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ABSTRACT

Whether torture to extract true information—for example, military secrets or the location of a terrorist-planted bomb—is morally permissible and empirically effective is widely disputed. But many agree that such torture's effectiveness is a necessary condition for its permissibility; if ineffective, then it is impermissible. Thus, the empirical issue has become crucial in deciding the moral issue. This Article addresses the empirical issue with a novel, non-empirical argument. Torture's ineffectiveness not only ensures torture's impermissibility but also exposes torture victims to criminal liability for any offenses they are tortured into committing. With torture as the most extreme and horrific form of coercion, seemingly if anyone deserves eligibility for a duress defense against criminal liability, it is torture victims. But ineffective torture is ineffective coercion, and ineffective coercion fails to sufficiently coerce to support a duress defense. Therefore, an unintended consequence of torture's ineffectiveness is its inconsistency with and preclusion of torture victims' eligibility for a duress defense. The inconsistency between the two establishes that at least one of them is false. Seeking to resolve the inconsistency, this Article considers several modifications of the empirical claim—including torture being merely generally ineffective or ineffective only under certain conditions—and alternative formulations of the duress defense. With none of these satisfactory, a dilemma arises: either close the door on torture victims' eligibility for a duress defense (by maintaining torture's ineffectiveness) or open the door on the permissibility of torture (by conceding torture's effectiveness). Neither alternative may be palatable, but (to resolve the inconsistency) one must be chosen.

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I. INTRODUCTION

Nested within the debate over the moral permissibility of torture as a means to save innocent lives in emergency situations, the empirical issue of whether torture actually works has become increasingly important.[1] While torture for sadistic or punitive reasons might well be effective,[2] philosophers,[3] legal commentators,[4] game theorists,[5]

1. *See, e.g.*, MIRKO BAGARIC & JULIE CLARKE, TORTURE: WHEN THE UNTHINKABLE IS MORALLY PERMISSIBLE 53 (2007) ("The criticism that torture does not work has been advanced by many."); UWE STEINHOFF, ON THE ETHICS OF TORTURE 14 (2013) (noting the "usual objection . . . repeated like a mantra by many torture opponents: 'Torture does not work to gain information'").

2. *E.g.*, Nils Melzer, *Foreword* to INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY ix, x (Steven J. Barela et al. eds., 2020) (comparing "the ineffectiveness of torture for the extraction of reliable information" with torture for other purposes being "very effective"); *cf.* Henry Shue, *Torture*, *in* TORTURE: A COLLECTION 47, 53 (Sanford Levinson ed., Oxford Univ. Press rev. ed. 2006) (distinguishing between terroristic torture and information torture).

3. *See, e.g.*, RICHARD MATTHEWS, THE ABSOLUTE VIOLATION: WHY TORTURE MUST BE PROHIBITED 219 (2008) (claiming that torture for the acquisition of truth is "maximally ineffective"); J.M. Bernstein, *Torture, Dignity, and the Rule of Law*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY, *supra* note 2, at 395, 407 (finding that torture's effectiveness "has become empirically suspect").

4. *See, e.g.*, DAVID LUBAN, TORTURE, POWER, AND LAW 89 (2014) (characterizing the probability that torture would be effective in the paradigmatic ticking-time-bomb scenario as "vanishingly unlikely"); PHILIP N.S. RUMNEY, TORTURING TERRORISTS: EXPLORING THE LIMITS OF LAW, HUMAN RIGHTS AND ACADEMIC FREEDOM 78 (2015) ("[T]he use of interrogational torture is ineffectual in ticking bomb cases."); Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, *in* TORTURE: A COLLECTION, *supra* note 2, at 299, 299 ("The torturer through history can be characterized as naive (in [the] hope that confession or disclosure will be accurate) . . . .").

5. *See* JOHN W. SCHIEMANN, DOES TORTURE WORK? 211 (2016) (presenting a game-theoretic demonstration that concludes "[i]nterrogational torture does not work").

neuroscientists,[6] political scientists,[7] psychologists,[8] and professional interrogators[9] all contend that information torture—torture to extract true information concerning, for example, state secrets or the location of a kidnapping victim—simply does not work. Maintaining that information torture is both empirically ineffective and morally impermissible, these torture abolitionists explain that "[t]he agony of torture create[s] an incentive to speak, but not necessarily to speak the truth."[10] Some abolitionists' claims are more modest: torture is ineffective under certain conditions,[11] or within particular time frames,[12] or is only generally ineffective.[13] But most abolitionists, according to a leading survey of the literature, "contest that it [torture] *ever* has good effects in practice."[14] Arguing that torture could be permissible, torture apologists insist that torture does work,[15] citing numerous examples, both historical and contemporary.[16] For example, Judge Posner finds "abundant evidence that

6. *See generally* SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION 1 (2015).

7. *See* DARIUS REJALI, TORTURE AND DEMOCRACY 463–66 (2007) (finding torture ineffective because interrogators rarely do better than chance in identifying false information).

8. Jean Maria Arrigo & Richard V. Wagner, *Psychologists and Military Interrogators Rethink the Psychology of Torture*, 13 PEACE & CONFLICT: J. PEACE PSYCH. 393, 393 (2007) (noting army interrogators and research psychologists found torture interrogation does not yield reliable information); s*ee also infra* note 42 and accompanying text.

9. BOB BRECHER, TORTURE AND THE TICKING BOMB 25 (Michael Boylan ed., 2007) ("Across the world, those who have the best claim to know—the military—agree that torture is largely ineffective in eliciting intelligence."); *see* Arrigo & Wagner, *supra* note 8, at 395–96 (noting torture is a poor strategy to obtain true information).

10. John H. Langbein, *The Legal History of Torture*, *in* TORTURE: A COLLECTION, *supra* note 2, at 93, 97.

11. *See, e.g.*, Jean Maria Arrigo, *A Utilitarian Argument Against Torture Interrogation of Terrorists*, 10 SCI. & ENG'G ETHICS 1, 11 (2004) (contending that torture's efficacy requires a considerable institutionalization of torture); Jessica Wolfendale, *Training Torturers: A Critique of the "Ticking Bomb" Argument*, 32 SOC. THEORY & PRAC. 269, 270 (2006) (claiming that torture is ineffective unless institutionalized).

12. *See, e.g.*, J. JEREMY WISNEWSKI & R.D. EMERICK, THE ETHICS OF TORTURE 24 (2009) ("[I]nterrogational torture, to be effective, simply cannot be carried out in the amount of time postulated in the ticking-bomb argument.").

13. *E.g.*, BRECHER, *supra* note 9, at 25 ("[T]orture is largely ineffective in eliciting intelligence."); Shane O' Mara, *Interrogating the Brain: Torture and the Neuroscience of Humane Interrogation*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY, *supra* note 2, at 197, 220 (noting that "coercive interrogation techniques typically fail"); *id.* at 218 (characterizing the number of effective tortures throughout history as "astonishingly low").

14. Seumas Miller, *Torture*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY 1 (May 5, 2017) (emphasis added), https://plato.stanford.edu/entries/torture [https://perma.cc/5BPZ-B3GT].

15. *E.g.*, FRITZ ALLHOFF, TERRORISM, TICKING TIME-BOMBS, AND TORTURE: A PHILOSOPHICAL ANALYSIS 140 (2012) ("[A]n implausible position is that torture *never* works."); BAGARIC & CLARKE, *supra* note 1, at 54 ("[T]here is a strong evidence that sometimes torture is effective . . . ."); Richard A. Posner, *Torture, Terrorism, and Interrogation*, *in* TORTURE: A COLLECTION, *supra* note 2, at 291, 294 ("[I]t is hard to believe that it [torture] is always and everywhere ineffectual . . . .").

16. For a cataloguing of eight examples where interrogational torture is claimed to have been successful and integral to thwarting both "imminent and long-range attacks,"

torture *is* often an effective method of eliciting true information."[17] However, abolitionists confront these examples with skepticism, contest them as "myth,"[18] and dismiss them as "fantasy."[19]

The stakes for determining the empirical issue are high[20] because of the issue's capacity to circumvent or foreclose the intractable debate over torture's moral and legal permissibility.[21] With some oversimplification, positions in this debate have largely cleaved into two camps. The abolitionist, Kantian, deontological, principle-based camp views torture as impermissible regardless of what good consequences it might yield or how many lives it might save.[22] In contrast, the apologist, consequentialist, utilitarian camp views torture as permissible if the good consequences outweigh the bad, if the many innocent lives saved outweigh the harm to the few who are tortured.[23] For many of the rest of us, the permissibility issue is difficult because no view seems comfortable or right: declining to use torture to save multiple innocent lives "is as coldhearted as it is to permit torture in the first place."[24] With the empirical issue more prominent in public discourse than either the moral or legal,[25] abolitionists have coupled their moral argument with

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see STEPHEN KERSHNAR, FOR TORTURE: A RIGHTS-BASED DEFENSE 60–64 (2012). *See also* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 137 (2002) ("The tragic reality is that torture sometimes works . . . . There are numerous instances in which torture has produced self-proving, truthful information that was necessary to prevent harm to civilians.").

17. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 81 (2006).

18. Jeannine Bell, *"Behind This Mortal Bone": The (In)Effectiveness of Torture*, 83 IND. L.J. 339, 341–42 (2008) (identifying widespread belief in the "torture myth"—that torture is more effective than less physical forms of interrogation).

19. BRECHER, *supra* note 9, at 39 ("Like so much of the rest of the so-called war on terrorism, the object of the proposal [Alan Dershowitz's controversial belief that torture warrants are justified by torture's effectiveness] is a fantasy.").

20. *See, e.g.*, MICHELLE FARRELL, THE PROHIBITION OF TORTURE IN EXCEPTIONAL CIRCUMSTANCES 136 (2013) (noting that "the question of whether torture works is crucial" to the debate on torture's permissibility); SCHIEMANN, *supra* note 5, at 6 (contending that "if it [torture] is to be justified at all, it must be effective").

21. *See, e.g.*, Sanford Levinson, *Contemplating Torture: An Introduction*, *in* TORTURE: A COLLECTION, *supra* note 2, at 23, 33 ("Some would sidestep the need for any such discussion [on the permissibility of torture to save lives] . . . by claiming that it is in fact inefficacious, that is to say counterproductive, in achieving its goals of gaining valuable information.").

22. *See, e.g.*, Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 238–39, 250–57 (2007) (explaining and comparing the views of the two camps); Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 676–82 (2006) (same).

23. *See supra* note 22.

24. Oren Gross, *The Prohibition on Torture and the Limits of the Law*, *in* TORTURE: A COLLECTION, *supra* note 2, at 229, 237; *see also* O'Mara, *supra* note 13, at 200 (noting that "many Kantians can be shifted" to accept torture as the number of lives to be saved increases).

25. David Luban & Katherine S. Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY, *supra* note 2, at 37, 40 ("Nor do we deny that the question of whether torture 'works' is the most common one in

an empirical claim. They have declared that a necessary condition for torture's permissibility is its effectiveness; a sufficient condition for its impermissibility is its ineffectiveness.[26] Acknowledging that torture's permissibility hinges on its effectiveness,[27] apologists nonetheless claim that abolitionists' use of the empirical issue "circumvents" the real issue—torture's permissibility.[28] Its use undermines the abolitionist position by implying that if torture does work, then abolitionists would concede torture's permissibility.[29] In turn, abolitionists reply that clear evidence of torture's efficacy serves as a threshold condition for the very debate over torture's permissibility.[30] As one abolitionist puts it, "Deciding whether one *ought* or *ought not* to drive a car is a pointless debate if the car has no gas."[31] Apologists counter that no example of torture's effectiveness will ever suffice for the abolitionist: "accepting the legitimacy of even one instance of 'efficacious' torture is morally disastrous" by opening the door to torture's permissibility.[32]

Some argue that the empirical question is "practically unanswerable"[33] because of two structural barriers.[34] First, carrying out methodologically rigorous scientific experimentation on human subjects to assess torture's efficacy is obviously barred on ethical grounds.[35] Second,

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the public discourse (although we deplore that public discourse cares so little about morality and law).").

26. *See, e.g.*, Steven J. Barela & Jens David Ohlin, *Introduction: Legal, Moral, and Effective Interrogation*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY, *supra* note 2, at 1, 2 (noting that even under the utilitarian approach, "for torture to be moral, it must *work*").

27. *See, e.g.*, Posner, *supra* note 15, at 294 ("[I]f it is true that torture is always ineffectual, it will always flunk a cost-benefit test."); *cf.* STEINHOFF, *supra* note 1, at 14–18 (contending that torture's permissibility depends only on the possibility, however slight, of torture's effectiveness).

28. FARRELL, *supra* note 20, at 15 ("[T]he 'torture does not work' argument . . . really only circumvents the moral and legal conundrum."); *see also* PHILIP BOBBITT, TERROR AND CONSENT 381 (2008) (terming it a "blithe assuming away of the problem").

29. BAGARIC & CLARKE, *supra* note 1, at 53 ("[Torture's ineffectiveness] is not in principle an objection. Rather it demonstrates a supposed practical flaw identified with life-saving torture. Presumably, if this obstacle was overcome the critics would then agree [with torture's permissibility].").

30. REJALI, *supra* note 7, at 446.

31. *Id.* at 447.

32. Levinson, *supra* note 21, at 34.

33. FARRELL, *supra* note 20, at 135; *see also* Levinson, *supra* note 21, at 33–34 ("An unfortunate reality, though, is that we really have no idea how reliable torture is as a way of obtaining information . . . . With regard to the effectiveness or futility of torture, we have only anecdotes and counter anecdotes, none of them dispositive.").

34. *See* Sanford Levinson, *"Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2029 (2003).

35. *E.g.*, M. Gregg Bloche, *Towards a Science of Torture?*, 95 TEX. L. REV. 1329, 1347 (2017) (noting that "comparative-effectiveness studies using suspects for whom harsh, real-world consequences loom are not possible"); Levinson, *supra* note 21, at 33 ("One cannot even imagine carrying out methodologically sophisticated tests except in a totalitarian society.").

the most conclusive data on torture's success or failure may be "inaccessible on national security or state secrecy reasons."[36]

This Article addresses this empirical issue with a novel, non-empirical argument. With abolitionists declaring the absolute evil of torture and torturers, and apologists trumpeting the many innocent lives saved by torturing, both groups oddly overlook torture victims. Both overlook that torture's ineffectiveness not only ensures torture's impermissibility but also exposes torture victims to criminal liability and punishment for any offenses they are tortured into committing. With torture as the most extreme and horrific form of coercion,[37] seemingly if *anyone* deserves eligibility for a duress defense against such liability, it is torture victims. Stated simply, a duress defense excuses conduct defendants were sufficiently coerced into committing. But with torture as a form of coercion, ineffective torture is ineffective coercion. Because ineffective coercion fails to coerce sufficiently, ineffective torture also fails to sufficiently coerce, and torture victims thereby fail to satisfy a duress defense. Therefore, an unintended consequence of torture's ineffectiveness is its inconsistency with and preclusion of torture victims' eligibility for the duress defense. The inconsistency between the two entails that only one (at most) is true—either torture is ineffective or torture victims are deserving of eligibility for the duress defense. And the inconsistency does not depend on torture being entirely ineffective. The inconsistency also arises if torture is merely generally ineffective.

The inconsistency remains overlooked, despite the voluminous literature on torture, perhaps because we typically fail to conceive of torture victims requiring a duress defense. By disclosing the demanded information as to the location of the ticking bomb or shallow grave of the kidnapping victim, the terrorist and kidnapper in the paradigmatic torture examples commit no crime and thus have no need for a duress defense. But some torture victims do commit a crime by disclosing and thus do need a duress defense. For example, suppose one of our soldiers is captured by the enemy, tortured into disclosing military secrets, and subsequently prosecuted by our country for aiding the enemy. Deeming torture ineffective bars eligibility for a much-needed duress defense, thereby wrongfully exposing our soldier to criminal punishment for acts committed under torture.[38]

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36. FARRELL, *supra* note 20, at 15.

37. *E.g.*, Levinson, *supra* note 21, at 21 (characterizing torture as "highly coercive interrogation"); Bell, *supra* note 18, at 343 (placing torture at the apex of a coercive interrogation pyramid); Posner & Vermeule, *supra* note 22, at 672 ("At some point of severity, coercive interrogation becomes a species of 'torture' . . . .").

38. *See, e.g.*, United States v. Fleming, 23 C.M.R. 7, 25 (C.M.A. 1957) (recognizing the general applicability of the duress defense for a prisoner of war charged with making propaganda statements that aided the enemy but denying the defense because the threatened harm was not sufficiently imminent); *cf.* Mark Fallon & Susan E. Brandon, *The HIG Project: A Road to Scientific Research on Interrogation*, *in* INTERROGATION AND TORTURE: INTEGRATING EFFICACY WITH LAW AND MORALITY, *supra* note 2, at 109, 112 ("In the aftermath of the Korean war, there were numerous Congressional hearings and

The scope of this Article is limited to demonstrating this inconsistency and canvassing possible resolutions. It takes a position on neither torture's permissibility nor its efficacy. But the inconsistency between torture's ineffectiveness and torture victims' eligibility for a duress defense establishes that (at least) one of them is false. Thus, if torture truly is ineffective, then we should re-examine whether torture victims deserve a duress defense. Conversely, if torture victims truly deserve a duress defense, then we should re-examine whether torture is ineffective.

Use of the term "ineffective torture" might require some explanation. My use of the term "torture," and my argument, unless the context suggests otherwise, is limited to a particular type of torture often denoted as interrogation or information torture—torture to extract true information from the victim through interrogation. My use of the term "torture" or "information torture" is also limited to extreme or severe forms of coercive pressure that easily and non-controversially qualify as torture. By "ineffective," I mean torture that fails to cause or induce the victim to comply with the torturer's demand. Therefore, the same instance of torture might be ineffective for one torturer's demand but effective for another's. For example, if the police torture a suspect into falsely confessing or the State tortures a victim into non-sincerely recanting a belief or position, that might well be effective. But given a demand for true information, the torture would be ineffective. Regardless of whether the victim fails to communicate truthfully or fails to communicate at all, the victim has equally failed to comply with the torturer's demand for true information, and thus the torture is equally ineffective. Torture is also ineffective if the victim discloses the demanded true information for reasons other than the torture. In such an instance, the torture did not cause the disclosure.

One obvious objection should be addressed. If torture is ineffective, one might object, why would a torture victim ever need a duress defense? Ineffective torture would never induce victims to make truthful disclosures thereby subjecting them to possible liability requiring the assertion of a duress defense. True, if torture is absolutely ineffective, meaning torture's effectiveness is impossible, the objection is valid. But no abolitionist maintains that torture's effectiveness is impossible—that would be absurd. After asserting that "[information] torture does not work," one abolitionist explains the claim as follows: "Does saying it does not work mean that it can never work? No. It can work. Under conditions that hardly ever obtain in the real world, it can work."[39] Thus, torture can be effective, and thereby torture victims might well need a duress defense even under the abolitionist view. But when assessed

studies regarding information about why American military prisoners of war had disclosed information to their abusive captors.").

39. SCHIEMANN, *supra* note 5, at 211.

under the abolitionist view, torture victims' duress defenses would necessarily fail.

The Article proceeds as follows. After providing a brief overview of the law of duress, Part II demonstrates how the empirical claim of torture's ineffectiveness is inconsistent with and precludes torture victims from satisfying as many as three central requirements of the duress defense. It presents examples depicting how torture's ineffectiveness forecloses torture victims from satisfying the requirements of a duress defense under common law formulations, modern state codifications, the Model Penal Code (MPC), federal law, and military law.

Part III considers possible resolutions to the inconsistency. It presents four modifications of the empirical claim that torture is ineffective, including that torture is merely generally ineffective or ineffective only under certain conditions. It next presents two modifications of the duress defense. Of these six, only two resolutions to the inconsistency emerge. But these two resolutions are perhaps deeply unappealing. The cure may be worse than the malady.

Part IV addresses the inconsistency by placing the unappealing resolutions in the form of a dilemma. We must choose between either closing the door on the permissibility of torture or opening the door to torture victims' eligibility for a duress defense. Both options may seem obligatory, but (because they are inconsistent) only one can be chosen. To put it another way, we must choose between either closing the door on a duress defense for torture victims or opening the door on the permissibility of torture. Neither option may seem palatable, but (to resolve the inconsistency) one must be chosen. Part IV next canvasses arguments as to the least bad option presented by the dilemma. It advances two possible justifications for sacrificing torture victims to ensure the condemnation of torturers. It then suggests how conceding on the empirical claim might constitute a productive compromise for abolitionists. Part IV concludes, however, that none of these arguments are clearly acceptable as the least bad option. Nonetheless, resolving the inconsistency requires choosing one of those bad options. Until resolved, the inconsistency between torture's ineffectiveness and torture victims' eligibility for the duress defense makes each one suspect.

II. Torture's Ineffectiveness Inconsistent with Duress Defense for Torture Victims

After supplying a brief overview of the law of duress, this Part establishes that torture's ineffectiveness is inconsistent with as many as three central requirements of the defense. It next presents examples illustrating the inconsistency with the duress defense under the common law, modern state codifications, the MPC, federal law, and military law.

A. *A Brief Overview of the Defense*

Though formulations of the duress defense vary across jurisdictions, they share several common requirements. Joshua Dressler supplies the following succinct account: "A person who is not at fault for placing himself in the coercive situation will be exculpated if he commits an offense as a result of a coercer's unlawful threat to imminently kill or grievously injure him or a family member."[40] Paul Robinson similarly explains that the defense applies if the actor's offense is "a result of (1) [the actor] being in a state of coercion caused by a threat that a person of reasonable firmness in his situation would not have resisted, [and] (2) the actor is not sufficiently able to control his conduct to be held accountable for it."[41] Claire Finkelstein provides the following list of traditional elements of the defense:

> (1) The defendant must have no reasonable opportunity to escape from the coercive situation.
> (2) The defendant must be threatened with significant harm—death or serious bodily injury.
> (3) The threatened harm must be illegal.
> (4) The threat must be of imminent harm.
> (5) The defendant must not have placed herself voluntarily in a situation in which she could expect to be subject to coercion . . . .[42]

An additional element, as seen in Dressler and Robinson's accounts above, so obvious and fundamental to often be only implicit, is that the defendant's criminal conduct was "a result of" the coercion.[43]

Perhaps the most influential modern formulation of the duress defense is from the MPC:

> It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.[44]

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40. Joshua Dressler, *Duress*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 269, 270 (John Deigh & David Dolinko eds., 2011).

41. 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 177(a), at 348 (1984).

42. Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 254 (1995) (characterizing these as "core requirements"). Finkelstein adds two more which are of "marginal status." *Id.* ("(6) Duress must not be pleaded as a defense to murder. (7) The defendant must have been acting on a specific command from the coercer."). For other commentators' similar lists of elements, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 23.01[B] (6th ed. 2012) (identifying five general elements); Stephen R. Galoob & Erin Sheley, *Reconceiving Coercion-Based Criminal Defenses*, 112 J. CRIM. L. & CRIMINOLOGY 265, 279 (2022) (listing six elements of "Canonical duress").

43. *See supra* notes 40–41 and accompanying text.

44. MODEL PENAL CODE § 2.09(1) (AM. L. INST., Proposed Official Draft 1962).

Notably, "[t]he influence of the Model Code on recently enacted and proposed revised codes has been considerable."[45] Most modern state duress provisions follow the MPC.[46] Though its formulation differs from the traditional common law elements in several ways,[47] one important difference for our purposes is the MPC's "person of reasonable firmness" standard, also seen in Robinson's account above.[48] Rather than the traditional common law requirement specifying death or substantial bodily harm, the MPC provision instead requires the coercer's threat to be of sufficient gravity that a person of ordinary fortitude would yield to it. "Most revisions incorporate the standard of a person of reasonable firmness."[49] Even in the absence of a codified duress provision, courts have adopted this MPC standard. For example, the Supreme Court of New Jersey, in the absence of a state statute, ruled that duress shall be a defense when the defendant is coerced by "unlawful force . . . which a person of reasonable firmness in his situation would have been unable to resist."[50]

Various rationales underpin the defense.[51] The traditional rationale conceived coercive threats as exculpating because they overpower victims' will.[52] But because coerced defendants asserting a duress defense choose to comply with the demands of coercers rather than the law,[53] perhaps "[t]he best explanation of duress is that coercion excuses when a person lacks a fair opportunity to act lawfully."[54]

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45. Model Penal Code and Commentaries § 2.09 cmt. 4 (Am. L. Inst., Official Draft and Revised Comments 1985).

46. *See* Wayne R. LaFave, Criminal Law § 9.7(b) (5th ed. 2010) ("A very distinct majority of the modern recodifications follow the Model Penal Code by requiring only that the threat be such that a person of reasonable firmness would have been unable to resist it.").

47. Dressler, *supra* note 40, at 272 (listing six ways the MPC differs from the traditional formulation).

48. *See supra* note 41 and accompanying text.

49. Model Penal Code and Commentaries § 2.09 cmt. 4 (Am. L. Inst., Official Draft and Revised Comments 1985); *see also* 2 Robinson, *supra* note 41, § 177(c)(2), at 353 (describing the requirement of a threat sufficient to coerce a person of reasonable firmness).

50. State v. Toscano, 378 A.2d 755, 765 (N.J. 1977).

51. *See, e.g.*, George P. Fletcher, Rethinking Criminal Law § 10.4 at 817–35 (1978) (undertaking a comparative law analysis of the rationale of the duress defense); Dressler, *supra* note 40, at 273–86 (canvassing various conceptions of the defense including as a denial of an element of the offense, a justification defense, and an excuse defense); Finkelstein, *supra* note 42, at 257–70 (comparing welfarist and voluntarist accounts of the defense).

52. *See, e.g.*, Dressler, *supra* note 40, at 285 (rejecting this traditional account as "descriptively false").

53. *E.g.*, Model Penal Code and Commentaries, § 2.09 cmt. 2 (Am. L. Inst., Official Draft and Revised Comments 1985) (maintaining that the coerced "actor makes a choice, but claims . . . that he was unable to choose otherwise"); Dressler, *supra* note 42, § 23.02[B] ("[T]he coerced actor *in fact* chooses to violate the law; she chooses to commit an offense rather than to suffer the threatened consequences.").

54. Dressler, *supra* note 40, at 285.

B. *Torture's Ineffectiveness Precludes Defense for Torture Victims*

Torture is the most extreme form of coercion.[55] Consider the following harrowing account of torture:

> The infliction of physical pain on a person with no means of defending himself is designed to render that person completely subservient to his torturers. It is designed to extirpate his autonomy as a human being, to render his control as an individual beyond his own reach . . . . When you break a human being, you turn him into something subhuman. You enslave him. This is why the Romans reserved torture for slaves, not citizens, and why slavery and torture were inextricably linked in the antebellum South.
>
> What you see in the relationship between torturer and tortured is the absolute darkness of totalitarianism. You see one individual granted the most complete power he can ever hold over another. Not just confinement of his mobility—the abolition of his very agency. Torture uses a person's body to remove from his own control his conscience, his thoughts, his faith, his selfhood.[56]

No less than making a compelling case for torture's impermissibility, this disturbing account also amply explains why torture victims should not be criminally responsible for conduct they are tortured into committing. Torture victims surely should not be victimized again by facing criminal liability and punishment. With torture as the most extreme and terrifying form of coercion, torture victims should easily satisfy all the above elements and standards for a duress defense.

But if torture is ineffective, torture victims are ineligible for a duress defense. Torture's ineffectiveness is inconsistent with torture victims satisfying as many as three of the defense's requirements. First, it is inconsistent with the "person of reasonable firmness" standard utilized in the MPC and most modern state formulations.[57] As Robinson explains, the defense's "requisite gravity of the threat . . . is commonly defined as the level of threat that the person of reasonable firmness could not resist."[58] A leading treatise identifies it as the very rationale of the defense: "The rationale of the defense of duress is that the defendant ought to be excused when he 'is the victim of a threat that a person of reasonable moral strength could not fairly be expected to resist.'"[59] This principle

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55. Though distinct, torture and moderate coercion are on a continuum of degrees of pressure; torture is merely an extreme degree of coercion. *See, e.g.*, John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, *in* TORTURE: A COLLECTION, *supra* note 2, at 145, 157 (observing that there is "a continuum in which coercion risks sliding into torture"); *see also* Bell, *supra* note 18, at 343 (placing torture at the apex of a coercive interrogation pyramid).

56. Andrew Sullivan, *The Abolition of Torture*, NEW REPUBLIC (Dec. 18, 2005), https://newrepublic.com/article/64493/the-abolition-torture-0 [https://perma.cc/42UD-CH9Y].

57. *See supra* notes 44–50 and accompanying text.

58. 2 ROBINSON, *supra* note 41, § 177(c)(2), at 353.

59. LAFAVE, *supra* note 46, § 9.7, at 519 (quoting Joshua Dressler, *Exegesis on the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1367 (1989)).

that an individual defendant asserting the duress defense is assessed by what others reasonably or generally do is illustrated by a case with an American prisoner of war in Korea.[60] Acknowledging the "abominable" conditions that the defendant and the other prisoners were subjected to, the court stated that "[i]t goes without saying that all men cannot stand firm against torture, physical violence, starvation or psychological mistreatment."[61] But the court denied the defendant's duress defense because "the accused weakened when others [other prisoners] stood fast."[62] In terms of the modern standard, the court rejected the duress defense because the defendant was subjected to that which a person of reasonable firmness could resist.

If torture is ineffective, then a person of reasonable firmness is expected to, can, and does resist it. Effective coercion leads to the victim yielding and complying with the coercer's demand because the victim is *unable* to resist. By contrast, ineffective coercion allows the victim to refrain from yielding and complying with the coercer's demand because the victim *is able* to resist. In other words, if torture is ineffective, then torture victims are able to resist it. Thus, a person of reasonable firmness would be able to resist it.[63] Therefore, individual torture victims cannot satisfy the standard requiring them to be *unable* to resist torture. Thus, torture victims are ineligible for a duress defense utilizing the person of reasonable firmness standard, which is represented in the MPC and most state statutes.[64]

Second, torture's ineffectiveness is inconsistent with and forecloses torture victims from satisfying the common requirement that there be "no reasonable opportunity to avoid the threatened harm" other than by complying with the coercer's demand.[65] Several scholars specifically cite it as a required element.[66] Placing even more importance on it, several federal courts of appeals list it as one of the three core

60. United States v. Batchelor, 22 C.M.R. 144, 144, 162 (C.M.A. 1956).

61. *Id.* at 162.

62. *Id.*

63. The "person of reasonable firmness" standard refers to persons "in general" and "normal members of the community." MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 2 (Official Draft and Revised Comments 1985). Other formulations of the standard refer to the "normal" person. *See infra* note 105 and accompanying text.

64. For citations to states utilizing the MPC reasonable person standard, see MODEL PENAL CODE AND COMMENTARIES § 2.09 cmt. 4, at 380–84, 380 n.52, 384 n.60 (Official Draft and Revised Comments 1985); *see also* 2 ROBINSON, *supra* note 41, at 353 n.11.

65. United States v. Toney, 27 F.3d 1245, 1248 (7th Cir. 1994).

66. *See, e.g.*, DRESSLER, *supra* note 42, § 23.01(B) (noting that the duress defense requires that "there was no reasonable escape from the threat except through compliance with the demands of the coercer"); Finkelstein, *supra* note 42, at 254 (explaining that a core element of a duress defense is that the "defendant must have no reasonable opportunity to escape from the coercive situation"); Galoob & Sheley, *supra* note 42, at 279 (requiring as one of the elements for a duress defense that the defendant "has no reasonable way of avoiding the harm referenced in the coercer's threat" except through compliance with the coercer's demand).

requirements of the duress defense.[67] Illustrating the requirement, the Ninth Circuit upheld the denial of a duress defense to a defendant who failed to appear for trial because he claimed there was a "contract" out on his life.[68] The court found that the defendant did not face the stark choice of failing to appear at trial or death.[69] The defendant had an alternative—turning himself into the authorities.[70]

If torture is ineffective, there is a reasonable alternative to complying with torturers' demands for true information. Given torture's ineffectiveness, many or most torture victims are not providing true information[71]—whether it be due to not speaking despite having true information, not speaking because they lack true information, speaking falsely despite having true information, or speaking falsely because they lack any true information.[72] That all or most torture victims are not disclosing true information makes not disclosing true information a reasonable alternative. Because torture victims have a reasonable alternative, torture victims cannot satisfy the requirement that there be no such alternative. As a result, torture's ineffectiveness is inconsistent with the "no reasonable alternative" requirement and forecloses torture victims' eligibility for a duress defense.

Third, perhaps the most fundamental requirement of any duress defense formulation, even if only implicit,[73] is that the threatened force caused or coerced the coercee's commission of the offense.[74] Most modern state provisions "typically state[] that the defendant must have acted 'because of' the coercion or compulsion."[75] Stephen Galoob and Erin Sheley refer to it as the "nexus requirement": there must be a nexus

67. *E.g.*, United States v. Tanner, 941 F.2d 574, 587 (7th Cir. 1991) (requiring that the feared death or substantial bodily harm "could be avoided only by committing the criminal act charged"). For further authorities, see *infra* notes 99, 101, 103 and accompanying text.

68. United States v. Atencio, 586 F.2d 744, 747 (9th Cir. 1978) (per curiam).

69. *See id.*

70. *See id.*

71. *Torture During Interrogations—Illegal, Immoral and Ineffective*, UNITED NATIONS: OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Oct. 11, 2017), https://www.ohchr.org/en/stories/2017/10/torture-during-interrogations-illegal-immoral-and-ineffective [https://perma.cc/Y5GE-CHSY] (discussing torture's ineffectiveness and highlighting research about captives being more likely to confess untruthful or inaccurate information when tortured).

72. Nayef Al-Rodhan, *The Wrongs, Harms, and Ineffectiveness of Torture: A Moral Evaluation from Empirical Neuroscience*, 54 J. SOC. PHIL., 565, 567–68 (2023), https://doi.org/10.1111/josp.12494 (explaining that tortured persons may not "break" or otherwise reveal truthful information).

73. *See* 2 ROBINSON, *supra* note 41, § 177(b)(2), at 351 ("In most statutory codifications the excusing condition [of being coerced] is implied rather than expressed.").

74. *E.g.*, MODEL PENAL CODE § 2.09(1) (AM. L. INST., Official Draft and Explanatory Notes 1985), https://heinonline.org/HOL/P?h=hein.ali/mpc1040&i=1 [https://perma.cc/N6F2-EP3H] (requiring "that the actor engaged in the conduct charged to constitute an offense *because he was coerced* to do so" (emphasis added)).

75. LAFAVE, *supra* note 46, § 9.7(b), at 525.

between the actor's commission of the crime and the coercer's threat.[76] The latter must have "arise[n] from" the former.[77] Dressler states that the defendant's commission of the crime must be "a result of" the force or threatened harm.[78] Wayne LaFave variously describes it as requiring that the coercer's threat "causes the defendant to engage" in the crime[79] or "that the defendant be actually coerced by the threat into violating the terms of the criminal law."[80] Illustrating the requirement, the Oregon Supreme Court denied a duress defense where the commission of the offense was due not to coercion but to the defendant's own "voluntary shortcoming."[81] It was the defendant who "began the digression from the path of rectitude."[82]

If torture is ineffective, then torture victims are not coerced, compelled, or induced into disclosing true information, and there is no nexus between the torture and torture victims' compliance with the torturer's demand for true information. Torture's ineffectiveness is inconsistent with the causation, coercion, or nexus requirement and precludes torture victims' eligibility for a duress defense.

However, even the abolitionist view acknowledges the effectiveness of torture to some degree. Maintaining that torture is merely generally ineffective, as some abolitionists do,[83] entails that torture is sometimes effective. And even abolitionists flatly stating torture's ineffectiveness nonetheless acknowledge that the effectiveness of torture is possible (albeit extremely unlikely).[84] Thus, even under the abolitionist view, some torture victims might well be coerced, compelled, or induced into disclosing true information. But under the abolitionist's strong and overwhelming presumption that torture is ineffective, it will be difficult for a defendant to satisfy the causation requirement. Because of this strong presumption, the abolitionist view would presume that any truthful disclosure by the victim was motivated by something other than the torture. And even if a defendant can overcome this strong presumption and satisfy the causation requirement, the defendant's duress defense would still fail because of the inability to satisfy the other two requirements.

Torture's ineffectiveness is inconsistent with and precludes torture victims from satisfying as many as three central requirements of the duress defense. While all three are perhaps not applicable in every

76. Galoob & Sheley, *supra* note 42, at 279.
77. *See id.* at 281.
78. *See* DRESSLER, *supra* note 42, § 23.01[B]; *see also* Dressler, *supra* note 40, at 270 (describing the traditional duress defense).
79. LAFAVE, *supra* note 46, § 9.7, at 518.
80. *Id.* § 9.7(c), at 527.
81. State v. Patterson, 241 P. 977, 978 (Or. 1925). For another example, see Galoob & Sheley, *supra* note 42, at 281 (illustrating the application of the nexus requirement in State v. Toscano, 378 A.2d 755, 761 (N.J. 1977)).
82. *Patterson*, 241 P. at 978.
83. *See supra* note 13 and accompanying text.
84. *See supra* note 39 and accompanying text.

jurisdiction, at least two would be applicable in most, if not all, jurisdictions.[85] Depending on the jurisdiction, failure to satisfy any one of these applicable requirements forecloses a torture victim's eligibility for a duress defense.[86] In addition, if torture is ineffective, torture victims fail to satisfy the rationale of the duress defense. Ineffective coercive pressure fails to overpower victims' will to act lawfully, fails to deny a fair opportunity to obey the law, and fails to usurp a free and meaningful choice to obey the law. As a result, torture's ineffectiveness is inconsistent with and forecloses torture victims' eligibility for a duress defense.

To see the inconsistency in different contexts and under different formulations of the defense, let us consider some examples. Consider *Enemy's Torture of Our Embassy Assistant*:

> Suppose a hostile foreign country suspects that one of their strategically important scientists is negotiating with our embassy to defect to our country. Seeking the scientist's name to prevent the defection, the enemy detains and interrogates a member of our embassy staff, a clerical assistant, on the false pretext that they are a spy. Having typed some documents stamped Top Secret pertaining to the defection, the assistant knows the defector's identity but refuses to divulge it. Determined to obtain the information, the enemy uses horrific means that clearly constitute torture, including suffocation, electric shocks, and dismemberment, all while demanding the scientist's name. Eventually, after continued torture, the assistant discloses the defector's identity and is released. If subsequently charged by our country for aiding the enemy, could the clerical assistant obtain a duress defense?[87]

If torture is sufficiently effective, the assistant would obtain a duress defense. The assistant easily satisfies all the elements: the ongoing unlawful torture constituted serious bodily injury; the assistant was not responsible for the situation that caused, induced, or coerced the crime specifically demanded by the torturer; and the assistant had no reasonable alternative to committing the crime. With the torture precluding a

85. Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833, 837 (2003), https://doi.org/10.1525/nclr.2003.6.2.833.

86. United States v. Hernandez, 894 F.3d 496, 503 (2d Cir. 2018).

87. The crime of treason is specified both in the Constitution as well as by federal statute. U.S. CONST. art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort."); 18 U.S.C. § 2381 ("Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere is guilty of treason."). Duress is a defense to treason. Kawakita v. United States, 343 U.S. 717, 735 (1952) (recognizing "coercion or duress" as a defense to treason); LAFAVE, *supra* note 46, § 9.7(b) (noting that "duress can excuse treason"). In the prosecutions of infamous propagandists broadcasting during World War II, duress was recognized as a valid defense to treason but failed to exculpate in the individual cases. *See* United States v. D'Aquino, 192 F.2d 338, 359–60 (9th Cir. 1951) (denying the defense to "Tokyo Rose"); Gillars v. United States, 182 F.2d 962, 975–76 (D.C. Cir. 1950) (denying the defense to "Axis Sally").

fair opportunity to act lawfully, the assistant also satisfies the rationale of the duress defense. But if torture is ineffective, the assistant loses the duress defense.

Because any charge against our embassy assistant would be federal,[88] the federal duress defense would be the most relevant to consider. There is no federal statute codifying the duress defense.[89] Instead, the duress defense is judicially recognized.[90] While the Supreme Court has declined to "specif[y] the elements of the defense,"[91] it did "presume the accuracy" of a lower court's listing of the following elements:

> (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law . . . and[;] (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.[92]

Note that the Court's third and fourth elements—the no reasonable alternative and causation elements—are among the elements discussed above that are inconsistent with torture's ineffectiveness.[93] Other federal circuit courts, in one case relying on the Court's above elements, have adopted accounts of duress with similar elements.[94] For example, the Second and Seventh circuits explicitly endorse the often-only-implicit causation element.[95] And the D.C., Second, Third, Seventh, Ninth, and Tenth circuits all require that the defendant have no reasonable alternative to committing the crime.[96]

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88. *See supra* note 87.

89. *E.g.*, Dixon v. United States, 548 U.S. 1, 3 n.2 (2006) ("There is no federal statute defining the elements of the duress defense.").

90. *Id.* at 17 ("In light of Congress' silence on the issue, however, it is up to the federal courts to effectuate the affirmative defense of duress . . . .").

91. *Id.* at 3 n.2 (citing United States v. Bailey, 444 U.S. 394, 409–10 (1980)) ("We have not specified the elements of the defense and need not do so today."); *see also Hernandez*, 894 F.3d at 504 ("[T]he Supreme Court has not adopted a definition of the duress defense . . . .").

92. *Dixon*, 548 U.S. at 3 n.2.

93. *See supra* text accompanying notes 56–82.

94. *See Hernandez*, 894 F.3d at 504–05 (citing and relying on the *Dixon* Court's duress defense elements to support the inclusion of an element in the Second Circuit's duress defense).

95. *See* United States v. Dingwall, 6 F.4th 744, 747 (7th Cir. 2021) (quoting SEVENTH CIRCUIT PATTERN CRIM. JURY INSTR. § 6.08 (2020 ed.)) ("The Seventh Circuit Pattern Criminal Jury Instructions describe 'coercion/duress' as when the defendant has proved that she committed the offense 'because [she was] coerced . . . .'"); United States v. Zayak, 765 F.3d 112, 120 (2d Cir. 2014) ("The affirmative defense of duress excuses criminal conduct committed under circumstances from which a jury may infer that the defendant's hand was guided not by evil intent, but by the imminent threat of grievous bodily harm.").

96. *See Dingwall*, 6 F.4th at 746 (requiring, as one of two elements, "the absence of reasonable, legal alternatives to committing the crime"); United States v. Carpenter,

Under the view that torture is ineffective, our embassy assistant fails to satisfy as many as two elements of the duress defense under federal law. First, rather than supplying true information that might constitute a crime, our assistant could have given false information or no information at all. Torture's ineffectiveness at extracting true information means that our assistant had a reasonable alternative to complying with the torturer's demand and thereby committing a crime. Second, ineffective torture does not cause, coerce, compel, or induce compliance with the demand for true information. If the torture is ineffective, there is no nexus between the torture and our assistant's commission of the crime. Under the view that torture is ineffective, the assistant's quite plausible claim that torture caused the disclosure would be automatically rejected. Such a view would implausibly conclude that the assistant—despite enduring horrific torture for quite some time rather than disclosing—finally did disclose for some reason unrelated to the horrific torture.

Ineffective torture is inconsistent with our assistant satisfying both the no reasonable alternative and causation requirements. Depending on the jurisdiction, failing to satisfy either one may bar a duress defense. As a result, the ineffectiveness of torture is inconsistent with and precludes our assistant from receiving the duress defense. Torture's ineffectiveness precludes a duress defense for torture victims under the MPC, leading commentators, most states, and federal law.

For another example, consider *Enemy's Torture of Our Soldier*:

> Suppose the enemy captures one of our soldiers on the battlefield during a military action abroad. The enemy interrogates our soldier, demanding the disclosure of secret military strategies. After our soldier refuses, the enemy uses horrific means that clearly constitute torture including suffocation, electric shocks, and dismemberment. Eventually, our soldier yields to the enemy's demands and is released. If our soldier is prosecuted by our country for divulging military secrets that aided the enemy, could our tortured soldier obtain a duress defense?[97]

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923 F.3d 1172, 1177 n.3 (9th Cir. 2019) ("A defendant must establish three elements to present a duress defense . . . [including] lack of a reasonable opportunity to escape the threatened harm."); *Hernandez*, 894 F.3d at 503 ("[T]hree discrete elements must be met to establish coercion or duress . . . [including] a lack of a reasonable opportunity to escape harm other than by engaging in the illegal activity." (quoting United States v. Podlog, 35 F.3d 699, 704 (2d Cir. 1994))); United States v. Nwoye, 824 F.3d 1129, 1135 (D.C. Cir. 2016) (requiring, as one of two elements, "that there was no 'reasonable, legal alternative to committing the crime'" (quoting United States v. Nwoye, 663 F.3d 460, 462 (D.C. Cir. 2011))); United States v. Santos, 932 F.2d 244, 249 (3d Cir. 1991) (noting that "duress contains three elements . . . [including] no reasonable opportunity to escape the threatened harm"); United States v. Scott, 901 F.2d 871, 873 (10th Cir. 1990) ("A coercion or duress defense requires the establishment of three elements . . . [including] no reasonable opportunity to escape the threatened harm.").

97. The soldier might be charged under the Uniform Code of Military Justice, Article 903b (aiding the enemy). 10 U.S.C. § 903(b), art. 103(b) ("Any person who (1) aids, or attempts to aid, the enemy . . . or (2) without proper authority . . . gives intelligence

If torture is sufficiently effective, our soldier would obtain a duress defense. Just like the embassy assistant, our soldier easily satisfies all the elements: the ongoing unlawful torture constituted serious bodily injury; the soldier was not responsible for the situation that caused, induced, or coerced the crime specifically demanded by the torturer; and the soldier had no reasonable alternative to committing the crime. With torture precluding a fair opportunity to act lawfully, our soldier also satisfies the rationale of the duress defense. Therefore, surely our soldier should successfully assert a duress defense and not be held criminally liable for disclosing military secrets after undergoing excruciating torture. But if torture is ineffective, our soldier loses the duress defense.

Because any charge against our soldier would be under military law,[98] the duress defense afforded by the Rules of Courts-Martial would be the most relevant and apply when:

> the accused's participation in the offense was *caused* by a reasonable apprehension that the accused . . . would immediately suffer serious bodily injury if the accused did not commit the act . . . . If the accused has any *reasonable opportunity* to avoid committing the act without subjecting the accused . . . to the harm threatened, this defense shall not apply.[99]

As seen in the above italicized language, the military law duress defense explicitly requires the causation[100] and no reasonable alternative elements.[101] Because ineffective torture fails to cause, coerce, or induce the

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to, or communicates or corresponds with or holds any intercourse with the enemy . . . [commits the offense]."). "The defense of duress is well-established in military law." United States v. DeHart, 33 M.J. 58, 61 (C.M.A. 1991). Duress is a defense to this charge. *See, e.g.*, MANUAL FOR COURTS-MARTIAL U.S. r. 916(h) (Joint Serv. Comm. on Mil. Justice 2019) (providing that "[c]oercion or duress . . . is a defense to any offense except killing an innocent person"). Duress is also recognized as a defense in prisoner of war cases. *See, e.g.*, WALTER B. HUFFMAN & RICHARD D. ROSEN, MILITARY LAW: CRIMINAL JUSTICE & ADMINISTRATIVE PROCESS § 3:278 (2022) ("Historically, the defense of coercion is commonly raised in prisoner misconduct cases and, if successfully proven, can result in acquittal."); Edith Rose Gardner, *Coerced Confessions of Prisoners of War*, 24 GEO. WASH. L. REV. 528, 545–52 (1956) (chronicling the history of prisoners of war asserting the duress defense, with varying results, for offenses including aiding and adhering to the cause of the enemy).

98. *See* 10 U.S.C. § 903(b), art. 103(b).

99. MANUAL FOR COURTS-MARTIAL U.S. r. 916(h) (Joint Serv. Comm. on Mil. Justice 2019) (emphasis added).

100. For cases requiring this element, see United States v. Biscoe, 47 M.J. 398, 402 (C.A.A.F. 1998) (requiring that the coercion "caused" the commission of the offense); United States v. Rankins, 34 M.J. 326, 329 (C.M.A. 1992) (requiring that the offense be "caused by" the coercion (quoting MANUAL FOR COURTS-MARTIAL U.S. r. 916(h) (Joint Serv. Comm. on Mil. Justice 2019)); United States v. Fleming, 19 C.M.R. 438, 450, (A.C.M.R. 1954), *aff'd*, 23 C.M.R. 7 (C.M.A. 1957) (requiring the coercion "induce" the fear of death or substantial bodily harm).

101. For cases requiring this element, see United States v. Hayes, 70 M.J. 454, 460 (C.A.A.F. 2012) (requiring that there be no "opportunity to avoid the harm threatened"); United States v. Vasquez, 48 M.J. 426, 430 (C.A.A.F. 1998) (requiring no "reasonable opportunity to avoid committing the act" (quoting MANUAL FOR COURTS-MARTIAL U.S. r. 916(h) (Joint Serv. Comm. on Mil. Justice 2019)); United States v. Franks, 76 M.J.

offense and does afford a reasonable alternative to its commission—not disclosing true information—our soldier, just as the embassy assistant in the previous example, would fail to satisfy these requirements.[102]

Though not explicitly included in the above provision, there is a third element of the defense our soldier might fail to satisfy. In interpreting the duress provision, courts of military justice look to the MPC and federal case law.[103] For example, the United States Court of Appeals for the Armed Forces, in ruling a defendant eligible for the duress defense, quoted and utilized the following standard discussed by the Supreme Court and acknowledged as influenced by the MPC: "[a]n accused 'ought to be excused when he is the victim of a threat that a person of reasonable moral strength could not be fairly expected to resist.'"[104] Other military cases and authorities have similarly required coercion sufficient to make "a person of normal strength and courage" yield.[105] If torture is ineffective, then most torture victims are resisting it. Thus, "a person of reasonable moral strength" and "normal strength and courage" could be fairly expected to resist it and not yield to it. Therefore, our soldier is fairly expected to resist it and not yield to it. As a result, our soldier cannot satisfy that requirement.

Torture's ineffectiveness is inconsistent with and precludes our soldier from satisfying as many as three of the above requirements. Depending on the military court, failure to satisfy any one of these three requirements bars our soldier's eligibility for the defense. Under the view that torture is ineffective, our soldier satisfies as few as none of these three requirements and is foreclosed from obtaining the defense in perhaps any military court. Torture's ineffectiveness is inconsistent with and precludes our soldier's eligibility for the defense.

To summarize, torture's ineffectiveness is inconsistent with and precludes torture victims' eligibility for a duress defense. While effective torture coerces, ineffective torture fails to coerce. Ineffective torture fails to overpower victims' will to act lawfully, fails to deny a fair opportunity to obey the law, and fails to usurp a free and meaningful choice

808, 815 (A. Ct. Crim. App. 2017) ("[F]or the defense of duress to apply, there must be 'no other reasonable alternative.'").

102. For discussion of how the embassy assistant in the previous example similarly fails to satisfy these two elements if torture is ineffective, see *supra* text accompanying note 96.

103. *E.g.*, United States v. Hayes, 70 M.J. 454, 463 n.5 (C.A.A.F. 2012) (quoting United States v. Curtis, 32 M.J. 252, 267 (C.M.A. 1991)) ("In addition [to federal case-law], we have used the Model Penal Code as a 'source of decisional guidance in military justice.'").

104. *Id.* at 461, 463 (quoting Dixon v. United States, 548 U.S. 1, 14 n.9 (2006)) ("Although the Model Penal Code is not binding on this Court, its focus on the significance of the harm rather than any particular source is consistent with the United States Supreme Court's statement in *Dixon* that the threat be such 'a person of reasonable moral strength could not fairly be expected to resist.'").

105. *Biscoe*, 47 M.J. at 402; United States v. DeHart, 33 M.J. 58, 65 (C.M.A. 1991); HUFFMAN & ROSEN, *supra* note 97, § 9:51 n.2 (quoting U.S. ARMY TRIAL JUDICIARY, ELEC. MIL. JUDGES BENCHBOOK 5–5 (2022)).

to obey the law. More specifically, torture's ineffectiveness is inconsistent with and precludes victims from satisfying as many as three central requirements of the duress defense. Depending on the jurisdiction, failure to satisfy even one of these requirements bars eligibility for the defense. The examples discussed above demonstrate that the inconsistency applies in a variety of contexts and under different formulations of the defense. The inconsistency arises under common law conceptions, modern state statutes, the MPC, federal law, and military law.

Unless resolved, the inconsistency between torture's ineffectiveness and torture victims' eligibility for a duress defense entails that both cannot be true. At least one of them is false. But because the inconsistency cannot, until resolved, establish which one is false, the inconsistency entails that both are suspect.

III. Attempts at Resolving the Inconsistency

This Part proposes six possible resolutions of the inconsistency. First, rather than deeming it completely ineffective, torture could be considered *generally* ineffective. Second, torture could merely be deemed ineffective under specified conditions. Third, torture could merely be deemed ineffective unless the victim asserts a duress defense. Fourth, torture could be acknowledged as generally *effective*. Fifth, eliminate three central requirements of the duress defense. And sixth, torture victims do not deserve eligibility for the duress defense. While some minimize the scope of the inconsistency, only three resolve the inconsistency. With one of the three impracticable, two resolutions remain. But perhaps neither is appealing.

A. *Torture is Generally Ineffective*

Rather than being entirely ineffective, torture is merely generally ineffective.[106] As only generally ineffective, torture is thus sometimes effective. To the extent that torture is effective, torture victims could satisfy the requirement that torture caused, coerced, or induced their commission of the offense.[107] As a result, the more modest empirical claim of torture being generally ineffective might avoid the inconsistency.

There are several problems with this proposed resolution. First, apart from whether it resolved the inconsistency, some abolitionists would be reluctant to give up their strong empirical claim. The strong claim shuts the door entirely on torture's permissibility. If it is entirely ineffective, then it is entirely impermissible. But the more modest claim that torture is generally ineffective concedes that sometimes torture is effective thereby opening the door to torture's permissibility.

106. For abolitionists holding this view, see *supra* note 13.
107. *See supra* notes 73–82 and accompanying text.

Second, it fails to resolve the inconsistency concerning the person of reasonable firmness or normal fortitude standard.[108] If torture is generally ineffective, then the person of reasonable firmness or ordinary fortitude will be able to resist it. Therefore, individual torture victims would fail to meet this standard requiring that the reasonable or ordinary person be *unable* to resist it. In jurisdictions including this requirement, no torture victim would obtain a duress defense. A shift in the empirical claim from torture being entirely ineffective to generally ineffective does not resolve the inconsistency between torture's ineffectiveness and the person of reasonable firmness standard.

Third, it fails to resolve the inconsistency regarding the no reasonable alternative requirement.[109] If torture is generally ineffective, then torture victims will generally not comply with the torturer's demand and thus not commit a crime. As such, torture victims will generally choose an alternative to compliance with the torturer's demand. Whatever it is that torture victims generally choose as an alternative to compliance—for example, disclosing false information—would thus qualify as a reasonable alternative. Therefore, individual torture victims asserting a duress defense would be unable to satisfy the requirement that there be no reasonable alternative. Torture as generally ineffective fails to avoid an inconsistency pertaining to the duress defense requirement that there be no reasonable alternative to committing the offense.

Torture being merely generally ineffective fails to resolve the inconsistency with torture victims' eligibility for a duress defense. True, it perhaps resolves the inconsistency stemming from one of the requirements. But it fails to resolve the inconsistency involving two other requirements. Depending on the jurisdiction, failure to satisfy even one of the requirements bars eligibility for the defense. Because almost every conception of the defense requires at least two of these elements, the proposed resolution fails.

B. *Torture Is Ineffective Only Under Certain Conditions*

Torture being ineffective only under certain conditions—for example, when undertaken outside an institutionalized setting or under specified time constraints—might avoid the inconsistency.[110] There are two problems with the proposed resolution. First, as with the above proposed resolution, conceding that torture is sometimes effective opens the door to the permissibility of torture. Second, the inconsistency still arises as to torture undertaken under circumstances that satisfy the specified limiting conditions. In general, if the empirical claim is that torture is ineffective only under conditions *XYZ*, then victims of torture

108. *See supra* notes 57–64 and accompanying text.
109. *See supra* notes 65–70 and accompanying text.
110. For abolitionists holding this view, see *supra* notes 11–12 and accompanying text.

under conditions *XYZ* will be ineligible for a duress defense. Limiting the empirical claim of torture's ineffectiveness to specified conditions limits the scope of, but does not resolve, the inconsistency.

C. *Torture Is Ineffective Unless Duress Defense Asserted*

Another possible resolution is that if the torture victim asserts a duress defense, then it is effective; otherwise, torture remains ineffective. The proposed resolution, however, suffers several difficulties. First, as with the above two proposals, conceding that torture is sometimes effective opens the door to torture's permissibility. Second, it is unprincipled and ad hoc.[111] There is no substantive explanation for why torture is effective when the victim asserts a duress defense and ineffective when the victim does not. Third, even with torture conceded to be effective whenever the victim asserts a duress defense, victims would still be ineligible for a duress defense because torture would still be generally ineffective. As generally ineffective, the person of reasonable or ordinary fortitude would be able to resist it.[112] Therefore, individual victims asserting the duress defense would fail to satisfy the standard requiring that the person of reasonable or ordinary fortitude be *unable* to resist the torture. Fourth, because torture would still be generally ineffective, there would be a reasonable alternative to complying with the coercer's demand—for example, disclosing false information.[113] With individual victims having a reasonable alternative, they fail to satisfy the no reasonable alternative requirement. By being inconsistent with two central elements of the duress defense, the proposed resolution fails to resolve the inconsistency.

D. *Torture Is Generally Effective*

The above three proposed resolutions to the inconsistency feature various modifications of the empirical claim. The first two are alternative formulations that some abolitionists advance. Not advanced by any abolitionist, the third perhaps captures our intuitions about what would be convenient to think about torture: it works when needed to accommodate a duress defense for torture victims and does not work when needed to ensure torture's impermissibility. While the second and third proposals limit the scope of the inconsistency, none of the three resolve entirely the inconsistency. And all three, by conceding that torture is sometimes effective, open the door to the permissibility of torture.

To resolve the inconsistency, the empirical claim would have to be even more limited: torture is merely sometimes ineffective. That is,

111. *See* Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181, 2181 n.1 (1996) (characterizing such arguments as "unprincipled lawyers' ad hocery").
112. *See supra* notes 57–64 and accompanying text.
113. *See supra* notes 65–70 and accompanying text.

torture is typically or ordinarily *effective*. Torture being typically or ordinarily effective is consistent with the three requirements of the duress defense that Part II demonstrated to be inconsistent with torture's ineffectiveness.[114] First, if torture is typically or ordinarily effective, then typical or ordinary persons yield to it and are unable to resist it. Therefore, the person of reasonable firmness and ordinary fortitude yields to it and is unable to resist it. Thus, individual torture victims asserting the duress defense satisfy the person of reasonable firmness standard. Second, if torture is typically and ordinarily effective, then typically and ordinarily victims are complying with the torture's demand. Therefore, torture victims lack a reasonable alternative to compliance and thus satisfy the no reasonable alternative requirement. Third, if torture is typically and ordinarily effective, then torture typically and ordinarily causes, coerces, or induces the victim to comply with the torturer's demand. Therefore, individual torture victims asserting a duress defense can satisfy the causation requirement.

Though resolving the inconsistency, torture being generally effective does not merely open the door to the permissibility of torture. It throws wide open the floodgates. The proposed resolution would limit the empirical claim as to defeat the very purpose of abolitionists advancing an empirical claim about torture's ineffectiveness.

E. *Modify Duress Defense*

The above four proposed resolutions feature various modifications of the empirical claim. Only one—conceding that torture is typically effective—succeeded but at a self-defeating cost that no abolitionist would eagerly pay. With modifications of the empirical claim not yielding a satisfactory resolution, perhaps rethinking the duress defense might generate a resolution.

There are as many as three central requirements of the duress defense that are inconsistent with torture's ineffectiveness.[115] One of the requirements we might easily replace. Though the person of reasonable firmness is the predominant modern standard, it is not the only standard. The older, more traditional standard or requirement for the gravity of the threat is fear of death or substantial bodily harm.[116] That latter standard is consistent with torture's ineffectiveness. Torture, whether effective or ineffective, that includes threats of death or substantial bodily harm, easily satisfies this requirement. But the other two remaining central requirements are not readily replaceable with alternate formulations. For example, the requirement that the coercion coerces, causes, or induces the defendant's compliance with the coercer's demands and

114. *See supra* Section II.B.
115. *See supra* Section II.B.
116. *See supra* notes 40, 42 and accompanying text.

non-compliance with the law's dictates seems fundamental and integral to a duress defense.[117]

Resolving the inconsistency by altering the duress defense would require eliminating all three of these central requirements. Because at least some of these requirements are fundamental to a duress defense, eliminating all three of these requirements is not a satisfactory solution. It is perhaps also impracticable. Eliminating three long-standing central requirements of a duress defense across common law, modern state statutes, federal law, and military law that would affect not just torture victims but all victims of coercion asserting a duress defense is perhaps too tall an order and too radical a change.

F. *Torture Victims Do Not Deserve Duress Defense*

The inconsistency between torture's ineffectiveness and torture victims' eligibility for a duress defense is only problematic if torture victims deserve to be eligible. The inconsistency is no longer problematic if torture victims are deemed undeserving of the duress defense. If abolitionists and the rest of us are willing to maintain that torture victims deserve to be ineligible, then that resolves the inconsistency.

Of course, maintaining that torture victims do not deserve eligibility for a duress defense is deeply counter-intuitive. As the most extreme and horrific form of coercion, we intuitively think that if *anyone* deserves a duress defense, it is torture victims. Holding torture victims criminally responsible for their conduct while, or as a result of, being tortured is to victimize them a second time. Imposing criminal punishment on torture victims might well be almost as wrong as torture itself.

Consideration of the various proposals presented in this Part yield three that resolve the inconsistency. If eliminating several central requirements of the duress defense is impracticable, the two remaining resolutions are maintaining that torture is generally effective and maintaining that torture victims are undeserving of the duress defense. Presumably neither resolution is appealing.

VI. The Dilemma: Choosing the Least Bad Option

With no satisfactory resolution through modest, surgical modifications of either the empirical claim or the duress defense, resolving the inconsistency requires confronting a dilemma with only difficult choices.[118] Maintaining that torture is ineffective to bar torture's

117. *See supra* notes 73–82 and accompanying text.

118. Though there are various conceptions, moral dilemmas are commonly understood as "situations in which an agent morally ought to (and can) take one course of action and morally ought to (and can) take another course of action, even though the agent cannot take both courses of action." Christopher W. Gowans, Innocence Lost: An Examination of Inescapable Moral Wrongdoing 4 (1994).

permissibility comes at the cost of barring a defense for torture victims. Accommodating a defense for torture victims requires conceding that torture is generally effective at the cost of opening the floodgates to torture's permissibility. We must choose between either (1) ensuring the condemnation of torture and torturers (by closing the door on torture's permissibility by maintaining that torture is ineffective) or (2) protecting torture victims from criminal punishment (by keeping the door open on torture victims' eligibility for a duress defense by conceding that torture is generally effective). Both alternatives may seem obligatory, but (because they are inconsistent) only one can be chosen. To put it another way, we must choose between either (1) closing the door on a duress defense for torture victims or (2) opening the door on the permissibility of torture. Neither alternative may seem palatable, but (to resolve the inconsistency) one must be chosen.

This Part considers three arguments that support choosing which option—between (1) and (2) above—is the least bad. First, the greater good for the many of foreclosing the permissibility of torture by claiming torture is ineffective may justify sacrificing the few torture victims who remain ineligible for the duress defense. Second, invoking the Doctrine of Double Effect may justify sacrificing torture victims' eligibility for the defense as unintentional collateral damage. Third, compromising on the empirical claim allows abolitionists to nonetheless get (almost) everything they want. The first two arguments support option (1); the third argument supports option (2). This Part concludes, however, that none of the three arguments are clearly persuasive in identifying the least bad option.

A. *The Greater Good Justifies Sacrificing Torture Victims*

Perhaps the greater good for the many of foreclosing the permissibility of torture outweighs and justifies the harm of sacrificing the few torture victims who will lack a defense for offenses they are tortured into committing. More specifically, abolitionists might argue that they need not choose between either ensuring the condemnation of torture or protecting torture victims. Instead, they can protect torture victims *by* condemning torture. Foreclosing the permissibility of torture by continuing to maintain that torture is ineffective will reduce the number of torture victims. It will do so in two ways. First, by declaring torture impermissible, moral actors will be less likely to do it. Second, by declaring torture ineffective, immoral but rational actors would lack a reason for doing it and thus will be less likely to do it. Reducing the number of torture victims is, of course, good for obvious reasons. But it is also good for a less obvious reason. The fewer the torture victims, the fewer the torture victims in need of a duress defense. And the fewer the torture victims in need of a duress defense, the fewer the torture victims who are denied the defense (because of torture's ineffectiveness). As a result, abolitionists might argue that the greater good of foreclosing the

permissibility of torture, both in general and specific ways, outweighs and justifies the harm of sacrificing torture victims' eligibility for a duress defense.

But however persuasive the above argument may be, abolitionists are foreclosed from making it. The above argument is a consequentialist/utilitarian argument that the greater good for the many outweighs and justifies the harm of sacrificing the interests of the few. If abolitionists were willing to adopt such consequentialist/utilitarian reasoning, abolitionists would cease to be abolitionists. They would instead be apologists justifying the torture of a few terrorists for the greater good of saving thousands or millions of lives from a radiological dirty bomb. Ironically, this greater good argument may well supply a persuasive reason to adopt option (1) above but is only available to those already committed to option (2). As a result, the argument fails to provide a persuasive reason for abolitionists (or the rest of us) to choose option (1).

B. *Doctrine of Double Effect*

The Doctrine of Double Effect (DDE) is sometimes invoked as a justification for causing incidental or collateral harm through otherwise permissible conduct.[119] Though controversial,[120] DDE might support choosing option (1) to the dilemma. While there are varying accounts of DDE, its basic conditions are as follows: an act that has two effects, one good and one bad, is permissible if (i) the good effect is intended, (ii) the bad effect, though foreseen, is unintended, (iii) the bad effect is not a means to attain the good, (iv) the good effect outweighs the bad, and (v) there is no alternative means of accomplishing the good effect that produces less harm.[121] Applying DDE here, one might argue

119. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II-II, q. 64, art. 7 (Fathers of the English Dominican Province trans., 1947) (1485).

120. For critical attacks on the doctrine, see PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 21 (1978); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFFS. 283, 292–96 (1991).

121. *See, e.g.*, SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 109 (1996) ("[A]n action is permissible if (i) the action is not wrong in itself, (ii) the bad consequence is not that which is intended, (iii) the good is not itself a result of the bad consequence, and (iv) the two consequences are commensurate."); Philip E. Devine, *Principle of Double Effect*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 737, 738 (Robert Audi ed., 2d ed. 1999) ("[O]ne may produce a forbidden effect, provided (1) one's action also had a good effect, (2) one did not seek the bad effect as an end or as a means, (3) one did not produce the good effect through the bad effect, and (4) the good effect was important to outweigh the bad one."); *cf.* Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFFS. 334, 334 n.3 (1989) (excluding the fourth condition in the above two accounts). The fifth condition is "commonly include[d]." JULIAN BAGGINI & PETER S. FOSL, THE ETHICS TOOLKIT: A COMPENDIUM OF ETHICAL CONCEPTS AND METHODS 133 (2007) ("There must be no better alternative means for accomplishing the good. Other means of bringing about the good consequence, if there are any, must cause the same or worse harm."); *see also* MICHAEL WALZER, JUST AND UNJUST WARS 155 (3d ed. 2000) (requiring that "the foreseeable evil be reduced as far as possible").

that maintaining that torture is ineffective has two effects. The intended good effect is torture's impermissibility. The foreseen (at least by virtue of this Article) but unintended bad effect is foreclosing torture victims from a deserved duress defense. That bad effect is not a means by which to attain the good. The good effect of torture's impermissibility outweighs the bad effect of foreclosing a deserved defense for torture victims. And no alternative means to attaining torture's impermissibility causes less harm.

DDE fails to provide a persuasive approach to the dilemma for two reasons. First, the fifth condition is not satisfied; there is an alternative means of accomplishing the good that causes less harm. Torture's ineffectiveness is not a necessary condition for torture's impermissibility. The moral argument that torture is impermissible (uncoupled from the empirical claim of torture's ineffectiveness) is an alternative means that does not cause the harm of barring torture victims' eligibility for a duress defense. Second, it is not entirely clear that maintaining torture's ineffectiveness has a good effect. The claimed good effect is torture's impermissibility. But that would be viewed by consequentialists, at least torture apologists, as a very bad consequence. They would view it as very bad because it might prevent saving thousands or millions of lives from a terrorist radiological bomb—lives that could have been saved if torture was permissible. Because the conditions for satisfying DDE are inapplicable, DDE is not a persuasive basis for abolitionists to choose option (1) to the dilemma.

C. *A Productive Compromise?*

Let us assume that torture abolitionists and apologists (and the rest of us) all want torture victims to be eligible for a duress defense. Thus, abolitionists want two things: torture's impermissibility and torture victims' eligibility for a duress defense. The only stance on torture's efficacy that allows abolitionists to get both things they want is for torture to be only sometimes ineffective. Again, torture being only sometimes ineffective in no way precludes torture from being entirely impermissible. Abolitionists will merely have to rely on the same method that apologists use to make their case for torture being possibly sometimes permissible: through moral argument. Because conceding that torture is only sometimes ineffective is the only way for abolitionists to get both things they want, abolitionists should arguably compromise by conceding that torture is only sometimes ineffective. As a result, abolitionists should choose option (2) above.

Abolitionists, however, might remain unpersuaded. Though they want both torture's impermissibility and torture victims' eligibility for a duress defense, they might well value one significantly more than the other. They might well value the former so much more than the latter that they are willing to forego the latter to ensure the former. Though it bars torture victims' eligibility for a duress defense, torture's

ineffectiveness ensures torture's impermissibility. Thus, abolitionists still might prefer option (1) above.

V. Conclusion

Torture abolitionists and apologists disagree both about whether information torture is morally permissible and whether it empirically works. But many agree that such torture's effectiveness is a necessary condition for its permissibility, and torture's ineffectiveness is a sufficient condition for its impermissibility. Thus, the empirical issue has become critical in determining the moral issue. Overlooked by both abolitionists and apologists, however, is that an unintended consequence of abolitionists maintaining torture's ineffectiveness (thereby ensuring torture's impermissibility) is exposing torture victims to criminal liability for offenses they are tortured into committing. With torture as a form of coercion, ineffective torture is ineffective coercion. Because ineffective coercion fails to sufficiently coerce to support a duress defense, ineffective torture also fails to sufficiently coerce, and its victims thereby fail to satisfy a duress defense. Torture's ineffectiveness is inconsistent with, and prevents torture victims from satisfying, as many as three central requirements of the defense. Torture's ineffectiveness forecloses torture victims from satisfying the requirements of a duress defense under common law formulations, modern state codifications, the MPC, federal law, and military law. The inconsistency between torture's ineffectiveness and torture victims' eligibility for the duress defense entails that both cannot be true. At least one of the two is false.

Lacking a clearly satisfactory resolution to the inconsistency, we confront a dilemma. We must choose between either closing the door on the permissibility of torture (by maintaining torture's ineffectiveness) or opening the door to torture victims' eligibility for a duress defense (by conceding torture's general effectiveness). Both alternatives may seem obligatory, but (because they are inconsistent) only one can be chosen. To put it another way, we must choose between either closing the door on torture victims' eligibility for the duress defense or opening the door on the permissibility of torture. Neither alternative may seem palatable, but (to resolve the inconsistency) one must be chosen. Until resolved, the inconsistency between torture's ineffectiveness and torture victims' eligibility for the duress defense makes each one suspect.