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The effectiveness of coercive interrogation: Scholarly and judicial responses*

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Introduction

Eric Posner and Adrian Vermeule recently observed that: '[a]mong legal academics, a near consensus has emerged: coercive interrogation must be kept "illegal," but nonetheless permitted in certain circumstances.'[1] In one of the most recent contributions to this growing body of work Mirko Bagaric and Julie Clarke have proposed that in certain circumstances torture is 'morally justifiable' and should be permitted as an 'interrogation device' in order to 'prevent significant harm to others.'[2] The 'near consensus' of which this work forms a part is given added importance because of the ongoing threat of a terrorist attack 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 sanctioned the use of coercive interrogation against detainees as a means of intelligence gathering.[3] In addition, the US military and Central Intelligence Agency (CIA) has been linked to the physical and psychological abuse of detainees in Iraq, Afghanistan, Guantánamo Bay and elsewhere.[4] These practices have attracted criticism, not least from individuals within the United States military, law enforcement agencies and the CIA.[5]

Despite the shock expressed by many at the use of coercion by US government agencies and their allies since 9/11, the reality is that coercion and torture have long been tools of US policy.[6] What perhaps is unique about the current situation is the number of scholars prepared to lend support to a legalised system of coercion. As a consequence of the 'near consensus' to which Posner and Vermeule refer, this Article will consider recent scholarly writings in this area, along with several decades worth of judicial decision-making that has considered the use of coercive interrogation.[7] In so doing, competing claims regarding the effectiveness of coercion will be considered.

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Is coercive interrogation effective? The response of legal scholars and the judiciary

Since 9/11 the scholarly proponents of a legally sanctioned system of coercive interrogation appear, without detailed analysis, to be convinced that it is an effective means of intelligence gathering. For example, Bagaric and Clarke claim: 'The main benefit of torture is that it is an excellent means of gathering information.'[8] In their analysis of the possible drawbacks and benefits of coercive interrogation, Posner and Vermeule cite evidence that they argue 'strongly suggests that coercive interrogation saves lives.'[9] 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.' (emphasis in original)[10] Some scholars have given support to the idea of legally sanctioned torture with little or no concern as to whether it is actually effective.[11] By contrast others have argued that it is ineffective. For example, in a recent article and without detailed analysis of evidence, Koh stated: 'To be sure, there is abundant evidence that torture is not effective either as an interrogation tactic or an information-extracting device.'[12]

The judiciary of several different jurisdictions has also considered the issue of coercive interrogation in various legal and factual contexts. In a number of these cases the issue of effectiveness has been in evidence. Most recently, in *A(FC) v. Secretary of State for the Home Department*[13] a 8:1 majority of the House of Lords determined that 'there is a general rule that evidence obtained by torture is inadmissible in judicial proceedings' and so could not be used against persons certified and detained as terrorists under the Anti-terrorism, Crime and Security Act 2001.[14] When discussing the exclusionary rule that precludes the use of such evidence, two of the Law Lords referred to the unreliability of information gained by torture. Lord Bingham of Cornhill stated:

> It seems indeed very likely that the unreliability of a statement or confession procured by torture and a desire to discourage torture by devaluing its product are two strong reasons why the [exclusionary] rule was adopted.[15]

Lord Carswell took a similar position, basing his view on evidence, albeit limited, of ineffective coercion:

> The objections to the admission of evidence obtained by the use of torture are twofold, based, first, on its inherent unreliability and, secondly, on the morality of giving any countenance to the practice. The unreliability of such evidence is notorious: in most cases one cannot tell whether correct

> information has been wrung out of the victim of torture- which undoubtedly occurred distressingly often in Gestapo interrogations in occupied territories in the Second World War- or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering. Reliable testimony of the latter comes from Senator John McCain of Arizona, who when tortured in Vietnam to provide the names of the members of his flight squadron, listed to his interrogators the offensive line of the Green Bay Packers football team, in his own words, "knowing that providing them false information was sufficient to suspend the abuse."[16]

Lord Hope took a very different perspective from the other judgments when he stated:

> Torture . . . is resorted to for a variety of purposes and it may help to identify them to put this case into its historical context. The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one form or another by the executive branch of government. The temptation to use it in times of emergency will be controlled by the law wherever the rule of law is allowed to operate. But where the rule of law is absent, or is reduced to a mere form of words to which those in authority pay no more than lip service, the temptation to use torture is unrestrained. The probability of its use will rise or fall according the scale of the perceived emergency . . . In the first place, torture may be used on a large scale as an instrument of blatant repression by totalitarian governments . . . Or it may be used in totalitarian states as a means of extracting confessions from individuals whom the authorities wish to put on trial so that they can be used against them in evidence.[17]

In this passage, Lord Hope recognises two characteristics of coercion that have been largely unacknowledged by those who propose a legalised system of coercive interrogation. He points to the problem that coercion may be 'controlled,' but only where the 'rule of law is allowed to operate.' This highlights the problem of slippage, whereby state officials are tempted to use coercion because of the pressure, for example, to prevent future acts of terrorism. Such pressures can result not only in officials ignoring legal prohibitions, but also using coercion in an increasing wide range of circumstances. By contrast to Lord Hope's observations, some of the proponents of a legally sanctioned system of coercion reject the slippage argument and claim that coercion can be legally controlled.[18] Lord Hope also recognises that coercion can exist for many different reasons, independently of whether or not it is effective. This can be contrasted with Dershowitz, who for example, states: '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.'[19] Here, Dershowitz simply assumes that torture exists around the globe for a rational reason, that is, as a means of preventing terrorism or other criminality. Yet elsewhere he does acknowledge that in countries such as Egypt, Jordan, and the Philippines, 'torture – including the lethal torture of purely political prisoners – is common and approved at the highest levels of government.'[20]

Lord Brown of Eaton-Under-Heywood's judgment highlights a tension between legal prohibitions and the prevention of terrorist acts that endanger the public.

> Torture is an unqualified evil. It can never be justified. Rather it must always be punished . . . But torture may on occasion yield up information capable of saving lives, perhaps many lives, and the question then inescapably arises: what use can be made of this information? Unswerving logic might suggest that no use whatever should be made of it: a revulsion against torture and an anxiety to discourage rather than condone it perhaps dictate that it be ignored: the ticking bomb must be allowed to tick on. But there are powerful countervailing arguments too: torture cannot be undone and the greater public good thus lies in making some use at least of the information obtained, whether to avert public danger or to bring the guilty to justice.[21]

This passage illustrates a dilemma that exists at the heart of the debate over coercive interrogation: while torture is described an 'unqualified evil,' it may also produce life saving information. However, similarly to the other Law Lords, Lord Brown's assessment of 'countervailing arguments' involves no serious effort to consider the effectiveness of such methods. By contrast, the head of the Security Service, Eliza Manningham-Buller, submitted a statement to the House of Lords during the hearing of the appeal in *A* which discussed the work of the Security Service and the use of intelligence supplied by foreign governments. This statement explained the importance of intelligence gleaned from foreign security agencies in fighting international terrorism and the methods used by the Security Service to ensure its reliability. It also contains two examples of crucial information that has been supplied by foreign security agencies.[22] In evaluating evidence supplied by foreign agencies which may have resulted from coercion, Manningham-Buller explained that attempts are made to identify the origins of intelligence and '[w]here context can be obtained it may assist the Agencies in assessing the reliability of the [intelligence].'[23] In the context of intelligence gathered from 'individuals in detention':

> 'We treat such intelligence with great care, for two main reasons: detainees can seek to mislead their questioners, and where the Agencies are not aware of the circumstances in which the intelligence was obtained, it is likely to be more difficult to assess its reliability. However, experience proves that detainee reporting can be accurate and may enable lives to be saved'.[24]

The information provided by Manningham-Buller can be interpreted in various ways. One could argue that it lends support to the suggestion that coercion works in producing life-saving information. However, this assumes that in the two case studies coercion was actually used to obtain intelligence. There are certainly grounds for suspicion,[25] however, in neither case can the link between alleged coercion and the disclosure of information be substantiated. Even if coercion was used in these cases it does not lend convincing support to the claim that coercion generally produces reliable information. This is because Manningham-Buller's statement provides no information on the number of cases in which the Security Service has rejected intelligence because of reliability concerns, nor the extent to which information that may have been gained through coercion has been subsequently proven to be inaccurate.

The judgment of the House of Lords in *A* appeared to ignore the 'countervailing arguments' noted by Lord Brown, along with Eliza Manningham-Buller's submission. Likewise, in *Ireland v. United Kingdom*, while the European Court of Human Rights acknowledged a claim that coercive interrogation produced significant intelligence gains,[26] it still held that the use of coercion by security forces in Northern Ireland amounted to 'inhumane or degrading' treatment under Art. 3 of the European Convention on Human Rights.[27] The claim of effectiveness thus appeared to have little influence on the court's decision. By way of contrast, in *Public Committee Against Torture in Israel. v. The State of Israel*[28] the Israeli High Court of Justice (HCJ) found that the Israeli General Security Service (GSS) did not have lawful authority to use techniques such as shaking or stress positions during the interrogation of terrorist suspects. The court concluded that a necessity defence might be available where coercion is used in cases involving 'ticking time bombs,' when 'there exists a concrete level of imminent danger of the explosion's occurrence.'[29] In this judgment, the HCJ cites two examples of coercion allegedly producing information that prevented future terrorist attacks, thereby saving the lives of innocent civilians.[30] By allowing the potential use of the necessity defence, the court clearly accepted the effectiveness of coercion, otherwise the defence would have had no foundation. In a recent German case, a court considered the necessity defence in the context of police officers who threatened a suspected kidnapper with pain 'he would never forget' if he did not disclose the

whereabouts of a child whom he had abducted and subsequently murdered. Following this threat, the suspect disclosed the location of the child. The police officers were convicted of offences under the German Criminal Code. The Regional Court at Frankfurt held that the necessity defence was not available, but decided that the officers should not be punished due to 'massive mitigating circumstances,' including the urgent need for information and the pressure on the investigating officers. [31]

In his consideration of a legalised system of coercive interrogation, Dershowitz cites the decision of *Leon v. Wainwright*[32] to suggest that the US courts have already considered the concept of necessity in the use of coercion by police officers. In this case the appellant, along with an accomplice, abducted a taxi driver and then demanded money from the driver's family for his safe return. The appellant was subsequently arrested by police officers, who then threatened and 'physically abused' him until he disclosed the location of the taxi driver.[33] Several hours later he gave a second confession to a different group of police officers and was later convicted of several offences including kidnapping. The appellant based his appeal on an argument that because of the initial coercion, the second confession was the product of a breach of his due process rights and should be ruled inadmissible. While Dershowitz emphasises those parts of the judgment that refer to necessity,[34] he neglects the court's reasoning that allowed for the validity of the appellant's second confession. The court held that the confession was freely given because it did not result from the coercion used by the arresting officers and was made several hours after his arrest, to different police officers from those who used the coercion and after the appellant waived his right to counsel.[35] The decision in *Leon* can be said to show some sympathy for the plight of police officers who are attempting to save a person from a potentially life-threatening situation. However, it should not be seen as authority for the view that coercion in times of necessity has been given serious consideration by the US courts. This was not the central issue in *Leon*, was only briefly mentioned, and the judgment of the court rested on entirely different grounds.

Judicial responses to coercive interrogation have for the most part rejected its use outright. In some cases its effectiveness has been explicitly denied as in *A*, while in other cases such as the *Leon* and the recent German case, its apparent effectiveness appears to have been largely ignored in the reasoning of the court. There appears to be only one case, the decision of the Israeli High Court of Justice, where it can be argued, that in allowing the possible use of the necessity defence, the court was acknowledging the potential utility of coercion in the interpretation of legal rules. The reluctance of the judiciary to allow the utility of coercion to influence decision-making can be contrasted with the support for a legalised system of coercion amongst a growing number

of legal scholars. This may be a reflection of differing roles: judges are required to interpret existing rules and prohibitions, while legal scholars are free to explore possible reforms, without the restraint of precedent or the separation of powers.

An analysis of evidence concerning the effectiveness of coercive interrogation

Despite claims that the effectiveness of coercion is unknown,[36] there is in fact growing evidence from a variety of sources that enables us to make a judgment on the general effectiveness of coercive interrogation. There exists evidence to suggest that coercion has sometimes resulted in the disclosure of potentially life-saving information, along with a literature that points to many problems associated with its use.[37] It is worth noting of course, that some of the claims contained within the existing evidence cannot be independently verified. This is matter that should not be ignored as both state actors, along with detainees may have reason to lie or exaggerate.[38] However, with that proviso in place, this section will examine three problems associated with coercive interrogation that have been largely unexplored within the current legal literature.

The view from the Central Intelligence Agency and Federal Bureau of Investigation

In 1997, following a Freedom of Information Act request by the *Baltimore Sun* newspaper, the CIA released two interrogation manuals, both of which explain the use of physical and psychological interrogation. The first manual is entitled: KUBARK, *Counterintelligence Interrogation*, dated July 1963.[39] The second is dated 1983 and entitled: *Human Resource Exploitation Training Manual.*[40] 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.'[41] Notwithstanding this assertion, both manuals detail the use of psychological techniques and physical coercion that can be used to obtain 'needed information from subjects.'[42]

These manuals provide a useful means of assessing claims regarding the effectiveness 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.'[43]

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 physical brutality creates only resentment, hostility, and further defiance.'[44] The manual also notes that there are some people able to withstand pain to a much greater degree than others.[45] 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.'[46] Both manuals emphasize the importance of creating rapport during interrogations and the need for control, professionalism, and patience on the part of the interrogator.[47]

Recent events in Iraq illustrate that the use of extreme physical brutality does not necessarily result in cooperation. After a series of severe beatings Iraqi Major General Abed Hamed Mowhoush died in United States military custody.[48] 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.'[49] These techniques failed to gain further cooperation.[50] Recent disclosures regarding this case indicate that other techniques used to try and get Mowhoush to divulge information included a mock execution involving one of his sons who was also detained.[51] Contrary to the approach that assumes physical brutality will yield reliable results the KUBARK manual states: '[t]he available evidence suggests that resistance is sapped principally by psychological rather than physical pressures.'[52]

Another problem with coercive interrogation, which raises serious concerns regarding its reliability, is that of false confessions or information. 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.[53]

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, Shafiq 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.[54]

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.[55] Recently, it has been claimed that some Guantánamo detainees are making multiple allegations against other detainees. For example, one Guantánamo detainee is alleged to have claimed that more than 60 other detainees had attended a terrorist training camp in Afghanistan. However, it has subsequently come to light that 'none of the men had been in Afghanistan at the time the accuser said he saw them at the camp.'[56] Such disclosures suggest that measures short of the infliction of pain may produce inaccurate information.[57]

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

> The CIA fuelled [press reports of coercion] hoping to instill fear. But, while 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.[58]

The problem of 'bad information' and false confessions may also damage the investigatory process by producing information that 'distracts, rather than supports, valid investigations.'[59] Documents recently released under the United States Freedom of Information Act[60] make it apparent that the FBI expressed serious reservations regarding the effectiveness and consequences 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.[61]

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.'[62] In the context of one detainee, 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 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."[63]

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.'[64] 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'[65] and that the system of interrogation adopted at Guantánamo provides intelligence that is 'inherently unreliable.'[66] The US Defense Intelligence Agency has recently provided further indications of the potential unreliability of evidence provided by detainees who have been coerced. It has recently been claimed that the main intelligence source that linked Saddam Hussein's regime in Iraq with al Qaeda prior to the invasion of Iraq by the United States, a Libyan national named Ibn al-Shay al-Libi, was rendered to Egypt for interrogation. After the U.S. invasion of Iraq, Libi retracted his allegations claiming that he had been subjected to 'harsh treatment.' It has been reported that:

> [A] Defense Intelligence Agency report issued in February 2002 that expressed scepticism about Mr. Libi's credibility on questions related to Iraq and Al Qaeda was based in part on the knowledge that he was no longer in American custody when he made the detailed statements, and that he might have been subjected to harsh treatment.[67]

Effectiveness and the slippery slope

The proponents of a legalised system of coercion claim that there is no evidence of slippage in the use of coercive interrogation. Posner and Vermeule claim such arguments are 'not supported by evidence.'[68] Bagaric and Clarke claim that such an argument 'holds that while torture might be justified in the extreme cases, legalizing it in these circumstances will invariably lead to torture in other less desperate situations.'[69] 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.'[70] The issue of slippage is of importance 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. 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 have been made to control coercion, those controls have failed in the face of organizational and operational pressures.[71]

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.[72]

B'Tselem claim that most cases in which coercive methods have been justified before the Israeli courts as involving the threat of a 'ticking bomb,' have proved 'totally unsubstantiated.'[73] 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.[74] In addition, 'from 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.'[75] B'Tselem also notes that some interrogations only occur during weekdays.[76] "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.'[77] 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.[78] 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'.[79]

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 subjected to coercion.[80] 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,'[81] and 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.[82]

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.'[83] 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: 'I knew that it was possible to make bad decisions in the heat of the moment, that it was easy for emotions to overwhelm good judgment. Following the rules to the letter was the safe route. Even entertaining the idea of doing otherwise was inviting "slippage.""[84] 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.[85] He also recounts how he was encouraged by an intelligence sergeant to scare detainees and how he began to use indirect threats of violence.[86] 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. CIA officials have also acknowledged growing pressures to identify terrorist threats following 9/11. Dana Priest, writing about the CIA's Counterterrorist Center, quotes one CIA official as claiming that following 9/11: '[The] logic [of operations officers and analysts] was: If one of them gets loose and someone dies, we'll be held responsible.'[87]

The difficulty of correctly identifying terrorists

In a recent story in the *Washington Post* it was reported that the United State's National Counterterrorism Center has a database of 325,000 people who are suspected of being linked to international terrorism. This list has grown significantly since 2003 when the database contained 75,000 names. The expansion of this database has raised concerns of whether or not all the people listed are in fact linked to terrorism.[88] Events since 9/11, including the identification of large numbers of people alleged to have links to terrorism illustrates a fundamental challenge for coercive interrogation: 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.'[89] 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 established.'[90] 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.'[91] 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 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. In such circumstances the pressures created by an emergency leads to action being taken against people on weak evidence. In this specific respect, Priest quotes a former senior intelligence officer thus: 'Whatever quality control mechanisms were in play on September 10th were eliminated on September 11th.'[92] Consequently, where coercive interrogation has been permitted, there are pressures to act against individuals without guilt or knowledge being 'patently obvious.'[93] 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.[94] A mistake as to identity was also made during investigations following the al Qaeda terrorist attacks in Madrid.[95] Jones 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.'[96] Recent disclosures regarding the abuse of Iraqi detainees by United States forces suggest significant numbers of detainees were not in fact insurgents or terrorists. In a recent Human Rights Watch report a sergeant recounted:, 'We were told by [military intelligence] that these guys were bad, but they could be wrong, sometimes they were wrong.'[97] 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.[98]

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.[99] 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.'[100] Supporting the existence of a continuing problem at Guantánamo involving the detention of innocent people, a recent report in the *Washington Post* found:

> Among those [recently] released from Guantánamo is Mamdouh Habib, an Egyptian-born Australian citizen, apprehended by a CIA team in Pakistan in October 2001, then sent to Egypt for interrogation, according to court papers. He has alleged that he was burned by cigarettes, given electric shocks and beaten by Egyptian captors. After six months, he was flown to Guantánamo Bay and let go earlier this year without being charged.[101]

Similarly, in a recent interview for CBS news, Sargeant 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, 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.[102]

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.'[103]

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,[104] 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 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.[105] This has resulted in torture and ill-treatment of detainees, and also the abuse of detainees, irrespective of their guilt.[106] 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.[107] Indeed, there is emerging evidence that the US military has failed to properly investigate and take legal action against military personal that have abused, or even unlawfully killed detainees. A recent report by *Human Rights First* that examined detainee abuse by U.S. forces in Iraq and Afghanistan since August 2002, notes:

> [T]he handling of death cases to date shows internal government mechanisms to secure accountability were badly dysfunctional during a time when torture and abuse in U.S. custody was at its worst. Commanders failed to convey that detainee deaths were to be taken seriously. Detainee death investigations were fundamentally flawed, and often did not meet the Army's own regulations. The result has been a pattern of impunity for the worst violations, with punishment for bad behavior too little and too late, and a still incomplete picture of what really went wrong.[108]

Recent research by Denbeaux and Denbeaux suggests that the factual basis for the continued detention of many Guantánamo detainees appears weak. The research is based on 'written determinations the Government has produced for detainees it has designated as enemy combatants ... [the] proofs upon which the Government found that each detainee, is in fact, an enemy combatant.'[109] Denbeaux and Denbeaux have found *inter alia* the government defines someone as being 'associated with al Qaeda' as applying to 'anyone who the Government believed ever spoke to an al Qaeda member. Even under this broad framework, the Government concluded that a full 60% of the detainees do not have even that minimum level of contact with an al Qaeda member.'[110] They have also found that 'a majority [55%] of those who continue to be detained at Guantánamo have no history of any 3(b) hostile act against the United States or its allies. This is true even though the Government's definition of a 3(b) hostile act is not demanding.'[111] This research has also raised questions regarding the strength of evidence being used against detainees labelled as 'enemy combatants.'[112]

These findings have been supported by a review of 132 prisoner files, along with a review of 'heavily censored' Combatant Status Review Tribunal transcripts for 314 Guantánamo detainees. Hegland found:

> Many of them are not accused of hostilities against the United States or its allies, Most, when captured, were innocent of any terrorist activity, were Taliban foot soldiers at worst, and were often far less than that. And some, perhaps many, are guilty only of being foreigners in Afghanistan or Pakistan at the wrong time. And much of the evidence – even the classified evidence – gathered by the Defence Department against these men is flimsy, second-, third-, fourth- or 12th hand. It's based largely on admissions by the detainees themselves or on coerced, or worse, interrogations of their fellow inmates, some of whom have been proved to be liars. [113]

There is also evidence that some of those who have been 'rendered' from US custody to other countries for questioning, detained for long periods and allegedly tortured, have in fact been innocent of terrorist activity. For example, it has recently been reported that the CIA inspector general is currently investigating so called 'erroneous renditions.' According to the *Washington Post*:

> One official said about three dozen names fall in that category; others believe it is fewer. The list includes several people whose identities were offered by al Qaeda figures during CIA interrogations, officials said. One turned out to be an innocent college professor who had given the al Qaeda member a bad grade, one official said. "They picked up the wrong people, who had no information. In many, many cases there was only some vague association" with terrorism, one CIA officer said.[114]

Finally, of all the detainee abuse scandals in Iraq that have attracted international attention since 9/11, the abuse of detainees at Abu Ghraib prison is one of the most prominent. One of the less publicised aspects of this scandal involves the number of people that may have been wrongly detained at the prison. Janis Karpinski, the former Army Reserve Brigadier General who was in charge of Abu Ghraib at the time of the abuse, has claimed in a recent interview that many of the detainees possessed no 'actionable intelligence':

> I can tell you that from the military intelligence interrogators, they wanted to release – after very brief initial interviews, or initial interrogations as they call them, to get basic information – they wanted to release easily 80 percent of the prisoners that were being held at Abu Ghraib . . . Because they were in the wrong place at the wrong time, they had no actionable intelligence, they didn't know anything about any of the questions that they were asking them. But they weren't allowed to . . . And at one point, when I was protesting that, I was told, "I don't care if we're holding 15,000 innocent Iraqis. We're winning the war" . . . And my response was, "Not inside the wire, you're not." Because every person that we're holding

who is innocent becomes our enemy the minute they walk out of any prison.

Conclusion

The problems associated with coercive interrogation that have been discussed in this article suggest that scholarly and judicial claims regarding the effectiveness of coercion must be treated with caution. Much of the discussion in this area tends to draw on limited sources, often without detailed analysis and both scholars and judges tend to generalize from the use of specific examples. So what can we say with certainty? There are two conclusions that can be drawn from this analysis. First, coercion does sometimes work. There are enough examples of coercive interrogation apparently leading to the disclosure of life saving information that it is simply not credible to argue that it never works. Second, despite the fact that it does sometimes produce life-saving information, there are also serious and inherent problems with the use of coercion. This article has highlighted some of the problems associated with coercion: false confessions and information and the problem of the slippery slope in which coercion is used for unauthorised purposes. It is also clear that in the context of the 'war on terror' there has been a significant problem of people being wrongly identified as terrorists or as possessing intelligence on the basis of highly dubious evidence.[115] Thus in the real world of intelligence gathering and state responses to terrorism, claims that coercive interrogation is effective have to be judged not only on the basis of those cases where it has worked, but also on the basis of the many instances where it has failed.

Notes

1. EA Posner & A Vermeule, *Should Coercive Interrogation Be Legal?* (Univ. of Chi. Pub. Law & Legal Theory Working Paper No. 84, 2005) 2.
2. M Bagaric & J Clarke, 'Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable' (2005) 39 USF L Rev 581, 583, 585. For the most recent articles forming part of this trend, see: DH Wallace & M Kutrip, 'Torture: Domestic Balancing & International Alternative and Extralegal Responses' (2006) 42 Crim Law Bulletin 2; JA Decker, 'Is the United States Bound by the Customary International Law of Torture? A Proposal for ATS Litigation in the War on Terror' (2006) 6 Chi J Int'l L 803.
3. For discussion, see: KJ Greenberg & JL Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005).
4. See e.g. Amnesty International, *Torture and Secret Detention: Testimony of 'Disappeared' in the 'War in Terror'* (2005); Physicians for Human Rights, *Break them Down*:

Systematic Use of Psychological Torture by US Forces (2005); Committee on International Human Rights of the Association of the Bar of the City of New York & Center for Human Rights & Global Justice, *Torture by Proxy*: *International and Domestic Law Applicable to 'Extraordinary Renditions*' (2004).

5. See e.g. AJ Mora, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues* (US Dept of Navy: 2004) and *infra* notes 61–63 and accompanying text. See also: E Schmitt and C Marshall, 'Before and After Abu Ghraib, A US Unit Abused Detainees' *New York Times* March 19, 2006.
6. AW McCoy, 'Cruel Science: CIA Torture & U.S. Foreign Policy' (2005) 19 New Eng J of Pub Pol'y 209; T Kepner, 'Torture 101: The Case Against the United States for Atrocities Committed by School of the Americas Alumni' (2001) *Dickinson Journal of International Law* 475; M Gibney, 'United States' Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1996' (1997) 7 *Journal of Transnational Law and Policy* 77.
7. 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 states: 'No one shall be subjected to torture or to inhumane or degrading treatment or punishment.'
8. Bagaric & Clarke, s*upra* note 2, 588–89.
9. Posner & Vermeule, *supra* note 1, 13.
10. AM Dershowitz, *Why Terrorism Works*: *Understanding the Threat, Responding to the Challenge* (2002) 137.
11. See e.g. AA Moher, 'The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World' (2004) 26 T Jefferson L Rev.469. For discussion of the evidence used by some of those who explore the possible introduction of a legally sanctioned system of coercive interrogation, see: Rumney, *infra note* 37.
12. HH Koh, 'A World Without Torture' (2005) 43 Col J Trans L 641, 653.
13. [2005] UKHL 71.
14. per Lord Hoffmann, *id*. para 97.
15. Id. para 39.
16. Id. para 147 (referring to a story in *Newsweek*, 2 November 2005, p 50).
17. Id. paras 101–102.
18. For discussion see: *infra* notes 68–70 and accompanying text.
19. Supra note 10, 138.
20. A Dershowitz, *The Case for Israel* (2003) 135.
21. *Supra* note 13, para 160.
22. *In the House of Lords on Appeal from Her Majesty's Court of Appeal (England), Statement of Eliza Manningham-Buller*, 20 September 2005.
23. *Id*. para 5–7.
24. *Id*. para 8.
25. *Id*. paras 8–9.
26. (1978) 2 EHRR 25. The court noted: '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,' para 98.
27. *Id*. para 167.
28. (1999) 38 ILM 1471, 1484, 1485–86, paras 32, 34.
29. *Id*. paras 32, 34.
30. *Id*. paras 4–5.
31. F Jessberger, 'Bad Torture-Good Torture? What International Criminal Lawyers Learn from the Recent Trial of Police Officers in Germany' (2005) *Journal of International Criminal Justice* 1059.
32. *Leon v. Wainwright* 734 F.2d 770 (11th Circuit 1984).
33. *Id*. 771–772.
34. The court stated: '[t]he police, motivated by the immediate necessity of finding the victim and saving his life, used force and threats . . .We did not have an act of brutal law enforcement agents trying to obtain a confession in total disregard of the law. This was instead a group of concerned officers acting in a reasonable manner to obtain information they needed in order to protect another individual from bodily harm or death' (at 773). For the relevant discussion by Dershowitz, see: *supra* note 10, 253, n 31.
35. *Supra* note 32, 773.
36. See e.g. S Levinson, 'Contemplating Torture,' S Levinson (ed), in *Torture*: *A Reader* (2004) 33.
37. See e.g. P Rumney, 'Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke,' [2006] 40 USF L Rev (forthcoming) and sources cited therein.
38. For discussion see: Rumney, *id note* 93 and accompanying text. K Zernike, 'Cited as Symbol of Abu Ghraib, Man Admits He is Not in Photo' *New York Times* March 18, 2006. In the recent US Supreme Court case of *Rasul v. Bush* 542 US 466 (2004), Justice Scalia referred to Guantánamo detainees thus: '[each] undoubtedly has complaints-real or contrived' regarding their conditions of detention (at 498).
39. Hereinafter the 'KUBARK' manual.
40. In terms of structure and wording, a substantial part of the 1983 manual appears to be based upon the content of the 1963 manual.
41. This warning appears before the manual's introduction, in a 'disclaimer' entitled 'Prohibition Against Use of Force.' 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) (last visited April 9, 2006).
42. *Id*. §A-1, at I.A (original all capitalized).
43. Bagaric & Clarke, *supra* note 2, 588–89.
44. KUBARK, *supra* note 39, 90–91 (internal quotation marks omitted).
45. *Id*. 93.
46. *Id*. 94. See also: B'Tselem, *Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Service* (2000) 52 (referring to the interrogation of a Hamas member by the Israeli security forces).
47. See 'Conducting the Questioning,' *Human Resource Exploitation Training Manual, supra* note 40, §I-1.
48. J White, 'Documents Tell of Brutal Improvisation by GIs' *Washington Post* August 3, 2005, A01.
49. *Id*.
50. *Id*.

51. H Shamsi, *Command's Responsibility: Detainee Deaths in US Custody in Iraq and Afghanistan* (Human Rights First: 2006) 6–8.
52. KUBARK, *supra* note 39, 92.
53. *Id*. 94. See B'Tselem, supra note 46, 52, for an example of a false confession induced by the Israeli security forces.
54. Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement*: *Detention in Afghanistan and Guantánamo Bay* (2004) para 199. See also: Public Committee Against Torture in Israel, *Back to a Routine of Torture* (2003) 86.
55. D Rose, *Guantánamo: America's War on Human Rights* (2004) 106–107.
56. C Hegland, 'Empty Evidence' *National Journal* Friday February 3, 2006. http://nationaljournal.com/scripts/printpage.cgi?/about/njweekly/stories/2006/0203nj4.htm(last visited April 9, 2006).
57. 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, *supra* note 54, paras 56–280. In the context of the detainee who has made multiple allegations against other detainees, it is worth pointing out that the circumstances in which these allegations were made are not clear. In other words, on the basis of the current evidence, it is not clear that they resulted from the use of coercion.
58. R Kessler, *The CIA at War: Inside the Secret Campaign Against Terror* (2003) 277. Given the recent allegations of abuse levelled at United States government agencies, including the CIA, some scepticism must be expressed regarding the accuracy of these claims, at least in terms of the absence of physical coercion during interrogation.
59. *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).
60. 5 U.S.C. §522 (2000).
61. E-mail from [redacted], to Gary Bald, Frankie Battle, Arthur Cummings (December 5, 2003, 09:53 A.M.), available at: http://www.aclu.org/torturefoia/released/FBI_3977.pdf (last visited April 9, 2006) (regarding 'Impersonating FBI at GTMO').
62. These differences refer to the Department of Defence'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 (last visited on April 9, 2006) [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 emphasises *inter alia* non-coercive methods and rapport building. For a brief discussion see: JT Parry & WS White, 'Interrogating Suspected Terrorists: Should Torture Be an Option?' (2005) 63 U Pitt L Rev 743, 754–55.
63. Harrington e-mail, *supra* note 62. Similarly, Seymour 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.

S Hersh, *Chain of Command*: *The Road from 9/11 to Abu Ghraib* (2004) 14.

64. Martin Bright, *Guantanamo has 'Failed to Prevent Terror Attacks*,' OBSERVER (London), Oct. 3, 2004 at http://www.guardian.co.uk/guantanamo/story/0,13743,1318702,00.html (last visited April 9, 2006). See also: Press Release, US Dep't of Def., Guantanamo Provides Valuable Intelligence Information (June 12, 2005); KT Rhem, Am. Forces Press Serv., Defense News: Guantanamo Detainees Still Yielding Valuable Intelligence, http://www.dod.mil/news/Mar2005/20050304_88.html (last visited April 9, 2006) (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.').
65. Bright, *id*.
66. Rose, *supra* note 55, 117. 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 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, available at: http://www.humanrightsfirst.org/us_law/etn/pdf/mccain-072205.pdf (last visited on April 9, 2006); see also: A Applebaum, 'The Torture Myth' *Washington* Post January 12, 2005, A21.
67. D Jehl, 'Qaeda-Iraq Link US Cited is Tied to Coercion Claim' *New York Times* December 9, 2005. It has been claimed that the CIA was involved in Libi's interrogation and that he was subjected to the Agency's 'enhanced interrogation techniques.' B Ross and R Espsito, 'CIA's Harsh Interrogation Techniques Described' *ABC News* November 18, 2005.
68. Posner & Vermeule, supra note 1, 16–17; see also Bagaric & Clarke, *supra* note 2, 615–16.
69. Bagaric & Clarke, supra note 2, 615.
70. *Id*. 615–16.
71. 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. JT Parry, 'Judicial Restraints on Illegal State Violence: Israel and the United States,' (2002) 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:

    > 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.

Public Committee Against Torture in Israel, *Back to a Routine of Torture* (2003) 81; see also: B'Tselem, *supra* note 46, 36 (arguing that 'the review mechanisms have failed almost completely to question GSS methods').

72. B'Tselem, *supra* note 46, 32. See Memorandum from [redacted] to [redacted] (June 10, 2004), *available at http*://www.aclu.org/torturefoia/released/t2614_2616.pdf (last visited April 9, 2006) (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.
73. B'Tselem, *Routine Torture: Interrogation Methods of the General Security Service* (1998) 30 [hereinafter B'Tselem, *Routine Torture*].
74. *Id*. at 29–30.
75. B'Tselem, *supra* note 46, 32.
76. B'Tselem, *Routine Torture, supra notes* 73, 15–16.
77. *Id*. 16.
78. Public Committee Against Torture in Israel, *supra* note 71, at 58 (noting that one detainee was held at least eighteen days before his interrogation even began).
79. B'Tselem, *Routine Torture*, *supra* note 73, 31. In another report B'Tselem claim 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* (1998) 13.
80. B'Tselem estimate 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 73, 5.
81. Public Committee Against Torture in Israel, *supra* note 71, 48.
82. *Id*. 89. The 1999 ruling is discussed *supra* notes 28–30 and accompanying text.
83. DJ Gottlieb, 'How We Came to Torture' (2005) 14 Kan JL & Pub Pol'y 449, 455. 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.
84. C Mackey, *The Interrogator's War: Inside the Secret War Against al Qaeda* (2004) 285. See also: Human Rights Watch, *Leadership Failure: Firsthand Accounts of Torture of Iraqi Detainees by the US Army's 82nd Airborne Division* (2005).
85. *Id*. 285–86.
86. *Id*. 286–89.
87. D Priest, 'Wrongful Imprisonment: Anatomy of a CIA Mistake' *Washington Post* December 4, 2005, A01.
88. W Pincus & D Eggen, '325,000 Names on Terrorism List' *Washington Post* February 15, 2006, A01.
89. Bagaric & Clarke, *supra* note 2, 611–13.
90. *Id*. 612.
91. *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*. 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? It might also be worth noting in the context of the

Royal Commission research, that if under the existing law, there is a problem of people pleading guilty to crimes they claim not to have committed, the use of coercion is likely to only make such problems worse.

92. Priest, *supra* note 87.
93. Bagaric & Clarke, *supra* note 2, 613. 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. Human Rights Watch, *supra* note 84, 11–12. Testimony from Palestinian detainees suggests a similar problem with physical or psychological coercion being used as a first resort. See B'Tselem, *supra* note 46, Appendix 1; Public Committee Against Torture in Israel, *supra* note 73, chs 2–3; B'Tselem, *Routine Torture*, *supra* note 71, 25–33.
94. J Calvert & D Leppard, 'Police Shot Wrong Man' *The Times* (London), July 24, 2005, available at: http://www.timesonline.co.uk/printFriendly/0,,1-20749-1706907,00.html (last visited April 9, 2006).
95. S Jones & M Smith, 'Torture Is Inhuman, Illegal and Futile' *The 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 April 9, 2006).
96. *Id.*
97. Human Rights Watch, *supra* note 84, 10.
98. *Id.* at 12.
99. Rose, *supra* note 55, at 46–47. *See also* Associated Press, 'Gitmo Detainees Say They Were Sold,' May 31, 2005. In a recent review of data gleaned from Combatant Status Review Tribunals by Denbeaux and Denbeaux it was found that '93% of the [Guantánamo] detainees were *not* apprehended by the United States,' *infra* note 109, 14 (emphasis in original). They also note: '[T]here was little opportunity on the field to verify the story of an individual who presented the detainee in response to a bounty award. Where the story constitutes the sole basis for an individual's detention in Guantánamo, there would be little ability either for the Government to corroborate or a detainee to refute such an allegation.'
100. G Miller, 'Many Held at Guantanamo Not Likely Terrorists' *Los Angeles Times* December 22, 2002, available at: http://www.latimes.com/la-na-gitmo22dec22,0,2294365.story (last visited April 9, 2006). A recent Amnesty International report also notes that:

> [S]cores of people have 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.
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> Amnesty International, *Guantánamo and Beyond*: *The Continuing Pursuit of Unchecked Executive Power* (2005) 16.

101. Priest, *supra* note 87.
102. 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 (last visited April 9, 2006). *See also* Rose, *supra* note 55, 46–47.
103. Public Committee Against Torture in Israel, *supra* note 71, 48.
104. Bagaric & Clarke, *supra* note 2, 611.
105. Human Rights Watch, *supra* note 84, 19–21, 25–26.

106. Id.
107. See discussion *supra* note 71. In the context of Iraq there is also evidence of a continuing failure, in light of ongoing abuses, to properly implement safeguards to prevent abuse: Amnesty International, *Beyond Abu Ghraib: Detention and Torture in Iraq* (2006).
108. Shamsi, supra note 51, ch 4.
109. M Denbeaux & J Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data* (2006) 5–6.
110. *Id*. 9.
111. *Id*. 11–12. '3(b)' refers to 'participation in military operations or commission of hostile acts' (at 8). It is also noted that 'the data illustrates that not only are the majority of the al Qaeda detainees merely "associated with" al Qaeda, but the Government concludes that a substantial percentage [72%] of those detainees did not commit 3(b) hostile acts,' *id*. 13.
112. Included within the evidence used against detainees is: 'Associations with unnamed and unidentified individuals and/or organizations; Associations with organizations, the members of which would be allowed into the United States by the Department of Homeland Security; Use of a guest house; Possession of Casio watches; and Wearing of olive drab clothing,' *id*. 17.
113. *Supra* note 56.
114. Priest, *supra* note 87.
115. For more detailed analysis of the problems associated with coercive interrogation, see e.g. Rumney, *supra* note 37.