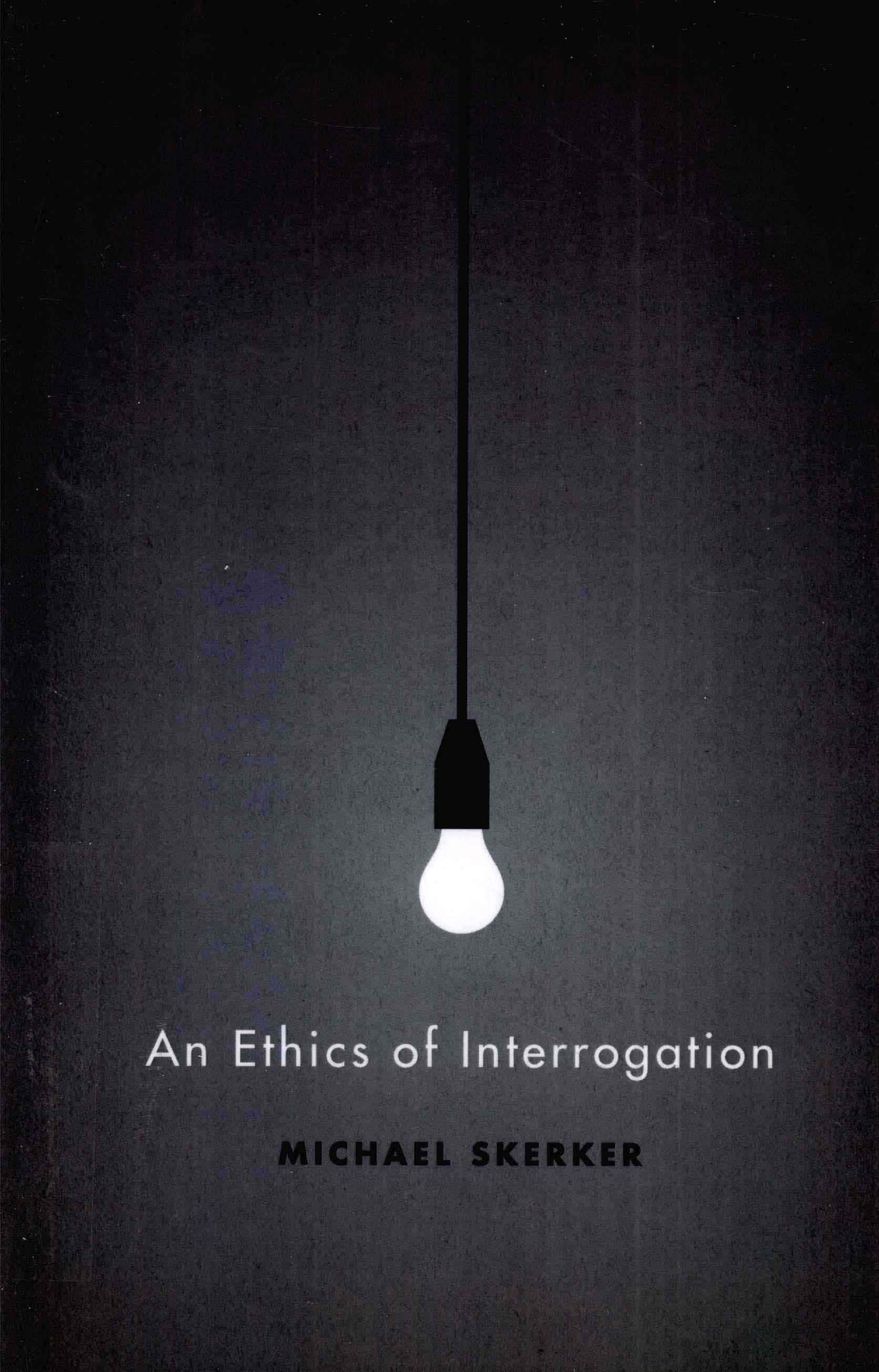
An Ethics of Interrogation
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Introduction

The public conversation about interrogation in America has been guided by pictures and letters. The Abu Ghraib photographs leaked in the spring of 2003 were horrifying both for what they revealed and what they concealed. Given the nature of what the photographs documented, one had to wonder what happened off camera and at other installations. Perhaps some were comforted by the Bush administration's assurances that the abuse of detainees at Abu Ghraib was isolated, the result of a few "bad apples," even if a steady stream of rumors and leaks suggested a vast enterprise of secret detention and harsh interrogation of terror suspects. We read of "ghost detainees" shuttled between secret prisons or delivered to dubious locales for clandestine interrogation. Novel ways of prosecuting terrorists were proposed, some believed, in order to allow testimony garnered through torture. Activists feared what treatment accompanied the incommunicado detention of terror suspects in the black hole of Guantanamo.

Revelations continue: As this book goes to press, four newly declassified memos from the Department of Justice to the CIA's Office of Legal Counsel confirm many of the darkest rumors. With exacting precision, the authors parse the international accords against torture to conclude that keeping an al-Qaeda agent awake for eleven days straight or suffocating him with a wet cloth does not meet the legal definition of torture since the techniques do not cause "pain" in the sense of blunt force or burns. The former vice president and CIA director publicly argue that such techniques were vital to gaining actionable intelligence from terrorists. CIA and FBI agents involved in the interrogations weigh in with their accounts of what happened, and a commission reporting to the new president will soon issue a report assessing the efficacy of harsh interrogations.

"Interrogation" has become part of the American vernacular, with a frequency of mention probably outstripping most people's understanding of the practice. Yet the presumption behind the practice surely deserves scrutiny: that there are times when a state is entitled to know the thoughts of one of its inhabitants (or even a foreign national), such that it can demand and compel their revelation. The idea that one person can have a claim to another person's secrets flies in the face of common morality and logic, and the practice of eliciting a person's secrets against his will seems a holdover from the Middle Ages, like alchemy or sorcery. While there have been some collections published recently addressing torture (which is involved in but one type of interrogation), there are no extant works addressing the range of moral issues related to interrogation per se. Disparate scholarly articles about the right to privacy, the Fifth Amendment, police-procured false confessions, military commissions, and detainee rights address some of the relevant moral and legal issues, but this literature often feels incomplete. If police or military interrogation tactics are condemned, alternatives are rarely proposed; if harsh interrogation tactics are promoted for use on terrorists, questions about the effects of such practices on interrogators and the government authorizing them are begged, along with the question of what to do with detainees following their torture. Appeals for greater latitude for law enforcement and national security actors typically abstract from the real limitations of state agents' knowledge and wrongly assume all suspects are guilty. Jurisprudential claims about the privilege against compelled self-incrimination or the right to silence are given scant philosophical justification, and philosophers, game to address the right to privacy, are largely silent on the subject of the privilege against compelled self-incrimination. This book means to address all the issues relevant to interrogation with an argument about the use of state power at home and abroad that is expansive enough to field broad conceptual questions and generate specific policy recommendations. It adopts an interdisciplinary approach for an interdisciplinary subject, encompassing moral and political philosophy, jurisprudence, and just war theory.

One of the two questions at the heart of this book was mentioned above. Under what circumstances is a state entitled to know a person's thoughts? If the first question can be satisfactorily answered, it prompts a second question regarding moral practice. How *can* information be procured from a person against his will in a morally upright manner? Full answers to these questions cannot be given in the language of professional ethics alone—in the sort of admonitions one might find in the appendix to an interrogators' handbook—since answers to these questions presuppose answers to

broader questions in moral theory, political theory, and international relations. What sort of deference does one owe to another's privacy, and why? Why is keeping secrets morally important? What good might it do to say harboring *criminal* secrets is illicit if such activity is normally undetectable by others? Given some standard for acting when motivated by suspicion alone, may police compel criminals to incriminate themselves, or is this inherently perverse, like forcing someone to commit suicide? If domestic criminal suspects are due a given set of rights, what do authorities owe foreign nationals? Do terrorists get the same POW rights as captured conventional combatants? In short, interrogation ethics is more than an answer to the question "to waterboard or not to waterboard?"

This book has a particular applied focus but also contributes to current academic debates about self-defense, political obligation, political consent, the Fifth Amendment, military commissions, and the rights of "unlawful enemy combatants." It should therefore be of interest to academics and professionals in the fields of law, philosophy, criminal justice, and national security. Since readers outside of academia may not share professional philosophers' interest in some of the details of moral and political theory, I will indicate later which sections devoted to these matters may be skipped in favor of more concrete discussions of criminal justice and national security matters.

Part 1 of this book discusses interrogation in the context of domestic law enforcement, and part 2, interrogation in the context of military and intelligence operations. This division is indicated by the different issues in play when a state interacts with its own inhabitants as opposed to foreign nationals. The two parts are distinct but interconnected. While questions regarding conventional foreign combatants can readily be addressed with concepts from the just war tradition, the general theory of just coercion and the justification for the coercive behavior of state agents developed in part 1 are necessary to resolve questions in part 2 regarding the rights of nonstate actors like guerillas and terrorists who are not automatically covered by the prerogatives of state agents. The general theory of just coercion is also used to assess the permissibility of interrogatory torture in chapter 8 since just war theory's justifications for violence against active combatants is not relevant to detained and disarmed interrogatees.

Chapter 1 develops a general theory of just coercion (i.e., permitting one to compel someone to do something), expanding extant theories of self-defense to cover responses to rights violations other than assault. This chapter creates the groundwork for the justification of interrogators' efforts to learn of criminals' plots both in domestic law enforcement and irregular warfare

contexts. Chapter 2 develops grounds for just political action in defense of inhabitants' lives and rights, linking a liberal state's police powers with the conditions for inhabitants' freedom. I argue that politically legitimate coercive actions (i.e., those compelling inhabitants to act or refrain from acting) are those that inhabitants cannot rationally reject, given that these actions are necessary for the protection of their lives and rights. This standard of political legitimacy entails that police actions materially infringing on inhabitants' freedom (e.g., questioning, arrest, interrogation, etc.) do not *violate* inhabitants' rights provided these actions are proportionate to a reasonable suspicion that the people affected are involved in criminal activity or have knowledge of criminal activity.

Chapter 3 explains the relationship between moral autonomy and rights to privacy and silence. It argues that criminal plotting is impermissible in the sense that acquiring contraband is impermissible and explains how an abuse of the rights to privacy and silence voids the right to keep certain secrets from others. The chapter also discusses how abuses of these rights are not as easily remedied by outsiders as are other types of misbehavior, because plotting is usually not as publicly obvious as is something like assault. In fact, the subjective and contextual nature of suspicion, coupled with the ordinary deference a liberal state affords its inhabitants, ground a series of rights for criminal suspects, including the right to silence during police interrogation.

Chapter 4 suggests that the constitutionally protected—but much maligned—privilege against compelled self-incrimination can be understood as integrating the state's necessarily rights-infringing investigative actions with the baseline deference it must show inhabitants before it has proven they are criminals. Critiques of the privilege can be met if it is conceived as based on a robust right to silence instead of as the basis for a more or less nominal right to silence in police custody, as is usually the case. Recognizing a suspect's right to silence in police interrogation expresses the deference a liberal state properly pays to an inhabitant it suspects of criminality: since the state does not have cause to *know* he is guilty, it cannot treat him as one who has voided his right to silence through criminal plotting or criminal activity. The chapter also develops a substantive standard for assessing police investigative behavior preferable to the relatively vague legal standard of "due process."

Chapter 5 describes contemporary American police interrogation techniques and finds certain deceptive techniques to be reasonably reliable, efficacious, and indispensable. These techniques are then assessed by the standard of police ethics developed over the previous chapters. I consider the

possible negative side effects of police deception, including false confessions, police corruption, and soured police-community relations to see if they should lead us to reject otherwise permissible interrogation techniques.

Part 2 addresses interrogation in an international context where military or intelligence officers might interrogate conventional prisoners of war or irregular fighters who do not meet the conventional criteria for POW status, including some guerillas and terrorists. Chapter 6 introduces the Western just war tradition, the moral foundation for the arguments to follow. Different possible moral justifications for POWs' legal immunity and nonpunitive detention are assessed in order to determine if combatants' roles as state agents, "warrior's honor," or the self-interest of the detaining power is the salient justification to use in extending or denying POW status to various irregulars. The chapter categorizes different types of irregulars based on their relationship to a state, nascent state, or recently occupied state and concludes that since "unprivileged irregulars"—militants who fail to achieve POW status—have essentially criminal profiles to the detaining power, they may be tried in criminal court or in a court martial for war crimes.

Chapter 7 describes contemporary American military interrogation techniques and assesses them in reference to the rights of POWs as well as the rights of both suspected and positively identified unprivileged irregulars. I argue that there is no cause for creating a third interrogation style meant for unprivileged irregulars, apart from law enforcement-style interrogation (with standard due process protections) and POW-style interrogation (lacking these protections but also assuming legal immunity), because there are no efficacious techniques in principle permissible only for unprivileged irregulars that are not also practically counterproductive for the detaining power. I consider three different possibilities for postinterrogation treatment of unprivileged irregulars and conclude that the lack of due process protections in POW-style interrogation makes information extracted there unsuitable for use as evidence in either civilian or military trials. Tailoring the mode of unprivileged irregulars' detention to the interrogation needs of the detaining power entails foregoing prosecution and holding irregulars as de facto POWs (despite their failure to formally meet the criteria for POW status) until the end of hostilities.

Chapter 8 addresses arguments made about interrogatory torture, or coercive interrogation, as it is sometimes called. After giving a brief history of interrogatory torture in the West, the chapter discusses torture's dubious efficacy and systemic corrupting effects on both the personnel employing it and the government authorizing it. Torture is impermissible according to the model of just coercion defended in this book; I argue abandoning these

moral limits has grotesque implications even proponents of coercive interrogation would likely abjure.

Method

The early chapters of this book assume conceptions of human beings and human rights that gained currency in the Enlightenment and have been passed down in concrete form by common law. I will not call these often-invoked rights into question or attempt to ground them in an all-encompassing philosophical system. Rather, my approach is hypothetical: *if* we are going to conceive of people as autonomous and equally provisioned with certain rights, then we must accept certain entailments regarding these rights by force of logic. With respect to certain contested rights, like the privilege against compelled self-incrimination and the right to silence, I will argue that my construal of such rights complements other, uncontroversial rights; meets standard critiques; provides a basis for answering practical questions about policing; and does so better than the alternatives available in the literature.

This book's contingent starting point with a particular conception of autonomy and an associated regime of rights means I will be operating in a deontological idiom when assessing questions of morality and taking deontology's salience to these questions as a given. In addition to recognizing certain entailments of autonomy on the moral level, I will assume that we should accept other entailments with respect to the political protection of moral autonomy if we wish to avoid certain political effects now typically condemned in the West. I take an aversion to these illiberal political effects as a second given.[1] Similarly, the second part of the book will take the well-established Western just war tradition as a given foundation for assessing combatant rights in an international context.

Finally, I know that no basic concept used here—rights, reason, autonomy, person, etc.—is uncontroversial, unproblematized, not already declared dead by some, and resurrected by others. By working with fairly classic moral terminology, and refraining from grounding my applied work on ideas unique to a more specialized modern wing of moral or political theory, my hope is to get a conversation about interrogation ethics *started*—and with an many interlocutors as possible.

PART ONE

Interrogation in Domestic Law Enforcement

ONE

Autonomy, Rights, and Coercion

The detectives lied to Eugene Livingston:

> Okay, as Sgt. Becker said Eugene, we have talked to a lot of people in this case. We've talked to you a couple of times, and every time we've talked to you, I think we were pretty, pretty honest with you. We were telling you what we were hearing, and we asked you a couple times to tell us what you know about this case. Now Mr. Young, as Sgt. Becker said, has uh given us a complete statement. He told us exactly what happened, what his role in the robbery was, and what everybody's role in the robbery was. He implicated you also in the robbery. He's identified you as being a participant. Now everybody who tells us things, at times may see things different, or may not be completely truthful. That's why we wanta come to you now and get your part of exactly what happened, and your participation in the robbery. In other words, we got a folder, about four or five folders thick of what the people are saying about Eugene Livingston. We have nothing on what Eugene Livingston had to say about this incident, and the best thing we can do now Eugene is be completely truthful, because it's over with.[1]

In fact, Young had not implicated Livingston in the robbery. The detectives, from the Vallejo, California, police department, made that up out of whole cloth. Yet the police were not necessarily acting unprofessionally; the most commonly used American police interrogation manual sometimes instructs interrogators to lie to suspects or engage in other deceptive ploys to trick them into confessing.[2] These techniques have even been condoned by the U.S. Supreme Court.

The above monologue may seem familiar to fans of police dramas. Yet consider the monologue and its context anew: is it not strange that in a liberal

democracy—where the government ostensibly serves the people—police may break down a man's door, drag him to a station house, then hold him against his will, in order to tell him lies and insult him? For that matter, as was asked in the introduction, is not the notion of interrogation itself strange? The underlying presumption that one man can have a claim to another man's secrets flies in the face of common morality and logic, and the practice of eliciting a person's secrets against his will seems like an exercise from a cruder age.

We need a framework for understanding what police are allowed to do generally in order to assess what it is morally acceptable for police to do in interrogation—a framework of police ethics. For that, we need two types of intellectual building blocks: first, a general account of just coercion identifying when it is acceptable for a person to force another person to do something against his or her will and, second, political theory, some account of what states may do to their inhabitants, including sometimes forcing them to do things against their wishes.

Political theory will be addressed in chapter 2. This chapter will address just coercion on a basic level apart from policing contexts in order to isolate the foundational issues involved in police interrogation. The various elements of this account of just coercion will later be used to resolve particular questions regarding police and military ethics. This chapter will extend theories of self-defense from traditional contexts of assault to broader contexts involving other types of rights violations. I will first outline in fairly general terms the conception of rights to be used in this project and then articulate the grounds for just coercion. This account of just coercion will strike a balance between an approach concerned with the defender's rights alone and an approach concerned solely with an objective consideration of the defensive action's consequences. The account will also address the rights of the offender and determine the status of third parties witnessing rights violations.

Some caveats about the scope and method of chapters 1 and 2: the discussion of rights and political obligation in these chapters are developed to the level of complexity I think necessary to adequately address the moral and political issues related to interrogation. Extended defenses of the foundational positions will be omitted in favor of more extended treatment of applied matters in the rest of Part 1. I have also tried to strike a balance in prose style in these foundational chapters between the precision expected by specialists and the nontechnical language desired by nonspecialists. The first two chapters are the most technical and abstract, dealing with fundamental questions in moral and political philosophy. A book's chapters are

meant to be read in order, but readers who are more interested in the concrete application of moral theory in policing and war fighting contexts than in broader philosophical questions of rights, autonomy, and state power may wish to skip ahead now to chapter 3.

The "rule deontological" framework I will be using in this book draws from the common stock of ideas endorsed by the medieval theologian St. Thomas Aquinas and the Enlightenment philosophers Thomas Hobbes, John Locke, Jean-Jacques Rousseau, and Immanuel Kant.[3] The framework belongs to a family of moral systems that judges actions based on their conformity to universally binding rules (rules that may be geared toward the protection of people's rights) rather than based on the actions' consequences. The exposition concerning coercion below owes most in its idiom to Kant, and focuses in places on specific arguments Kant made, but it might have couched in the vocabulary of one of the other thinkers or of various modern authors.[4] The conclusions I reach about police powers and interrogation could have likely been reached with different starting points, but I prefer Kant's idiom because of its precision and his general approach because it marries well with the diverse approaches to interrogation in the philosophical and legal literature.

Rights and Coercion

A central moral claim made by deontological thinkers is that human beings are autonomous, meaning there are core areas of thought and action individuals should govern for themselves, all other things being equal. The deeds or titles to self-governance with respect to these areas of thought and action are *rights*. These titles grant their owners the liberty to think or act as they choose in these areas without uninvited interference from others. On the *moral* understanding of autonomy to be employed in this chapter, *moral rights* are understood to be a natural part of human beings, rather than conventionally recognized or bestowed on them by some entity like a state. All human beings have these rights, regardless of their citizenship, gender, religion, class, or profession. *Moral rights* are fostered by persons' reciprocal recognition of these rights on the parts of others. *Political rights* (to be discussed in chapter 3) are rights conventionally recognized by a state in self-limitation of its own power as well as by its promise to limit the power of inhabitants with respect to one another. In many cases, political rights overlap with moral ones.

This chapter will address what is owed persons as persons, based on the concepts of moral autonomy and rights, abstracted from any particular

empirical (i.e., concrete, real-world) setting. In most empirical settings, in the context of a state, moral rights are relevant to private citizens' interpersonal behavior. No moral right is absolute in a system where all have equal rights; instead, every person's moral rights are dependent on and limited to the reciprocal recognition of the same rights, and same scope of rights exercise, for others.[5] This requires further explanation. If one has a moral right in a particular area, then it is an area properly self-governed instead of governed by others. For example, if we say that the right to own private property entails the right to own a car, that right might protect the following choices: whether or not to buy a car; what type of car to buy; and when and where to drive it. Just the same, one may not drive one's car anywhere or in any manner one wishes. The only coherent and stable picture of a society of independently self-directing agents is one in which all issue similar self-directions, at least on major issues where agents' behavior might come into conflict. For example, the only safe way for independently controlled automobiles to simultaneously travel in the same lane in close proximity to one another is if they all travel in the same direction and at roughly the same speed. Each driver is free to choose whether or not to drive, what to drive, and where to go but must follow certain rules enabling all other car owners to enjoy the same scope of freedom. Such behavior allows for all to get to where they want to go: provided they observe the same traffic rules, Smith's success at reaching his destination does not prevent Jones from reaching hers. The will to perform morally permissible actions (like "driving in accordance with traffic rules") can be universalized, meaning driving to a destination is still possible even if everyone desires to do the same—the idea of driving to a destination has not been rendered absurd by everyone in principle wishing to drive.[6]

Morally upright people, who will be defined here as people who respect other's rights, must in turn be treated deferentially by others, afforded the space to make their own decisions, and ford their way through the world. They can be trusted with this freedom because they are only going to embark on actions consistent with respect for others' rights. This respectful behavior does nothing to reduce others' opportunities to achieve their legitimate aims. Again, Smith's successful car trip does not prevent Jones from reaching her destination as well.

By contrast, Smith's fellow highway travelers *would* have cause to object if he broke the rules that accommodate everyone's freedom and, for example, drove south in a northbound lane. Generally then, one's rights are bounded where universal accord would break down—for those actions where all could not logically consent to one's actions, because such actions