

## *The Torture Debate*

# Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke

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IN THEIR RECENT ARTICLE, Mirko Bagaric and Julie Clarke propose that in certain circumstances torture is “morally justifiable” and should be permitted as an “interrogation device” in order to “prevent significant harm to others.”<sup>1</sup> Their article is one of a growing number of scholarly works that have considered the efficacy of torture in such circumstances. Indeed, Eric Posner and Adrian Vermeule argue that: “[a]mong legal academics, a near consensus has emerged: coercive interrogation must be kept ‘illegal,’ but nonetheless permitted in certain circumstances.”<sup>2</sup> This body of work has been given added importance because of the ongoing threats of terrorist attacks in the United States and elsewhere, as well as growing evidence that as part of the “war on terror,” officials within the Bush Administration have sanc-

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1. Mirko Bagaric & Julie Clarke, *Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable*, 39 U.S.F. L. REV. 581, 583, 585 (2005).

2. Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?* 2 (Univ. of Chi. Pub. Law & Legal Theory Working Paper No. 84, 2005). While it is indeed the case that a consensus is emerging within legal scholarship, there are still significant differences between individual viewpoints. As a form of shorthand, those who have explored the possible advantages of a system of coercive interrogation operating within a legal framework of exceptions shall, for the purpose of this Article, be termed “proponents.” This is for ease of reference and is not intended to imply that this group of scholars thinks torture or other ill-treatment is a generally favorable thing. Many, such as Alan Dershowitz, have made clear their general opposition to the use of torture. See also *infra* note 35 and accompanying text; Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 275–76 (2004) (“I am generally against torture as a *normative* matter, and I would like to see its use minimized.”).

tioned the use of coercive techniques against detainees.<sup>3</sup> There is also convincing evidence that detainees in Afghanistan, Iraq, and Guantánamo Bay have been subjected to physical and psychological abuse.<sup>4</sup> According to reports, some terrorist suspects have been sent to other countries, such as Syria and Egypt, for interrogation, where they have been subjected to torture and other abuses by authorities with a long history of such practices.<sup>5</sup>

This Article will consider a key issue: does coercive interrogation,<sup>6</sup> as Bagaric and Clarke suggest, work in producing timely, reliable, life-saving information? Thus far, much of the scholarly discussion in this area has been concerned with the procedural, legal, and philosophical issues raised by coercive interrogation. Only very limited attention has been given to the issue of effectiveness. The proponents of a legally-sanctioned system of coercive interrogation appear, without detailed analysis, to be convinced that it is effective. Bagaric and Clarke claim, "The main benefit of torture is that it is an excellent

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3. For primary documents detailing interrogation techniques authorized by the Bush Administration, see generally *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

4. See, e.g., AMNESTY INT'L, *TORTURE AND SECRET DETENTION: TESTIMONY OF "DISAPPEARED" IN THE "WAR ON TERROR"* (2005) [hereinafter *SECRET DETENTION*]; PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES* (2005); see also *infra* notes 122–23 and accompanying text.

5. For a detailed discussion of so-called "extraordinary rendition," see COMM. ON INT'L HUMAN RIGHTS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE, *TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS"* (2004).

6. While reference is made to "torture" in many of the sources cited within this Article, the author will wherever possible refer to "coercive interrogation." This term includes not only the most serious forms of coercion that involve the infliction of extreme physical and psychological suffering, but also those techniques that do not reach the "torture" threshold, but which still may have a debilitating impact upon the well-being of those who are subjected to such methods. This approach is based on Article 3 of the European Convention on Human Rights, which distinguishes between torture and "inhumane and degrading" treatment. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221. Article 3 states: "No one shall be subjected to torture or to inhumane or degrading treatment or punishment." *Id.* The jurisprudence of the European Court of Human Rights provides that torture is defined as "deliberate inhuman treatment causing very serious and cruel suffering" and that the distinction between torture and inhumane or degrading treatment rests upon the "intensity of the suffering inflicted." *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 79, para. 167 (1978). In more recent cases the court has also stated that:

ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some circumstances, the sex, age and state of health of the victim.

*A. v. United Kingdom*, 27 Eur. H.R. Rep. 611, 629, para. 20 (1999).

means of gathering information.”<sup>7</sup> In their analysis of the possible drawbacks and benefits of coercive interrogation, Posner and Vermeule cite evidence that “strongly suggests that coercive interrogation saves lives.”<sup>8</sup> Likewise, Dershowitz claims that torture “sometimes works, even if it does not always work” and that “there are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.”<sup>9</sup> Other scholars have given support to the idea of legally-sanctioned torture with little concern as to whether it is effective.<sup>10</sup>

It is apparent that the assessment of evidence given by the proponents of a legally-sanctioned system of coercive interrogation is limited. While there are undoubtedly examples of coercion gaining life-saving information, this Article questions whether such techniques can be considered generally effective. Since the effectiveness of coercive interrogation must be central to any argument for a legally-sanctioned system of coercion, it is a matter that cannot be overlooked. Such an analysis also raises further doubts regarding Bagaric and Clarke’s claim that a moral justification for the use of such techniques exists.

In deciding whether coercive interrogation works, this Article develops an analytical framework with which to judge the issues. Given the complex legal and moral questions raised by coercive methods, claims of effectiveness cannot rest merely upon assumptions that these methods will work most of the time, or even sometimes. Rather, there must be an examination of evidence and a recognition of the importance of this evidence in any decision to overturn current legal prohibitions on the use of torture and other illegal methods. The two parts of the analytical framework considered in this Article are *reliability* and *predictability*. These variables emphasize important elements in determining the effectiveness of coercive techniques. *Reliability* is of fundamental importance to the debate over coercive interrogation.<sup>11</sup>

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7. Bagaric & Clarke, *supra* note 1, at 588–89.

8. Posner & Vermeule, *supra* note 2, at 13.

9. ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 137 (2002) [hereinafter UNDERSTANDING].

10. See, e.g., Andrew A. Moher, *The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World*, 26 T. JEFFERSON L. REV. 469 (2004).

11. Strauss has put forward an argument that reliability may not be a central concern in the context of coercive interrogation:

[T]orture need not always be effective to be justified. First, it is important to remember that torture is not being advocated for purposes of obtaining evidence to prosecute someone. In that case, the reliability of information would be paramount. But here, the information is being sought in order to further investigate

If coercion is unreliable, then it is unlikely that it will produce the timely and accurate information that is sought. Such methods may lead to cooperation, but are they a reliable means of obtaining truthful information? *Predictability* has a widely recognized role in the development and application of legal rules. It enhances decision making and assists in the assessment of risk. The notion of predictability may also apply to the development of tools for the investigation and enforcement of the law. In the context of coercive interrogation, predictability is important when deciding whether and when coercion is likely to produce reliable information and what types of interrogation techniques might be utilized in order to achieve that goal.

In their recent work on coercive interrogation, Posner and Vermeule argue that “there is no philosophical justification for thinking that coercive interrogation should be considered special, and regulated differently than the other serious, coercive harms that government inflicts.”<sup>12</sup> In so doing, the authors make specific reference to the legal regulation of the use of “deadly force” by police officers and suggest that similar legal mechanisms could apply to the use of coercive interrogation.<sup>13</sup> Similarly, Bagaric and Clarke state:

Ultimately, torture is simply the sharp end of conduct whereby the interests of one agent are sacrificed for the greater good. As a community, we are willing to accept this principle. Thus, although differing in degree, torture is no different in nature from conduct that we sanction in other circumstances.<sup>14</sup>

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and to try to prevent future terrorist attacks. While, undoubtedly, there is ample evidence that torture frequently yields false confessions, this concern is less significant when the purpose of an interrogation is to obtain information and not to secure a conviction. When torture is utilized for informational purposes only, the dangers of false information are the risks of wasted time and resources. The possibility of even a germ of truth coming from the mouth of an otherwise silent conspirator, conceivably, might be worth the risk.

Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 263 (2004) (citation omitted). In the current debate, the most prominent scenario in which it is argued that coercion might be appropriate is in the context of a terrorist who refuses to disclose the whereabouts of a “ticking bomb.” In such circumstances, the disclosure of timely, reliable information is essential. The claim that the “dangers of false information” only involve “wasted time and resources” fails to recognize the purpose of intelligence gathering. False information may also have untold consequences in terms of the prevention of future terrorist attacks, as well as for those who may be implicated in acts of terrorism, resulting from false accusations. This latter problem was in evidence during the French use of torture in Algiers. Darius Rejali, *Does Torture Work?*, SALON.COM, June 21, 2004, available at [http://www.salon.com/opinion/feature/2004/06/21/torture\\_algiers/index\\_np.html](http://www.salon.com/opinion/feature/2004/06/21/torture_algiers/index_np.html). This has also been alleged by former detainees of Guantánamo Bay. See *infra* note 75 and accompanying text.

12. Posner & Vermeule, *supra* note 2, at 4.

13. *Id.* at 3.

14. Bagaric & Clarke, *supra* note 1, at 584.

In principle, these are strong arguments—why completely outlaw coercive interrogation when the law currently allows state officials, such as police officers, to inflict greater harm in certain defined circumstances? Clearly, on an abstract philosophical level, using a particular set of assumptions, one can establish a case for regulating coercion, just like other harms inflicted by state officials. To be convincing, however, such arguments have to be rooted in an analysis of evidence, which helps establish whether or not coercive interrogation is indeed “no different in nature from conduct that we sanction in other circumstances.”<sup>15</sup> In the context of whether or not coercion is effective as compared with other forms of regulated conduct, Bagaric and Clarke fail to engage in such an analysis.

Taking the example of deadly force used by Posner and Vermeule, there are specific issues of reliability and predictability that are of central importance to this discussion. First, shooting dead an armed suspect who is threatening police officers or innocent bystanders is a highly effective way of neutralizing a clear and imminent threat. Assuming the officers are competent and hit their intended target, then the risk to innocents, such as being shot in any crossfire, is minimized. In this respect, the decision to shoot an armed suspect can be said to have reliable and predictable consequences.

By contrast, where coercive interrogation is used in circumstances suggested by Posner, Vermeule, Bagaric, and Clarke, to prevent an imminent catastrophe, the situation is less clear. First, unlike the case of the gun-wielding criminal, the authorities may not be entirely certain as to whether the detainee is a guilty party in the sense of either being a terrorist or someone in possession of relevant life-saving information. Second, unlike the use of deadly force in the scenario described, the use of coercive interrogation is a much less reliable means of achieving the intended goal of gaining timely, truthful information. There are widely recognized problems of coercive interrogation producing “bad information.”<sup>16</sup> Indeed, one of the ironies of the entire debate surrounding coercive interrogation is that its use in the context of the paradigmatic “ticking bomb” terrorist may also be where it is of the least utility. Where a decision to use coercion is made in order to avoid an imminent catastrophe, the suspect, *assuming* he or she possesses relevant knowledge and is prepared to divulge information, could easily give false or misleading information simply to stop

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15. *Id.*

16. For discussion, see *infra* Parts I.B–C and accompanying text.

the infliction of pain. Once found to be false, there may be little time for the authorities to gain truthful information.

If this analysis is accurate, then the distinction between deadly force and coercive interrogation lies in their effectiveness. Nevertheless, one has to also recognize that in the real world there are problems associated with the use of deadly force. The police make mistakes, and in some police departments, officers do not always act with appropriate judgment or restraint.<sup>17</sup> It could be argued, therefore, that the use of deadly force is problematic and, like coercive interrogation, may involve the targeting of innocents or may not prevent harmful actions by suspects. This then raises the question—why outlaw one and not the other?<sup>18</sup> An alternative way of looking at this might be to question whether it is wise to empower the state with the further authority to inflict harm during the interrogation process when the problem of effectiveness, as will become apparent, is so widely recognized. If, as Posner, Vermeule, Bagaric, and Clarke claim, the authorized use of coercion would only take place in rare circumstances,<sup>19</sup> then this raises the question as to whether it is worth risking the potential negative consequences of its use. In addition, many of the problems associated with the unauthorized or incompetent actions of police officers who use deadly force can be addressed by training and the use of methods that avoid lethal force.<sup>20</sup> By contrast, most of the problems associated with coercive interrogation, even with the use of highly competent interrogators, are inherent to its use. This is precisely why the Central Intelligence Agency (“CIA”) warns about the

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17. Craig Whitlock & David S. Fallis, *County Officers Kill More Often*, WASH. POST, July 1, 2001, at A1 (featuring a police department in which officers shot and killed a significant number of unarmed people who had committed no criminal offenses and commenting on the failure of culpable police officers to be held to account for their actions).

18. A crucial question, beyond the scope of this Article, would be to determine the extent and degree of the problems associated with lethal force.

19. Bagaric and Clarke describe their “ticking bomb” hypothetical as “not one that has occurred in the real world.” Bagaric & Clarke, *supra* note 1, at 583–84. Posner and Vermeule point out that “catastrophic scenarios” that might warrant coercive interrogation are “extremely rare” outside of war. Posner & Vermeule, *supra* note 2, at 11.

20. See Whitlock & Fallis, *supra* note 17, at A1; NAT’L INST. OF JUSTICE, *USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 30–31* (1999) (noting the infrequent use of firearms, as compared with chemical agents, which were the most common type of force used by officers). This study also noted the use of firearms where there was no, or only slight suspect resistance. *Id.* at 49; INT’L ASS’N OF CHIEFS OF POLICE, *POLICE USE OF FORCE IN AMERICA 2001*, at ii (2001) (showing data indicating a decrease in the rate of firearm use, with an increase in the use of chemical agents).

ineffectiveness of physical coercion in its own interrogation manuals.<sup>21</sup>

Posner and Vermeule rightly point out that both police shootings and coercive interrogation have potential costs and benefits,<sup>22</sup> and conclude that while the “net cost-benefit calculus” between the two might be different, “it is unlikely that the difference is great enough to justify a complete ban on coercive interrogation alone.”<sup>23</sup> Posner and Vermeule also note that, “[i]f coercive interrogation is effective, then the cost of a bright line rule that bans it in all circumstances is high.”<sup>24</sup> This, however, must be balanced with any unintended consequences of allowing the use of coercive interrogation, a very difficult element to factor into a cost/benefit model.<sup>25</sup> In addition, the cost/benefit analysis favored by Posner and Vermeule requires consideration of all relevant factors, including the fundamental point of whether coercive interrogation is actually effective—an issue to which they pay only limited attention. A threshold of effectiveness, however defined, should be a precondition to any legalized system of coercion. It is to this issue of effectiveness that this Article now turns.

## I. An Analysis of Evidence Concerning the Effectiveness of Coercive Interrogation

Levinson recently claimed that “we really have no idea how reliable torture is as a way of obtaining information.”<sup>26</sup> While it is certainly the case that there are inherent uncertainties in considering the effectiveness of coercive interrogation, it cannot be said that we have “no idea” as to its reliability. Instead, a discussion of evidence is required to gain a better understanding of its effectiveness. This Article examines a number of specific issues raised by this review of evidence. No single issue can be said to be conclusive, but taken together, one

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21. See discussion *infra* Part I.C.

22. Posner and Vermeule rightly reject the use of “cost” and “benefit” in “the technical sense” and rather the terms be used to denote “good consequences” and “bad consequences.” They also acknowledge that others might disagree with their empirical estimates. Posner & Vermeule, *supra* note 2, at 8 nn.22, 31.

23. *Id.* at 15.

24. *Id.* at 14.

25. See discussion *infra* Part II.A.

26. Sanford Levinson, *Contemplating Torture*, in *TORTURE: A READER* 33 (Sanford Levinson ed., 2004). Strauss makes a similar point: “Evaluating the efficacy of torture requires information not currently available and perhaps, unknowable.” Strauss, *supra* note 11, at 263.

could reasonably take the view that a judgment can be made regarding the effectiveness of coercive interrogation.

### A. The Evidence of Effectiveness upon Which the Proponents Rely

Bagaric and Clarke rely on only one example in claiming coercion is an “excellent means of gathering information.”<sup>27</sup> Their example is a case from Germany, where the police, by the threat of physical coercion, induced a suspect to divulge the location of a child whom he had kidnapped and then murdered.<sup>28</sup> Bagaric and Clarke, as part of their proposal, also argue for the use of a wide range of coercive techniques without regard for their effectiveness. They state that where certain criteria are satisfied, “all forms of harm may be inflicted on the agents—even if that results in death.”<sup>29</sup> This raises two problems. The first problem is that by implication, Bagaric and Clarke appear to acknowledge the uncertain effectiveness of coercive methods by permitting officials to use “all forms of harm.” The second problem relates to the effectiveness of the most extreme interrogation methods; coercion that “results in death” has clearly failed. By failing to engage with the literature, Bagaric and Clarke do not take account of evidence that shows that the infliction of lethal force, used as a means of securing cooperation, has a decidedly mixed history in terms of getting results.<sup>30</sup>

Despite claiming that there are “numerous” instances of successful coercive interrogation in *WHY TERRORISM WORKS*, Dershowitz cites only three examples, all of which are problematic. It is unclear what definitive role, if any, coercion played in each example. In the first example, Dershowitz states that “Jordan apparently broke the most notorious terrorist of the 1980s, Abu Nidal, by threatening his

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27. Bagaric & Clarke, *supra* note 1, at 588.

28. *Id.* at 589.

29. *Id.* at 611. Some proponents of coercive interrogation are much more specific on the methods to be used. Dershowitz refers to “nonlethal” torture and mentions the use of a sterilized needle inserted under a suspect’s fingernails. *UNDERSTANDING*, *supra* note 9, at 148–49.

30. See, e.g., Jean Maria Arrigo, A Consequentialist Argument Against Torture Interrogation of Terrorists (Jan. 30–31, 2003) (unpublished manuscript), available at <http://www.au.af.mil/au/awc/awcgate/jscope/arrigo03.htm> (last visited on Oct. 8, 2005). This paper was presented at the Joint Services Conference on Professional Ethics, January 30–31, 2003, in Springfield, Virginia. *Id.* Part I of the paper, “The Animal Instinct Model of Truth Telling,” discusses two examples of lethal or near-lethal force being used during interrogation, one successful, one a failure. *Id.* at pt. 1. On a related matter it is interesting to note that according to a CIA interrogation manual, “The threat of death has often been found to be worse than useless.” KUBARK, COUNTERINTELLIGENCE INTERROGATION 92 (1963).



mother.”<sup>31</sup> Elsewhere, it has also been claimed that threatening family members has sometimes resulted in cooperation with interrogators.<sup>32</sup> Irrespective of how effective such tactics might be, Dershowitz appears to oppose them: “Unless we are prepared to impose some limits on the use of torture or other barbaric tactics that might be of some use in preventing terrorism, we risk hurtling down a slippery slope into the abyss of amorality and ultimately tyranny.”<sup>33</sup>

Dershowitz’s second example of successful coercive interrogation involves the following reference: “Philippine Police reportedly helped crack the 1993 World Trade Center bombings by torturing a suspect.”<sup>34</sup> Yet the source he cites for this claim mentions neither the Philippines nor the World Trade Center attack.<sup>35</sup> Dershowitz’s third and most detailed discussion involves the case of Abdul Hakim Murad, who in 1995 was also detained and tortured by authorities in the Philippines and was later extradited to the United States to stand trial for involvement in the 1993 attack on the World Trade Center. Dershowitz, basing his discussion on an article published in the *Washington Post*<sup>36</sup> refers to “the lifesaving information they had beaten out of him.”<sup>37</sup> McCoy notes that in the use of this example by Dershowitz and others, certain facts have been omitted,<sup>38</sup> perhaps the most important being that

Manila police got all important information from Murad in the first few minutes when they seized his laptop with the bomb plot and evidence that led the FBI [to another terrorist suspect]. Most

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31. UNDERSTANDING, *supra* note 9, at 249 n.11.

32. RALPH McGEHEE, *Deadly Deceits* 105–06 (1999) (McGehee is a former CIA officer discussing his experiences of witnessing the interrogation of suspected communist insurgents in Thailand. In addition to one instance where a threat to a family member was successful, McGehee also refers to an incident where the wife of a “leading communist” was told that if she did not cooperate her child would be shot. Despite this threat, she still refused to cooperate.).

33. UNDERSTANDING, *supra* note 9, at 146.

34. *Id.* at 137 n.11.

35. Steve Chapman, *No Tortured Dilemma*, WASH. TIMES, Nov. 5, 2001, at A18. Dershowitz may be confusing this story with another newspaper story from the *Washington Post* he cites in the preceding footnote, which does discuss two interrogations by Philippines authorities. The details provided by the story are limited, making an evaluation of the coercion’s effectiveness difficult. Matthew Brzezinski, *Bust or Boom*, WASH. POST, Dec. 30, 2001, at 15.

36. Brzezinski, *supra* note 35, at 15.

37. UNDERSTANDING, *supra* note 9, at 137.

38. Alfred W. McCoy, *Cruel Science: CIA Torture & U.S. Foreign Policy*, 19 NEW ENG. J. OF PUB. POL’Y 209, 239 (2005). While Murad’s confession during interrogation led to the arrest of a fellow conspirator in Pakistan, it is clear from the *Washington Post* story, upon which Dershowitz relies, that the “most damning information” gleaned by the authorities in this case, was obtained from a computer. Brzezinski, *supra* note 35, at 27–28.

supposed details gained from the sixty-seven days of torture that followed were, as one Filipino officer testified in New York, police fabrications that Murad mimed to end the pain.<sup>39</sup>

The length of Murad's torture also has implications for Dershowitz's reference to torture being used "to prevent an imminent act of terrorism."<sup>40</sup> It raises a question as to whether coercion is a reliable means of gathering information in circumstances where time is of the essence.<sup>41</sup>

The conclusions that the proponents draw from the evidence they cite are also of interest. While Dershowitz uses three examples of alleged successful coercion as evidence that it "sometimes" works, Bagaric and Clarke claim from just one example that coercion is an "excellent" technique. Further, unlike Bagaric and Clarke, Dershowitz acknowledges the limitations of some of the evidence in this area. He notes a claim that, as a result of an Israeli High Court of Justice decision declaring that the Israeli security services did not possess lawful authority for the use of certain coercive interrogation techniques, "at least one preventable act of terrorism has been allowed to take place." Yet he states, "Whether this claim is true, false, or somewhere in between is difficult to assess."<sup>42</sup> One might also point out that in the context of predictability, it is simply impossible to know whether coercive methods would have succeeded in that instance.

Dershowitz also engages in a form of reverse reasoning to suggest that coercive interrogation works: "It is precisely because torture sometimes does work and can sometimes prevent major disasters that it still exists in many parts of the world and has been totally eliminated from none."<sup>43</sup> Dershowitz makes a leap by simply assuming that torture exists around the globe for a rational reason, that is, as a means of preventing terrorism or other criminality. He cites no evidence to support this claim. Indeed, elsewhere he acknowledges that in countries such as Egypt, Jordan, and the Philippines "torture—including

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39. McCoy, *supra* note 38, at 239 (citation omitted).

40. UNDERSTANDING, *supra* note 9, at 162. The initial reason for Murad's arrest was for his alleged connection to a plot to "disrupt" a visit of the Pope who was due to visit the Philippines six days after Murad's arrest. MARITES DANIGUILAN VITUG & GLENDA M. GLORIA, UNDER THE CRESCENT MOON: REBELLION IN MINDANAO 222-23 (2000).

41. In regards to the plot to disrupt the Pope's visit, discussed by VITUG & GLORIA, *supra* note 40, one could conclude that the Pope would have already arrived and left the Philippines many weeks prior to the disclosure of the "lifesaving information beaten out of [Murad]." In other words, even if one accepts Dershowitz's interpretation of the facts in this case, the coercive interrogation failed to produce timely information.

42. UNDERSTANDING, *supra* note 9, at 150.

43. *Id.* at 138.

the lethal torture of purely political prisoners—is common and approved at the highest levels of government.”<sup>44</sup> When one examines evidence regarding torture, it becomes apparent that it is used for a variety of reasons, including: the victimization of political opponents, human rights campaigners, and journalists; the general suppression of dissent; as well as the persecution of cultural, racial, and sexual minorities.<sup>45</sup> Judged by this evidence, the notion that torture exists because it works to “prevent major disasters” is perverse.

Posner and Vermeule use evidence from the Israeli security services to support their assertion that the argument that coercive techniques are ineffective “runs aground on the evidence.” The Israeli authorities claim to have prevented ninety planned terrorist attacks by the use of coercive interrogation.<sup>46</sup> Posner and Vermeule describe this evidence as “anecdotal or impressionistic,”<sup>47</sup> which in itself raises doubts as to whether they can reasonably argue that such evidence is also “strong.” As with other claims regarding the effectiveness of coercive interrogation, the information is limited and verification is impossible. Indeed, there is a much more fundamental point; we do not even know if the self-justifying claims made by the Israeli authorities are in fact true.<sup>48</sup> Other issues also raise doubts regarding the effectiveness of coercion within the Israeli context. B’Tselem, an Israeli information center for human rights, states:

[T]he findings are inconclusive . . . those who make this argument have not provided a shred of evidence that physical force is the only or the most effective means to prevent attacks. It is not enough to present cases in which the GSS [(General Security Service)], after using force during interrogations, succeeded in

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44. ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 135 (2003).

45. Human rights reports detailing the use of torture and ill-treatment are too numerous to list. For some recent examples from countries where the United States is also “rendering” terrorist suspects for interrogation, see AMNESTY INTERNATIONAL, *SYRIA: A CULTURE OPPRESSED—THE TORTURE AND IMPRISONMENT OF SYRIAN KURDS* (2004); HUMAN RIGHTS WATCH, *IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT* (2004); HUMAN RIGHTS WATCH, *EGYPT: SECURITY FORCES ABUSE ANTI-WAR DEMONSTRATORS* (2003).

46. Posner & Vermeule, *supra* note 2, at 12–13. In HCJ 5100/94, *Public Committee Against Torture in Israel v. Israel*, [1999] IsrSC 53(4) 817, the Israeli High Court of Justice referred to two examples of coercive interrogation that the Israeli security forces claimed had prevented future specific acts of terrorism. *Id.* at paras. 4–5, *translated in* 38 I.L.M. 1471, 1473–74 (1999).

47. Posner & Vermeule, *supra* note 2, at 13.

48. This is not a suggestion made lightly, B’Tselem claims that members of the Israeli security services have exaggerated and committed acts of perjury. B’TSELEM, *LEGISLATION ALLOWING THE USE OF PHYSICAL FORCE AND MENTAL COERCION IN INTERROGATIONS BY THE GENERAL SECURITY SERVICE* 52–53 (2000) [hereinafter B’TSELEM, *LEGISLATION*].

preventing terrorist attacks, because we do not know what the result would have been had the GSS used other methods instead.<sup>49</sup>

B'Tselem also notes an increase in major attacks during the 1990s against Israelis by Palestinian terrorists. This increase occurred after the General Security Service ("GSS") was authorized to use more forceful interrogation methods: "Some will argue, no doubt, that were it not for the GSS's use of these interrogation methods, many more persons would have been killed or wounded, but, in the absence of firm proof, this argument does not prove that torture is the most effective way to prevent terrorist attacks."<sup>50</sup>

A number of senior Israeli officials, including a former GSS director, have also criticized the use of physical coercion, claiming that effective alternatives are available.<sup>51</sup> Of course, the availability of viable alternatives does not in itself mean that coercion is ineffective. Coercive interrogation does, however, raise specific, and some might argue intractable, problems. In light of the evidence discussed below, which includes further reference to the Israeli experience, coercive interrogation may be significantly less effective than other means of information gathering.

## B. A Cautionary Note from the Historical Record

Historically, there are numerous anecdotal stories of threats or violence leading to the disclosure of information from detainees.<sup>52</sup> This material, some of which is limited in terms of detail, also highlights the problem of reliability in the use of coercive interrogation. In Europe, the use of coercive interrogation has a long history; a number of European states integrated torture with their criminal justice systems before later abandoning such techniques. According to John H. Langbein, the safeguards instituted to protect the innocent "never proved adequate."<sup>53</sup> He also notes a recurrent problem with which we are faced today, "Against the coercive force of the engines of torture, no safeguards were ever found that could protect the innocent and guarantee the truth. The agony of torture created an incentive to speak, but not necessarily to speak the truth."<sup>54</sup> These practices also

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49. *Id.* at 50.

50. *Id.*

51. *Id.* at 51.

52. See CHRIS MACKEY & GREG MILLER, *THE INTERROGATORS* 282–84 (2004); B'TSELEM, *LEGISLATION*, *supra* note 48, at 51–52.

53. John H. Langbein, *The Legal History of Torture*, in *TORTURE: A COLLECTION* 96–97 (Sanford Levinson ed., 2004).

54. *Id.*

appear to have been a highly unreliable means of gaining confessions, whether true or not. Arrigo states:

[E]xamination of court records for 625 cases of torture interrogation in France, from the 1500s through the mid-1700s, showed approximate rates of error—that is, no confession on the rack, under repeated drowning, crushing of joints, and the like—in 67% to 95% of cases, depending on the province.<sup>55</sup>

Some historical documents condoning the use of coercive interrogation also recognized its limitations. *THE MALLEUS MALEFICARUM*, written in the fifteenth century, described and advocated the use of torture in order, inter alia, to obtain confessions from suspected witches. It also provided repeated warnings regarding false confessions that may result from the use of torture.

[If] the Bishop and the Judge are well persuaded that, all circumstances considered, the accused is denying the truth, let them torture him slightly, without shedding blood, bearing in mind that torture is often fallacious and ineffective. For some are so soft-hearted and feeble-minded that at the least torture they will confess anything, whether it be true or not. Others are so stubborn that, however much they are tortured, the truth is not to be had from them. There are others who, having been tortured before, are the better able to endure it a second time, since their arms have been accommodated to the stretchings and twistings involved; whereas the effect on others is to make them weaker, so that they can the less easily endure torture. . . . Therefore there is need for much prudence in the matter of torture, and the greatest attention is to be given to the condition of the person who is to be tortured.<sup>56</sup>

It is worth pointing out that the problems associated with coercive interrogation, which were identified by the authors of *THE MALLEUS MALEFICARUM* in 1486, have not been adequately recognized by Bagaric and Clarke, or many other proponents of a legalized system of

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55. Arrigo, *supra* note 30, at 17 (citing LISA SILVERMAN, *TORTURED SUBJECTS: PAIN, TRUTH, AND THE BODY IN EARLY MODERN FRANCE* 182 (2001)). As a matter of more recent history Arrigo refers to work by PETER HOFFMANN, *HISTORY OF THE GERMAN RESISTANCE: 1933–1945*, at 519 (1977), who recounts the use of torture by the Gestapo against members of the German Resistance:

Six months from the start of their investigations the Gestapo still had nothing like precise knowledge of the resistance movement . . . This lack of information and knowledge is all the more astounding in that Himmler's men employed every means to extract confessions. . . . Moreover all forms of torture were used without hesitation.

Arrigo, *supra* note 30, at 7–8.

56. HEINRICH KRAMER & JAMES SPRENGER, *THE MALLEUS MALEFICARUM OF HEINRICH KRAMER AND JAMES SPRENGER* 243 (Montague Summers trans. & ed., Dover Publications 2d ed. 1986) (1486); see also *id.* at 225, 229.

coercive interrogation. Yet these problems are inherent when using coercion.

### C. A Further Note of Caution from the CIA and FBI

Since the 1950s, the CIA has conducted research and field trials involving human behavior and psychology. One of the reasons for this work was to produce methods of gathering information from detainees during interrogation.<sup>57</sup> In 1997, following a Freedom of Information Act request by the *Baltimore Sun* newspaper, the CIA released two manuals, both of which explain the use of physical and psychological interrogation. The first manual is entitled: KUBARK COUNTERINTELLIGENCE INTERROGATION, JULY 1963 ("KUBARK manual"). The second is dated 1983 and is entitled: HUMAN RESOURCE EXPLOITATION TRAINING MANUAL.<sup>58</sup> The latter manual explicitly refers to the ineffectiveness of coercion: "Experience indicates that the use of force is not necessary to gain cooperation of sources. Use of force is a poor technique, yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."<sup>59</sup> Notwithstanding this assertion, both manuals detail the use of psychological techniques and physical coercion that can be used to obtain "needed information from subjects."<sup>60</sup>

These manuals provide a useful means of assessing the claims of those who propose a legalized system of coercive interrogation. For example, to bolster their argument, Bagaric and Clarke state, "Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of a torturer to avoid the pain. Often even the threat of torture alone will evoke cooperation."<sup>61</sup> They cite no evidence to support these claims.

The CIA manuals by contrast, emphasize the limitations of coercive methods. The KUBARK manual states, "In fact, most people underestimate their capacity to withstand pain. . . . In general, direct

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57. For detailed discussions, see generally McCoy, *supra* note 38.

58. In terms of structure and wording, a substantial part of the 1983 manual appears to be based upon the content of the 1963 manual.

59. This warning appears before the manual's introduction, in a "disclaimer" entitled "Prohibition Against Use of Force." CENT. INTELLIGENCE AGENCY, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL (1983) [hereinafter HUMAN RESOURCE EXPLOITATION TRAINING MANUAL], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20A1-G11.pdf> (pt. I); <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/CIA%20Human%20Res%20Exploit%20H0-L17.pdf> (pt. II).

60. *Id.* § A-1, at I.A (original all capitalized).

61. Bagaric & Clarke, *supra* note 1, at 588-89.

physical brutality creates only resentment, hostility, and further defiance.”<sup>62</sup> The manual also notes that there are some people able to withstand pain to a much greater degree than others.<sup>63</sup> Of particular relevance to a terrorist with deeply embedded religious or political beliefs, the manual states, “Persons of considerable moral or intellectual stature often find in pain inflicted by others a confirmation of the belief that they are in the hands of inferiors, and their resolve not to submit is strengthened.”<sup>64</sup> Both manuals emphasize the importance of creating rapport during interrogations and the need for control, professionalism, and patience on the part of interrogators.<sup>65</sup>

Recent events in Iraq illustrate that the use of extreme physical brutality, as proposed by Bagaric and Clarke, does not necessarily result in cooperation. After a series of severe beatings Iraqi Major General Abed Hamed Mowhoush died in United States military custody.<sup>66</sup> Having initially cooperated with his captors without the use of coercion, it was decided that to gain further information physical coercion would be used. Prior to his death “a secret CIA-sponsored group of Iraqi paramilitaries, working with Army interrogators, had beaten Mowhoush nearly senseless, using fists, a club and a rubber hose.”<sup>67</sup> These techniques failed to gain further cooperation.<sup>68</sup>

Another issue that relates to the reliability of coercive interrogation is that of accurate recollection. The 1983 CIA manual raises questions regarding the use of “pressures” and the reliability of confessions.

Some psychologists feel that the subject’s ability to recall and communicate information accurately is as impaired as his will to resist. This objection has some validity but the use of coercive techniques will rarely confuse a reluctant subject so completely that he does not know whether his own confession is true or false. . . . The classic cautions apply. The pressures are lifted enough so that the subject can provide information as accurately as possible.<sup>69</sup>

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62. KUBARK, *supra* note 30, at 90–91 (internal quotation marks omitted).

63. *Id.* at 93.

64. *Id.* at 94. See B’TSELEM, LEGISLATION, *supra* note 48, at 52, for a possible example of this phenomenon (referring to the interrogation of a Hamas member by the Israeli security forces).

65. See *Conducting the Questioning*, in HUMAN RESOURCES EXPLOITATION TRAINING MANUAL, *supra* note 59, § I-1.

66. Josh White, *Documents Tell of Brutal Improvisation by GIs*, WASH. POST, Aug. 3, 2005, at A01.

67. *Id.*

68. *Id.*

69. HUMAN RESOURCE EXPLOITATION TRAINING MANUAL *supra* note 59, § L-7, pt. B. It is worth emphasizing the fact that Bagaric and Clarke’s proposal is for the use of coercion to

In addition, the manual discusses that some techniques that induce "debility," such as "prolonged constraint; prolonged exertion; extremes of heat, cold or moisture; and deprivation of food or sleep," are based on an "assumption . . . that lowering the subject's physiological resistance will lower his psychological capacity for resistance."<sup>70</sup> It further explains, however, that "[p]rolonged constraint or exertion, sustained deprivation of food or sleep, etc. often become patterns to which a subject adjusts by becoming more apathetic and withdrawing into himself. . . . In this case debility would be counter productive."<sup>71</sup> The KUBARK manual states: "The available evidence suggests that resistance is sapped principally by psychological rather than physical pressures."<sup>72</sup>

Another problem with coercive interrogation, which raises serious concerns regarding its reliability, is that of false confessions. The KUBARK manual makes specific reference to this problem.

Intense pain is quite likely to produce false confessions, concocted as a means of escaping from distress. A time-consuming delay results, while investigation is conducted and the admissions are proven untrue. During this respite the interrogatee can pull himself together. He may even use the time to think up new, more complex "admissions" that will take still longer to disprove. KUBARK is especially vulnerable to such tactics because the interrogation is conducted for the sake of information and not for police purposes.<sup>73</sup>

Prior to their release from Guantánamo Bay in 2004, three British detainees falsely admitted, after repeated interrogations, to appearing in a video with Osama Bin Laden. One of the detainees, Sahfiq Rasul, gave the following explanation for his false confession:

The reason I did this was because of the previous five or six weeks of being held in isolation and being taken to interrogation for hours on end, short shackled and being treated in that way. I was going out of my mind and didn't know what was going on. I was desperate for it to end and therefore eventually I just gave in and admitted to being in the video.<sup>74</sup>

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gain *intelligence* regarding an imminent catastrophe. This is arguably a more difficult and complex process than gaining a confession, which may involve only minimal cooperation by a detainee with his or her captors.

70. *Id.* § L-3.

71. *Id.*

72. KUBARK, *supra* note 30, at 92.

73. *Id.* at 94. See B'TSELEM, LEGISLATION, *supra* note 48, at 52, for an example of a false confession induced by the Israeli security forces.

74. SHAFIQ RASUL, ASIF IQBAL & RHEHEL AHMED, COMPOSITE STATEMENT: DETENTION IN AFGHANISTAN AND GUANTÁNAMO BAY, para. 199 (2004) [hereinafter COMPOSITE STATEMENT].



Rasul and another British inmate at Guantánamo Bay, Asif Iqbal, claim that coercion also resulted in false accusations being made by some detainees against fellow detainees.<sup>75</sup> These disclosures suggest that measures short of the severe infliction of pain have the potential to produce inaccurate information in order to stop the coercion.<sup>76</sup> Similarly, the Public Committee Against Torture in Israel cites a case from the Tel Aviv-Jaffa District Court in 2003. In acquitting the defendant, the court expressly doubted the claims of the GSS interrogator and made the following comments regarding the defendant's alleged confession:

GSS interrogators have confirmed in their testimonies, and it has been evidenced in protocols that were recorded, that the accused reached a state in which he announced to them that he is prepared to sign anything they wrote, even while at the same time he continued to emphasize that he had no relation to the accusations attributed to him, because he loves the State and would never harm it.<sup>77</sup>

Ronald Kessler's account of the CIA's campaign against al Qaeda raises further doubts regarding the effectiveness of coercive interrogation.

The CIA fueled [press reports of coercion] hoping to instill fear. But, while CIA psychologists suggested ways to manipulate the prisoners, and prisoners might be deprived of sleep, the CIA had found that torture was not needed and, in any case, it produced bad information. Simply offering them tea and sympathy was often enough to get al Qaeda members to talk. . . . Most al Qaeda members cooperated after a day or two.<sup>78</sup>

The problem of "bad information" and false confessions may also damage the investigatory process. In hearings concerning the confirmation of Alberto Gonzales as United States Attorney General, Douglas A. Johnson, executive director of The Center for Victims of Torture, claimed that the argument that torture is necessary rests on "unproven assumptions based on anecdotes from agencies with little transparency." He goes on:

Well trained interrogators, within the military, the FBI, and the police have testified that torture does not work, is unreliable and dis-

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75. DAVID ROSE, *GUANTÁNAMO: AMERICA'S WAR ON HUMAN RIGHTS 106-07* (2004).

76. The three British detainees have provided detailed accounts of how they suffered psychologically and physically as a result of coercion that included being exposed to extremes of temperature, being chained for long periods of time, and the use of stress positions and dogs to frighten them. COMPOSITE STATEMENT, *supra* note 74, at paras. 56-280.

77. PUB. COMM. AGAINST TORTURE IN ISR., *BACK TO A ROUTINE OF TORTURE 86* (2003).

78. RONALD KESSLER, *THE CIA AT WAR: INSIDE THE SECRET CAMPAIGN AGAINST TERROR 277* (2003). Given the recent allegations of abuse leveled at United States government agencies, including the CIA, some skepticism must be expressed regarding the accuracy of these claims, at least in terms of the absence of physical coercion during interrogation.

tracting from the hard work of interrogation. Nearly every client at the Center for Victims of Torture, when subjected to torture, confessed to a crime they did not commit, gave up extraneous information, or supplied names of innocent friends or colleagues to their torturers. It is a great source of shame for our clients, who tell us they would have said anything their tormentors wanted them to say in order to get the pain to stop. Such extraneous information distracts, rather than supports, valid investigations.<sup>79</sup>

Johnson's reference to the FBI is timely. Documents recently released under the United States Freedom of Information Act<sup>80</sup> make it apparent that the FBI expressed serious reservations regarding the effectiveness of interrogation techniques used by other agencies at Guantánamo Bay. In a released e-mail, an FBI official states:

Of concern, DOD [Department of Defense] interrogators impersonating Supervisory Special Agents of the FBI told a detainee that [redacted] . . . . These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee. If this detainee is ever released or his story made public in any way, DOD interrogators will not be held accountable because these torture techniques were done [by] the "FBI" interrogators. The FBI will [be] left holding the bag before the public.<sup>81</sup>

In another e-mail an FBI official notes that the DOD and FBI techniques differ "drastically" and in meetings with the Department of Justice, "we often discussed [redacted] techniques and how they were not effective or producing [intelligence] that was reliable."<sup>82</sup> The FBI official goes on to say that the DOD

wanted to pursue expeditiously their methods to get "more out of him" [redacted]. We were given a so called deadline to use our

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79. *Nomination of the Honorable Alberto R. Gonzales, Counsel to President George W. Bush, to Be the Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 9–10 (2005) (testimony of Douglas A. Johnson); see also Matthew de LaPlante, *Expert Interrogator Is Roiled by Army's Prisoner Treatment*, SALT LAKE TRIB., Aug. 4, 2005, at A1.

80. 5 U.S.C. § 522 (2000).

81. E-mail from [redacted], to Gary Bald, Frankie Battle, Arthur Cummings (Dec. 5, 2003, 09:53 A.M.), available at [http://www.aclu.org/torturefoia/released/FBI\\_3977.pdf](http://www.aclu.org/torturefoia/released/FBI_3977.pdf) (last visited Oct. 8, 2005) (regarding "Impersonating FBI at GTMO").

82. These differences refer to the Department of Defense's use of coercive methods and the FBI's use of non-coercive methods. E-mail from [redacted], FBI, to T.J. Harrington, FBI (May 10, 2004, 12:26 P.M.), available at [http://www.aclu.org/torturefoia/released/t3131\\_3133.pdf](http://www.aclu.org/torturefoia/released/t3131_3133.pdf) (last visited on Oct. 8, 2005) [hereinafter Harrington e-mail] (copied to others at the FBI, regarding "Instructions to GTMO interrogators"). In this e-mail, the FBI official refers to "our methods that are proven (Reed school, etc)." "Reed School" refers to the so-called "Reed technique" of interview and interrogation that emphasizes *inter alia* non-coercive methods and rapport building. See John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 754–55 (2005), for a brief discussion.

traditional methods. Once our timeline [redacted] was up [redacted] took the reigns. . . .

. . . .

. . . I voiced concerns that the [intelligence] produced was nothing more than what FBI got using simple investigative techniques . . . . I finally voiced my opinion concerning the information. The conversations were somewhat heated [redacted] agreed with me. [redacted] finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the “[redacted] methods.”<sup>83</sup>

One further point is worthy of mention in the context of Guantánamo Bay. The Bush Administration’s view is that the detainees at Guantánamo are producing “enormously valuable intelligence.”<sup>84</sup> These claims, however, have been doubted. For example, Lieutenant Colonel Anthony Christino, who for six months prior to his retirement had regular access to the intelligence coming from Guantánamo Bay, has argued that its value has been “wildly exaggerated”<sup>85</sup> and that the system of interrogation adopted at Guantánamo provides intelligence that is “inherently unreliable.”<sup>86</sup>

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83. Harrington e-mail, *supra* note 82. Similarly, Seymour M. Hersh quotes a Pentagon adviser as stating:

They did it the wrong way . . . and took a heavy-handed approach based on coercion, instead of persuasion—which actually has a much better track record. It’s about rage and the need to strike back. It’s evil, but it’s also stupid. It’s not torture but acts of kindness that lead to concessions. The persuasive approach takes longer but gets far better results.

SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 14* (2004).

84. Martin Bright, *Guantanamo Has “Failed to Prevent Terror Attacks,”* OBSERVER (London), Oct. 3, 2004, available at <http://www.guardian.co.uk/guantanamo/story/0,13743,1318702,00.html>; see also Press Release, U.S. Dep’t of Def., *Guantanamo Provides Valuable Intelligence Information* (June 12, 2005), available at <http://www.dod.gov/releases/2005/nr20050612-3661.html>; Kathleen T. Rhem, Am. Forces Press Serv., *DefenseLINK News: Guantanamo Detainees Still Yielding Valuable Intelligence*, [http://www.dod.mil/news/Mar2005/20050304\\_88.html](http://www.dod.mil/news/Mar2005/20050304_88.html) (quoting Army Brig. Gen. Jay Hood, commander of Joint Task Force at Guantánamo Bay: “Initially we had a lot to do to learn about the nature of our detainees. Many of them used aliases; many of them were not forthcoming with us in describing who they were and what their activities on the battlefield were . . . . But over the last couple years, we’ve gained a great deal of information on them and intelligence from them.”).

85. Bright, *supra* note 84.

86. Rose, *supra* note 75, at 119–20. Recently, a number of retired senior military leaders, including nine former generals, signed a letter criticising the use of coercive techniques as ineffective. In this letter, they make reference to the restrictions on the treatment of detainees contained in the Army Field Manual and state:

The Manual applies the wisdom and experience gained by military interrogators in conflicts against both regular and irregular foes. It authorizes techniques that have proven effective in extracting life-saving information from the most hardened enemy prisoners. It also recognizes that torture and cruel treatment are ineffective methods, because they induce prisoners to say what their interrogators

#### D. The Use of Coercive Interrogation in Algiers and Northern Ireland

Coercive techniques have also been used during a number of conflicts between states and terrorist organizations. Two such instances that will be discussed here are Algiers and Northern Ireland. In Algiers during the 1950s, the French military used coercive interrogation to gain intelligence in its bid to crush a rebellion against its rule. Sanford Levinson quotes a recent review of several books published in the *New York Review of Books*: "Was torture effective? . . . [T]orture enabled the French to gather information about future terrorist strikes and to destroy the infrastructure of terror in Algiers."<sup>87</sup> The problem here is how one defines effectiveness. Levinson fails to quote the following text from the same paragraph. "Torture not only failed to repress the yearning for independence among Algerians, it increased popular support for the FLN, contributing to the transformation of a small vanguard into a revolutionary party with mass support . . . . Indeed, France's tactics helped the FLN to win over Algerian moderates . . . ." <sup>88</sup>

Furthermore, there is continuing disagreement as to the effectiveness of the methods used by the French authorities. Recent work by Darius Rejali paints a very different picture than that suggested by Shatz. Rather than achieving a military victory against terrorists through the use of torture, Rejali argues that "the French won by applying overwhelming force in an extremely constrained space, not by superior intelligence gathered through torture . . . . What made the difference for the French in Algiers was not torture, but the accurate intelligence obtained through public cooperation and informants."<sup>89</sup> He also notes:

In fact, no rank-and-file soldier has related a tale of how he personally, through timely interrogation, produced decisive information

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want to hear, even if it is not true, while bringing discredit upon the United States.

Letter from twenty-nine retired military officials to John McCain, United States Senator 2 (Oct. 3, 2005), available at [http://www.humanrightsfirst.org/us\\_law/etn/pdf/mccain-072205.pdf](http://www.humanrightsfirst.org/us_law/etn/pdf/mccain-072205.pdf) (last visited on Oct. 8, 2005); see also Anne Applebaum, *The Torture Myth*, WASH. POST, Jan. 12, 2005, at A21.

87. Adam Shatz, *The Torture of Algiers*, N.Y. REV. BOOKS, Nov. 21, 2002, at 53, 57 (book review).

88. *Id.* at 57. The Front de Libération Nationale ("FLN") began as a small underground organization violently opposed to French rule in Algeria. *Id.* at 57.

89. Both Adam Shatz and Darius Rejali note that the French legal system had great difficulty controlling the French armed forces and their activities in Algiers. Rejali, *supra* note 11; Shatz, *supra* note 87, at 57.

that stopped a ticking bomb. "As the pain of the interrogation began," observed torturer Jean-Pierre Vittori, "they talked abundantly, citing the names of the dead or militants on the run, indicating locations of old hiding places in which we didn't find anything but some documents without interest."<sup>90</sup>

In Northern Ireland in the early 1970s, after an upsurge in violence by the Irish Republican Army, terrorist suspects were interned without trial by security forces, and some were subjected to what became known as the "five techniques." As part of so-called "interrogation in depth," the following five techniques were utilized by interrogators: wall-standing, hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.<sup>91</sup> In *Ireland v. United Kingdom*,<sup>92</sup> the European Court of Human Rights held that while these techniques did not violate the European Convention on Human Rights, Article 3 prohibition on the use of torture, they did amount to "inhumane and degrading treatment."<sup>93</sup> Of particular interest to this Article is the following passage from the court's judgment: "The . . . interrogation in depth by means of the five techniques led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents."<sup>94</sup>

It is assumed that the source of this information was the United Kingdom government, based on disclosures from the Northern Ireland security forces, but there are no means of verifying these claims. It is also worth noting, as acknowledged by the Human Rights Commission, that neither the security forces, nor the alleged victims of abuse had given "accurate and complete accounts of what had happened."<sup>95</sup> In addition, there were also problems, as acknowledged by

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90. Rejali, *supra* note 11. The 1983 CIA manual refers to the Algiers conflict thus: "During the battle of Algiers, the French army used torture to neutralize a terrorist group within a matter of months. Unfortunately, along with the hundreds of terrorists that were arrested and tortured, so were hundreds of innocent civilians." HUMAN RESOURCE EXPLOITATION TRAINING MANUAL, *supra* note 59, § A-1, at pt. I.B.

91. *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25, 59, para. 96 (1978).

92. *Id.*

93. *Id.* at 79–80, para. 167.

94. *Id.* at 60, para. 98.

95. *Id.* at 58, para. 93. Where there was dispute, the court relied on medical evidence. *Id.* It is worth pointing out that state authorities and some detainees may have self-serving reasons to lie regarding coercive interrogation. An al-Qaeda training manual seized during a raid by police in Manchester, England advises members to make allegations of abuse: "1. At the beginning of the trial, once more the brothers must insist on proving that torture was inflicted on them by State Security [investigators] before the judge. 2. Complain [to

the court, of people being “arrested or even detained on the basis of inadequate or inaccurate information.”<sup>96</sup> This obviously raises the problem of reliability—one cannot gain valuable information from those unconnected to terrorism. Nor, given the lack of transparency, can we judge the general effectiveness of the five techniques. For example, did a small number of individuals subjected to the techniques disclose a lot of information or were the disclosures more widely spread? Were there any false confessions? Did the detainees give false information? Indeed, we do not know how much information would have been disclosed by utilizing lawful techniques. It is also worth noting that whatever information was gleaned from the interrogations in Northern Ireland, it did not reduce the amount or severity of terrorism. On the contrary, the court recognized the security situation worsened significantly during this period.<sup>97</sup>

The Algiers and Northern Ireland examples illustrate another problem with coercion, it can easily distract from other more effective techniques. Rejali argues that in the context of Algiers, torture became so entrenched that “engaging in torture prevented the use of ordinary—and more effective—policing skills.”<sup>98</sup> In a recent interview for the *New Yorker*, a former member of the British security service MI5, Tom Parker, notes that in the context of Northern Ireland, often “detainees aren’t valuable” because they do not have the information the interrogators are seeking. What is instead required is “‘being creative’ about human intelligence gathering, such as infiltration and eavesdropping.”<sup>99</sup>

## II. Underlying Reasons for the General Ineffectiveness of Coercive Interrogation

### A. The Problem of the Slippery Slope

The proponents of a legalized system of coercion claim that there is no evidence of slippage in the use of coercive interrogation. According to Bagaric and Clarke, such an argument “holds that while torture

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the court] of mistreatment while in prison.” [http://www.au.af.mil/au/awc/awcgate/terrorism/alqaida\\_manual/](http://www.au.af.mil/au/awc/awcgate/terrorism/alqaida_manual/) (last visited Jan. 29, 2005). The lack of transparency that attaches to claims made by state authorities, also applies to some of the allegations made by detainees. Often allegations of abuse have not been independently verified and it might be the case that some detainees have reason to exaggerate or lie about their experiences.

96. *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25, 38 (1978).

97. *See, e.g., id.* at 39–43.

98. Rejali, *supra* note 11.

99. Jane Mayer, *Outsourcing Torture*, *NEW YORKER*, Feb. 14, 2005, at 106, 116.

might be justified in the extreme cases, legalizing it in these circumstances will invariably lead to torture in other less desperate situations."<sup>100</sup> This issue of slippage is important because it bears directly upon the effectiveness of coercion. Coercion will have no beneficial effect if, for example, it is used against people who do not possess life-saving information or where increasingly coercive and ineffective coercive techniques are utilized.

Posner and Vermeule give various examples of the slippery slope argument, including, "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." Posner and Vermeule claim such arguments are "not supported by evidence."<sup>101</sup> Bagaric and Clarke claim that the slippery slope argument is "not sound" because the "floodgates are already open" and that "the legalization of torture in very rare circumstances would, in fact, reduce the instances of torture because of the increased level of accountability."<sup>102</sup> They also claim "there is no evidence to suggest that the lawful violation of fundamental human interests will necessarily lead to a violation of fundamental rights where the pre-conditions for the activity are clearly delineated and controlled."<sup>103</sup>

Whatever the current incidence of torture and ill-treatment around the world, Bagaric and Clarke do not appear concerned that a legal-based system of coercion might actually encourage coercion rather than reduce it. Contemplating a system that is "clearly delineated and controlled" assumes that such a system could be successfully operated. It is apparent that in countries where attempts were made to control coercion, they failed in the face of organizational and operational pressures.<sup>104</sup> Indeed, slippage appears to be an inevitable part of coercive interrogation. Amnesty International argues, "States that

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100. Bagaric & Clarke, *supra* note 1, at 615.

101. Posner & Vermeule, *supra* note 2, at 16–17; *see also* Bagaric & Clarke, *supra* note 1, at 615–16.

102. Bagaric & Clarke, *supra* note 1, at 615.

103. *Id.* at 615–16.

104. It has been argued that the Israeli High Court of Justice decision referred to earlier has operated to restrain the interrogation methods of the security services. John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 138 n.292 (2002). Since the publication of Parry's article, however, it has been claimed that interrogation practices have worsened and that Israeli legal system has failed to deal properly with allegations of abuse. The Public Committee Against Torture in Israel ("PCATI") argues:

use torture and ill-treatment use it broadly. . . . We have not found a single state which tortures 'only once,' or only in a few extreme cases."<sup>105</sup>

In responding to these denials of a slippery slope and to link the problem of slippage to the issue of effectiveness one has to examine the current evidence. Contrary to Bagaric, Clarke, Posner, and Vermeule's claims, there are in fact several examples of this problem. In the context of the Israeli security forces' use of coercive interrogations, it has been claimed by B'Tselem that coercive techniques have been used against an increasing range of people and well beyond situations involving "ticking bombs."

In practice, not only was torture not limited to "persons who planted ticking bombs," it was not even limited to persons suspected of membership in terrorist organizations, or to persons suspected of criminal offenses. The GSS regularly tortured political activists of Islamic movements, students suspected of being pro-Islamic, religious sages, sheiks and religious leaders, and persons active in Islamic charitable organizations, the brothers and other relatives of persons listed as "wanted" (in an attempt to obtain information about them), and Palestinians in professions liable to be involved in preparing explosives[—]an almost infinite list. In a number of cases, wives of detainees were arrested during their husbands' detention, and the interrogators even ill-treated them to further pressure their husbands. Also, GSS agents used torture to recruit collaborators.<sup>106</sup>

B'Tselem claims that most cases in which coercive methods have been justified before the Israeli courts as involving the threat of a

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The [Israeli High Court of Justice] today enables torture to take place as far as possible in time and place from the discerning eyes of attorneys . . . . The State Prosecutor's Office takes care, by relying on internal GSS investigations, to reject every complaint of torture, and the Attorney General accepts unquestioningly, without exception and wholesale the "ticking bomb" and "defense of necessity" claims presented to him by the GSS.

PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 81; *see also* B'TSELEM, LEGISLATION, *supra* note 48, at 37 (arguing that "the review mechanisms have failed almost completely to question GSS methods"); Shatz, *supra* note 87 (concerning the French use of coercion in Algiers).

105. Amnesty Int'l, Torture and Ill-Treatment: The Arguments, <http://web.amnesty.org/pages/stoptorture-arguments-eng> (last visited Oct. 8, 2005).

106. B'TSELEM, LEGISLATION, *supra* note 48, at 33. See Memorandum from [redacted] to [redacted] (June 10, 2004), available at [http://www.aclu.org/torturefoia/released/t2614\\_2616.pdf](http://www.aclu.org/torturefoia/released/t2614_2616.pdf) (last visited Oct. 8, 2005) (United States Government memorandum regarding "Report of Violations of Geneva Conventions and the International Laws of Land Warfare"), for a similar example involving United States forces in Iraq, recently released under the United States Freedom of Information Act.



“ticking bomb” have proved “totally unsubstantiated.”<sup>107</sup> It cites examples where the use of coercion against three detainees was justified on the grounds that they possessed information that would prevent terrorist attacks. In the case of one of these detainees, the authorities claimed to have evidence from six witnesses to support the allegation that a detainee was “active in a military organization.” All three detainees were subsequently released without charge.<sup>108</sup> In addition, “[F]rom a sample of 162 Palestinians tortured by the GSS about whom complete details are available regarding their post-interrogation fate, sixty-five were released without any proceedings having been initiated against them and forty-one were placed in administrative detention. Only fifty-six were indicted.”<sup>109</sup> B’Tselem also notes that some interrogations only occur during weekdays.<sup>110</sup> “‘Intensive interrogation,’ then, is rather peculiar. The lethal bomb ticks away during the week, ceases, miraculously, on the weekend, and begins to tick again when the interrogators return from their day of rest.”<sup>111</sup> Elsewhere it has been claimed that with some detainees there are long delays between arrest and questioning with the use of coercion, which raises questions regarding the urgency of the threat that led to the arrest.<sup>112</sup> Further, regarding the violent shaking of detainees, B’tselem states that this technique is

supposed to be used only in cases of extreme danger. . . . over the past two years, GSS interrogators violently shook at least twenty-four Palestinians. Of these, eleven were not indicted for any offense and no legal proceedings were initiated. Nine others were released after being detained or imprisoned for several months. Two were sentenced to imprisonment exceeding one year, and in two cases, the legal proceedings against them have not yet been concluded.<sup>113</sup>

Further slippage occurs in the Israeli example in terms of the numbers of detainees who are subject to coercive methods. B’Tselem estimates that the vast majority of Palestinian detainees may have been

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107. B’TSELEM, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 30 (1998) [hereinafter B’TSELEM, ROUTINE TORTURE].

108. *Id.* at 29–30.

109. B’TSELEM, LEGISLATION, *supra* note 48, at 32.

110. B’TSELEM, ROUTINE TORTURE, *supra* note 107, at 15–16.

111. *Id.* at 16.

112. PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 58 (noting that one detainee was held at least eighteen days before his interrogation even began).

113. B’TSELEM, ROUTINE TORTURE, *supra* note 107, at 31. In another report B’Tselem claims that: “[t]he late prime minister, Yitzhak Rabin, stated that some 8000 Palestinians had been ‘shaken’ prior to mid-1995.” B’TSELEM, 1987–1997 A DECADE OF HUMAN RIGHTS VIOLATIONS 13 (1998).

subjected to coercion.<sup>114</sup> In addition, in its report on the treatment of detainees between September 2001 and April 2003, the Public Committee Against Torture in Israel (“PCATI”) noted a “rapid deterioration in the ethics of GSS interrogations.”<sup>115</sup> The report refers to a decision of the Israeli High Court of Justice (“HCJ”), which found that the GSS did not have lawful authority to use techniques such as shaking or stress positions, but that a necessity defense might be available where such techniques were to be used in cases involving “ticking time bombs” where “there exists a concrete level of imminent danger of the explosion’s occurrence.”<sup>116</sup> PCATI states:

The achievements of the HCJ ruling of 1999 have been ground to dust. The HCJ’s attempt to allow torture “only” in extreme conditions as the improvisation of an interrogator in an “isolated case” that can be recognized as legal “only” retroactively, has failed completely. Today, dozens and maybe hundreds of Palestinian detainees are tortured monthly, with torture and ill-treatment being the rule, and what the HCJ termed “reasonable interrogation” being the exception.<sup>117</sup>

Beyond the Israeli example, slippage is also evidenced in the Bush Administration’s “war on terror.” Commenting on coercive interrogation techniques authorized by the Bush Administration and scandals such as Abu Ghraib, David Gottlieb states that “[o]nce these powers were placed in the hands of poorly-trained reservists, they morphed into something more sinister.”<sup>118</sup> Indeed, the current allegations surrounding detainee treatment in Guantánamo Bay, Iraq, and Afghanistan strongly suggest that allowing coercion has led to even more serious abuses. This is further evidenced by the testimony of a former military interrogator, Chris Mackey, in Afghanistan. Mackey recounts the pressures that can produce slippage:

When we arrived in Afghanistan, I had an unshakable conviction that we should follow the rules to the letter: no physical touching, no stress positions, no “dagger on the table” threats, and no deprivation of sleep . . . but I knew that it was possible to make bad decisions in the heat of the moment, that it was easy for emotions

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114. B’Tselem estimates that coercive techniques have been used against up to 85% of detainees, with the General Security Service annually interrogating 1000–1500 Palestinians. B’TSELEM, ROUTINE TORTURE, *supra* note 107, at 5.

115. PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 48.

116. HCJ 5100/94, Pub. Comm. Against Torture in *Isr. v. Israel*, [1999] IsrSC 53(4) 817, translated in 38 I.L.M. 1471, 1484, 1485–86, paras. 32, 34 (1999).

117. PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 89.

118. David J. Gottlieb, *How We Came to Torture*, 14 KAN. J.L. & PUB. POL’Y 449, 455 (2005). Of course, it could be argued that what is required are better trained and more experienced interrogators. The problem is that on the basis of many of the examples discussed in this Article, experience may not appear to reduce the incidence of abuse.

to overwhelm good judgment. Following the rules to the letter was the safe route. Even entertaining the idea of doing otherwise was inviting "slippage."<sup>119</sup>

Mackey goes on to describe that he discovered that the "safe route" governed by the Geneva Conventions "was ineffective," and he attempted to "get around" rules against making physical threats and using sleep disturbance or deprivation.<sup>120</sup> He also recounts how he was encouraged by an intelligence sergeant to scare detainees and how he began to use indirect threats of violence.<sup>121</sup> While Mackey emphasized that the Geneva Conventions were a significant consideration in limiting his treatment of detainees, he provided some evidence of the pressures that lead to slippage. Other evidence produced by organizations such as Human Rights Watch suggest that a wide variety of coercive techniques have been used in Afghanistan, including beatings and several fatalities, and that abuses have been "systematic."<sup>122</sup>

Further, slippage can and does occur when coercion is used for means other than for the purposes of intelligence gathering. Evidence of this problem was recently provided by three serving members of the United States military, who in disclosures to Human Rights Watch, pointed to the "systematic" abuse of Iraqi detainees by United States forces. The report notes that military intelligence officers encouraged the abuse of detainees as part of the interrogation process.<sup>123</sup> Nevertheless, even if one accepts such techniques as a legitimate means of gaining intelligence, the use of coercion spread beyond intelligence gathering. One sergeant of the 82nd Airborne Division reported that detainees would be abused because "we would just get bored . . . . We did that for amusement. . . . Everyone in camp knew if you wanted to work out your frustration you show up at the [detainee] tent. In a way it was sport."<sup>124</sup>

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119. MACKAY & MILLER, *supra* note 52, at 285.

120. *Id.* at 285–86.

121. *Id.* at 286–89.

122. For details, see HUMAN RIGHTS WATCH, "ENDURING FREEDOM": ABUSES BY U.S. FORCES IN AFGHANISTAN (2004); HUMAN RIGHTS WATCH, SYSTEMIC ABUSE OF AFGHAN PRISONERS (2004).

123. HUMAN RIGHTS WATCH, LEADERSHIP FAILURE: FIRSTHAND ACCOUNTS OF TORTURE OF IRAQI DETAINEES BY THE U.S. ARMY'S 82ND AIRBORNE DIVISION 1–2, 12 (2005) [hereinafter LEADERSHIP FAILURE].

124. *Id.* at 9, 11. Similarly, as a result of an Israeli security crackdown in 2002, Amnesty International reported the use of physical abuse of detainees during interrogation and also questioned the motives behind the treatment of thousands of detainees:

Most of those still in custody are held without charge or trial, often under administrative detention orders which may be renewed indefinitely. There is strong evidence that the majority of those detained have been arbitrarily detained, and that

One final example of slippage is worthy of mention. It is evident that coercion is being used in some cases, not to gather information, but to gain confessions. Confessions, such as the one made by the British detainee at Guantánamo Bay discussed earlier, have little role to play in gathering information that will prevent future terrorist attacks.<sup>125</sup>

The purpose of this discussion has been to link the slippery slope argument, dismissed by Bagaric, Clarke, Posner, and Vermeule, to the issue of the effectiveness of coercive interrogation. The evidence discussed here suggests that in the midst of conflicts with terrorists and insurgents, attempts to control the use of coercion fail and the techniques escalate, as do the range of persons subjected to those techniques. This is directly linked to the issue of effectiveness because intelligence gathering requires the use of interrogation techniques that produce reliable information, along with the accurate identification of those who possess relevant knowledge. The problem of slippage also creates difficulties in terms of predictability as non-coercive interrogation is cast aside to be replaced by a range of coercive techniques that have not been proven to be more effective. Indeed, as the earlier analysis suggests, such techniques might actually have a range of predictable consequences that hinder, rather than assist, intelligence gathering.

## **B. The Difficulty in Correctly Identifying Terrorists or Those Who Possess “Required Knowledge”**

As already noted, a fundamental challenge with coercive interrogation is the need to correctly identify those who should be subject to such methods. Bagaric and Clarke identify five variables that they claim are “relevant in determining whether torture is permissible.”<sup>126</sup> One of the variables is the “likelihood” of the detainee’s guilt or possession of relevant information. They admit that “[i]t will be rare that conclusive proof is available that an individual does, in fact, possess the required knowledge . . . [and] potential torturees will not have been through a trial process in which their guilt has been estab-

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thousands of Palestinians have been rounded up, humiliated, ill-treated and held in poor conditions as a collective punishment for the attacks on Israelis by members of Palestinian armed groups.

AMNESTY INT’L, ISRAEL AND THE OCCUPIED TERRITORIES: MASS DETENTION IN CRUEL, INHUMAN AND DEGRADING CONDITIONS 23 (2002).

125. See COMPOSITE STATEMENT, *supra* note 74 and accompanying text. In the context of Israel, see PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 61, 69.

126. Bagaric & Clarke, *supra* note 1, at 611–13.

lished.”<sup>127</sup> They claim that this is not a “decisive objection . . . to the use of torture” because trials do “not seem to be a particularly effective process.”<sup>128</sup> It is worth noting, of course, that Bagaric and Clarke are prepared in this context to allow the infliction of “all forms of harm” based on evidence standards that are significantly lower than that required to convict people for the most minor criminal offenses.

Bagaric and Clarke’s casual dismissal of basic evidentiary requirements increases the likelihood that some, perhaps even many, completely innocent people would be victims of their legalized system of torture. This is a problem that is likely to be exacerbated in circumstances where it is believed that a terrorist attack is imminent and time is of the essence. It is evident that where coercive interrogation has been permitted, there are pressures to act against individuals without guilt or knowledge being “patently obvious.”<sup>129</sup> In addition, authorities can, and do, make serious mistakes, as did the police recently in London when they shot dead an innocent man wrongly believed to be a terrorist suspect.<sup>130</sup> A mistake as to identity was also made during investigations following the al Qaeda terrorist attacks in Madrid.<sup>131</sup> Joseph and Smith note that “seemingly incontrovertible evidence can prove to be false: for two weeks during investigations last year into the Madrid train bombings, the FBI mistakenly thought it had found the fingerprint of an American lawyer, Brandon Mayfield, on evidence linked to the terrorists.”<sup>132</sup> Recent disclosures regarding the abuse of

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127. *Id.* at 612.

128. *Id.* In doubting the efficacy of the normal trial process Bagaric and Clarke state “research carried out in the United Kingdom for the Royal Commission on Criminal Justice suggests that up to eleven percent of people who plead guilty claim innocence.” *Id.* at 613. This of course undermines their argument; if significant numbers of people are being wrongly convicted of criminal offenses in criminal cases with a high standard of proof, how many mistakes are going to be made in the context of a system that does not require proof beyond a reasonable doubt?

129. *Id.* In the context of recent evidence on the abuse of Iraqi detainees by United States forces it is evident that any detainee was a potential target for abuse and that it was being used before detainees were even given the chance to talk. LEADERSHIP FAILURE, *supra* note 123, at 11–12. Testimony from Palestinian detainees suggests a similar problem with physical or psychological coercion being used as a first resort. See B’TSELEM, LEGISLATION, *supra* note 48, at app. 1; PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 23–75; B’TSELEM, ROUTINE TORTURE, *supra* note 107, at 13, 21, 25–33.

130. Jonathan Calvert & David Leppard, *Police Shot Wrong Man*, TIMES (London), July 24, 2005, available at <http://www.timesonline.co.uk/printFriendly/0,,1-20749-1706907,00.html> (last visited on Oct. 8, 2005).

131. Sarah Joseph & Marius Smith, *Torture Is Inhuman, Illegal and Futile*, AGE, May 18, 2005, available at <http://www.theage.com.au/news/Opinion/Torture-is-inhuman-illegal-and-futile/2005/05/17/1116095958897.html> (last visited on Oct. 8, 2005).

132. *Id.*

Iraqi detainees by United States forces suggest significant numbers of detainees were not in fact insurgents or terrorists. In the Human Rights Watch report discussed earlier, a sergeant recounted: "We were told by [military intelligence] that these guys were bad, but they could be wrong, sometimes they were wrong."<sup>133</sup> He continues:

The point of [the coercion] was to get them ready for interrogation. [The intelligence officer] said he wanted the [detainees] so fatigued, so smoked, so demoralized that they want to cooperate. But half of these guys got released because they didn't do nothing. We sent them back to Fallujah. But if he's a good guy, you know, now he's bad guy because of the way we treated him.<sup>134</sup>

It has become increasingly apparent that many individuals detained by the United States as part of the "war on terror" have no connection to terrorism and do not possess the specific knowledge that is being sought. This is a result of a range of factors including the selling of supposed "terrorists" to United States forces and the poor quality assessment of individuals when they are first screened by inexperienced military intelligence officers.<sup>135</sup> Indeed, early internal intelligence assessments at Guantánamo Bay suggested that fifty-nine detainees (nearly 10% of the total number of detainees at the camp) did not meet screening criteria for deciding which prisoners should have been sent to Guantánamo Bay. A report in the *Los Angeles Times* claimed that an operational commander at Guantánamo Bay had gone to Afghanistan and complained "that too many 'Mickey Mouse' detainees were being sent to the already crowded facility."<sup>136</sup> In a recent interview for CBS news, Sergeant Erik Saar, a United States Army linguist who worked at Guantánamo for three months, echoed these problems.

Some of [the detainees] were conscripts who actually were forced to fight for the Taliban, so actually had taken up arms against us,

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133. LEADERSHIP FAILURE, *supra* note 123, at 10.

134. *Id.* at 12.

135. Rose, *supra* note 75, at 46–47; see also Associated Press, *Gitmo Detainees Say They Were Sold*, May 31, 2005.

136. Greg Miller, *Many Held at Guantanamo Not Likely Terrorists*, L.A. TIMES, Dec. 22, 2002, available at <http://www.latimes.com/la-na-gitmo22dec22,0,2294365.story>. A recent Amnesty International report also notes that:

scores of people had been released from Guantánamo without charge or trial. They, too, had been labelled by the administration as "enemy combatants" and "terrorists." On return to their countries, the vast majority have been released. Their home governments evidently either believed that there was no evidence against the detainees, or that any evidence was inadequate, unreliable or inadmissible.

AMNESTY INT'L, GUANTÁNAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER 16 (2005).

but had little or no choice in the matter . . . Some of them were individuals who were picked up by the Northern Alliance, and we have no idea why they were there, and we didn't know exactly what their connections were to terrorism.<sup>137</sup>

This problem of misidentification has also been acknowledged in the Israeli experience of coercive interrogation. In a newspaper interview cited by the Public Committee Against Torture in Israel, a GSS interrogator admitted, "To say that [shaking and beating] always succeeds?—it doesn't. I also had a case when we thought mistakenly that someone was a bomb [sic], and only afterwards it became clear that he was an activist, but not related to that specific terrorist attack."<sup>138</sup>

The coercive interrogation of those who are not guilty of wrongdoing is one of the starkest illustrations of why coercion is inherently problematic. The infliction of serious harm, or even death, as suggested by Bagaric and Clarke, on the innocent significantly raises the cost of a legally-sanctioned system of coercion. Based on past experience, prohibitions or restrictions placed on particular methods of coercion or the circumstances in which those methods are to be used, do not provide much of a guarantee that they will not be transgressed. Indeed, the recent decision of the Bush Administration to exclude "unlawful combatants" from the legal protections offered by the Geneva Conventions has led to confusion amongst military personnel and the systematic undermining of guidance that was given.<sup>139</sup> This has resulted in torture and ill-treatment of detainees, and also the abuse of detainees, irrespective of their guilt. It cannot be assumed, however, that the problem of slippage can be explained merely by the absence of clear legal rules, and therefore could be more easily controlled within a legal framework. The Israeli experience suggests that legal rules may fail to operate as a control on coercive interrogation where there is an unwillingness to enforce or be restrained by those rules.<sup>140</sup>

## Conclusion

One might be forgiven for wanting to avoid any discussion of coercive interrogation, its regulation, circumstances where it might be viewed as morally or legally permissible, or, as in the case here, detail-

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137. CBS News, *Torture, Cover Up at Gitmo?*, CBS NEWS.COM, May 1, 2005, available at [http://www.cbsnews.com/stories/2005/04/28/60minutes/main691602\\_page2.shtml](http://www.cbsnews.com/stories/2005/04/28/60minutes/main691602_page2.shtml); see also ROSE, *supra* note 75, at 46–47.

138. PUB. COMM. AGAINST TORTURE IN ISR., *supra* note 77, at 48.

139. See LEADERSHIP FAILURE, *supra* note 123, at 19–21, 25–26.

140. See discussion *supra* note 104.

ing why it would often appear ineffective. At times the tone and form of the recent debate over coercive interrogation has gone beyond reasoned discussion. The response to Bagaric and Clarke's defense of torture has been highly critical, which, given the nature of their proposals, one would expect—not so, the hate mail received by them.<sup>141</sup> Alan Dershowitz has complained about the repeated misrepresentation of his views, as well as some of the personal characterizations to which he has been subjected.<sup>142</sup> In this vein, Professor Conor Gearty recently authored a stinging attack on those he terms “Rumsfeldians,” who, in his view, are attempting to normalize the use of torture.<sup>143</sup> The tone and content of his article personalizes the issues and includes sweeping assertions regarding the views of those with whom he disagrees.<sup>144</sup>

The questionable tone of some of the commentaries in this area also extends to those who challenge the critics of coercion. Louis Michael Seidman recently characterized academics as having “little desire to talk seriously about torture,” and accuses some of evasion in failing to deal with the “hardest issues.”<sup>145</sup> Those whom he terms

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141. Geoff Maslen, *Make Torture Legal, Say Law Academics*, TIMES, May 27, 2005 (referring to criticism of Bagaric and Clarke's viewpoint by former Australian Prime Minister Malcolm Fraser, and hate mail received by Bagaric and Clarke).

142. Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 275–76 (2004).

143. Conor Gearty, *Legitimizing Torture—With a Little Help*, INDEX ON CENSORSHIP, Jan. 2005, available at <http://www.indexonline.org/en/news/articles/2005/1/international-legitimising-torture-with-a-li.shtml> (last visited Oct. 8, 2005).

144. *Id.* As an illustration of the tone of his piece, Gearty states:

These individuals are distinguished by their determination to permit, indeed to encourage, the holding of suspected “terrorists” or “unlawful combatants” (or whoever it might be: “bogus asylum-seekers”, “drug-barons”, “anti-social elements” etc) in conditions which make torture, inhuman and degrading treatment well-nigh situationally inevitable. No ethic drives their policy, not even one of self or national interest, since torture is inefficient as well as (in post-post-modern terms) plain wrong. The brutality to which they commit themselves is that of the stupid playground bully, lashing out just because it is possible; or that of the self-serving police officer using violence to camouflage incompetence. . . . Through being able to do this without immediate disgrace, they push back the barriers of the unsayable, thereby opening the door to the hitherto undoable. To succeed in transforming the liberal discourse, however, [they] need a great trauma on which to feed; 11 September is an obvious example though not in itself sufficient. They also require an ideological super-structure that fits with the democratic times in which they still (perhaps reluctantly) find themselves.

*Id.*

145. Louis Michael Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 882–83 (2005). Posner and Vermeule explore reasons as to why many people regard coercive interrogation as a taboo. For example, they speculate that it might in part result from of “concern for reputation, social influences, and the fear of ostracism,” along with people “herding”



“Moralists,” he claims, “focus on the human suffering imposed by the use of certain techniques, but are unwilling to broaden their concern to suffering that might be caused by the failure to use them. Instead, many of them adopt as an article of faith the proposition that these techniques are never useful.”<sup>146</sup> He also accuses “Moralists” of “willful blindness” involving a “readiness to substitute pious denunciation for practical measures that might limit the amount and severity of torture.”<sup>147</sup> He continues, “It should come as no surprise that people are most comfortable with a stance of moral purity when they do not have to pay the price.”<sup>148</sup>

It could be argued that any discussion concerning the effectiveness of coercive interrogation raises the possibility of lending support for its use if coercive interrogation is found to be effective. This fear of coercion becoming legitimized is undoubtedly guiding some of those concerned with the current debate on coercive interrogation. Effectiveness, however, cannot be examined in isolation. Even if coercion does produce predictable and reliable results, it is only one of many practical, legal, and ethical issues that require consideration, including whether or not coercive interrogation can be controlled within a framework of law. As such, it is important to engage in debate with those who claim coercion is effective and who propose exceptions to the current outright legal prohibition on the use of coercion.

The debate has already begun; the case for the use of coercion is being made with increasing frequency, and it is important that those opposed to the use of coercion have the confidence in their arguments to engage in that debate. The last word on this issue should be given to Alan Dershowitz, who reminds academics of their societal role. He notes that there are dangers in discussing coercion as it might legitimize its use, but points out that “academics have a duty to raise [controversial issues] and submit them to the marketplace of ideas. There may be danger in open discussion, but there is far greater danger in actions based on secret discussion, or no discussion at all.”<sup>149</sup>

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where people simply follow the views of others. Posner & Vermeule, *supra* note 2, at 33. A troubling aspect of this analysis, along with that of Seidman is an underlining assumption that if people think seriously about coercion, they will view its use more favorably.

146. Seidman, *supra* note 145, at 883.

147. *Id.* at 883–85.

148. *Id.* at 891.

149. UNDERSTANDING, *supra* note 9, at 163. In the context of “legitimizing” torture, I have experienced concern from those who oppose the use of coercive interrogation. I recently spoke at a conference that examined policing and intelligence issues since 9/11 at

In a recent article, Harold H. Koh stated, "To be sure, there is abundant evidence that torture is not effective either as an interrogation tactic or as an information-extracting device."<sup>150</sup> If this were true, then answering the question set out in the title of this Article would be straightforward. Unfortunately for the proponents and opponents of coercive interrogation, effectiveness is a far more complex affair than has often been acknowledged. The fact is that coercion *does* sometimes work in individual cases,<sup>151</sup> but a significant body of evidence raises serious doubts about its overall reliability and predictability. Giving coercive interrogation a veneer of credibility by integrating it within a regulatory framework, as suggested by Bagaric and Clarke, will do nothing to address many of the problems discussed in this Article.

This is an instance when the carefully crafted intellectual defenses of coercive interrogation meet the realities of law enforcement, the abuse of state power, and the pressures that are generated in times of national emergency. More fundamentally, it is an instance when these defenses meet the evidence on effectiveness. Bagaric and Clarke's claim that coercion is an "excellent means of gathering information" simply cannot be supported in view of the available evidence. The word "excellent" surely implies that coercion will result in timely, accurate disclosures in a clear majority of cases in which it is used. Their single example of the successful use of coercive interrogation does not remotely support the claim to which it is attached. Posner and Vermeule's assertion that "the evidence" contradicts claims that

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which I presented a version of this Article. Philip N.S. Rumney, *The Effectiveness of Coercive Interrogation*, Remarks at the In the Shadow of 9/11 Conference at the University of Wolverhampton (Sept. 22, 2005). During the question and answer session following my paper it was evident that some of those attending the event were unhappy at the idea of even discussing the effectiveness of coercive interrogation. I was told by two delegates that there was a danger that I might "legitimize" the use of torture and that such discussions could lead to a "slippery slope" where torture might become viewed as acceptable. During the lunch interval another delegate asked me whether there were any British academics arguing for the use of torture, and when I replied that I was not aware of any, he anxiously sought my agreement that this was, indeed, a "good thing."

150. Harold H. Koh, *A World Without Torture*, 43 *COL. J. TRANSNAT'L. L.* 641, 653 (2005).

151. This conclusion is based on Bagaric and Clarke's reference to the German hostage case, Bagaric & Clark, *supra* note 1, at 589; note 26 and accompanying text, and an assumption that, despite the lack of transparency, there is some factual basis to the claims made by the Israeli and Northern Ireland security forces that were discussed earlier. To be clear, there is no independent verification of these claims, however, they cannot be dismissed in their entirety without good reason. See also *Confessions of an al-Qaeda Terrorist*, *TIME*, Sept. 15, 2002, at 35, 37. (discussing how after three months of "psychological interrogation," including sleep deprivation and isolation, a leading member of al-Qaeda disclosed valuable intelligence to the CIA).

coercion is ineffective, “runs aground” because, like the other proponents, they cite so little reliable evidence to support their claim and do not consider countervailing findings. Dershowitz’s argument that coercive interrogation “sometimes” works leaves a huge scope for residual failure and can hardly be viewed as a solid basis for making resilient legal and public policy. Indeed, if coercive interrogation is largely ineffective, then the other arguments in favor of its use are futile—who but a sadist would propose to legalize the infliction of great harm with little prospect of any resulting benefit? This is why the issue of effectiveness is central to the whole debate on the legalization of coercive interrogation, and it is a matter with which its proponents and opponents must engage.

