumstances in which serious harms may be inflicted are specified ex ante, rather than being remitted solely to the discretionary mercy of juries, judges, and the executive after the fact. Contrary to the academic consensus, we see no plausible reason for treating coercive interrogation differently.