

Extremely Harsh Treatment

Stephen Kershnar
State University of New York, Fredonia

1. Introduction

I shall use the following stipulative definition: One person harshly treats another if and only if the first intentionally imposes great suffering in a short amount of time on the second. Here are some examples: drilling in an unanesthetized tooth, branding with a hot iron, violent shaking, repeated beatings, car-battery shocks to the genitalia, rape by dogs, anal penetration by toilet plungers, jaw breaking by expanding mechanical instrument, sleep deprivation, sensory isolation, or the imposition of the feeling of drowning. Such treatment is more extreme than that ordinarily accompanying hazing and military basic training, although this is not necessarily the case.

This stipulative definition does not always track ordinary usage. For example, we might say that “Paul Hayes was treated harshly when he received a life sentence for a minor forgery (his third felony conviction),” and this sentence does not necessarily involve intense suffering. Some alleged counterexamples involve a misunderstanding of the definition. It might be claimed that decades ago when unanesthetized teeth were drilled for dental purposes, the treatment involved intense suffering but was not harsh treatment. However, this does not involve intense suffering being intentionally imposed.

Interrogational harsh treatment is harsh treatment that is done to gain information, usually from the person who is harshly treated. Punitive harsh treatment is harsh treatment that is done to punish someone, again usually the person who is harshly treated. Persons who are harshly treated can validly consent to such treatment and it can be imposed on someone who is not defenseless. On some accounts, although not ones with which I agree, these features distinguish it from torture.

Extremely harsh treatment is often considered unjust. On different accounts, extremely harsh treatment fails to respect persons because it infringes on an absolute right, fails to respect a person’s dignity, constitutes cruel or inhumane treatment, violates rules that rational persons would choose under fair and equal choosing conditions, or results in a person losing his agency to another.¹ Others respond that in some cases extremely harsh

¹ The notion that torture violates an absolute right can be seen in Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice Hall, 1973), pp. 87-88. The notion that torture doesn’t respect persons as morally autonomous agents can be seen in David

treatment is just because some individuals forfeit their moral rights against extremely harsh treatment or because it is the fair way to distribute a danger that was created by the person to be so treated.²

There might be disagreement about whether the above objections to extremely harsh treatment posit that it is a type of injustice. If injustice is understood to mean violating respect owed to persons, harsh treatment is a type of injustice. If injustice is viewed more narrowly, then my interest in this article is on, and only on, objections that are injustice-based.

In this paper, I develop an argument that is designed to sidestep these criticisms. That is, I develop an argument that almost every justice theorist can accept and that shows that in some cases justice not only permits extremely harsh treatment, but also requires it. More specifically, I argue for the following.

- (1) *Permission Thesis*: In some cases, justice permits extremely harsh treatment.

Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33 (2005), pp. 1-33; Jeffrie Murphy, "Cruel and Unusual Punishments," in Jeffrie Murphy, *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel Publishing Company, 1979). The notion that some punishments such as torture are cruel and inhumane can be seen in Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman, and Degrading Treatment," *International Journal of Applied Philosophy* 19 (2005), pp. 161-78; Michael Davis, *Justice in the Shadow of Death* (Lanham, MD: Rowman & Littlefield, 1996), chaps. 2-3; Jeffrey Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14 (1985), pp. 115-48; Hugo Adam Bedau, *Death Is Different* (Boston, MA: Northeastern University Press, 1987), chap. 4. Davis explains that an inhumane punishment is shocking, and a shocking punishment is one that treats the criminal as less than a person or that can't be universalized; see Davis, *Justice in the Shadow of Death*, pp. 36-38. See his similar analysis of the wrongness of torture in Michael Davis, "The Moral Justifiability of Torture and Other Cruel, Inhuman, and Degrading Treatment," esp. pp. 167-70. Bedau fills out this notion in terms of the duty to respect a person's social, rational, and autonomous nature; see Bedau, *Death Is Different*, p. 127. The notion that torture is wrong because it involves a person's body being subject to the will in another, that is, he effectively loses his agency, can be seen in Sussman, "What's Wrong with Torture?" pp. 1-33. In the context of warfare, Henry Shue argues that torture is wrong insofar as it involves an attack on the defenseless; see Henry Shue, "Torture," *Philosophy & Public Affairs* 9 (1978), pp. 124-43.

² The former view can be seen in Stephen Kershnar, "For Interrogational Torture," *International Journal of Applied Philosophy* 19 (2005), pp. 223-41; Stephen Kershnar, "Respect for Persons and the Harsh Treatment of Criminals," *International Journal of Applied Philosophy* 18 (2004), pp. 107-108; Stephen Kershnar, *Desert, Retribution, and Torture* (Lanham, MD: University Press of America, 2001), chap. 8. The latter view can be seen in Michael Moore, "Torture and the Balance of Evils," in Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), pp. 726-36.

- (2) *Requirement Thesis*: In some cases, justice requires extremely harsh treatment.

I conclude by bracketing issues of whether consequentialist reasons support extremely harsh treatment and whether these reasons are relevant to state and private action. Thus, this article does not address the all-things-considered moral status of extremely harsh treatment.

2. The Argument for the Permission Thesis

a. *Relevant principles*

I begin by setting out a few principles of justice that almost all of the above theorists could accept and then show that they support both the *Permission Thesis* and the *Requirement Thesis*. These principles are closely related to Robert Nozick's argument for libertarianism in *Anarchy, State, and Utopia*, but are changed so as to avoid some of the objections to his account and to libertarianism in general.³ One principle is the following:

- (3) *Justice as Just Steps*: If individuals begin at one just state and proceed via just steps to a second state, then the second state is just.

"State" is short for "state of affairs." By a "just state," I mean "states in which no one's moral rights are infringed."⁴ A step is an act or a conjunction of acts.

The idea behind (3) follows from the notion of justice. If justice consists of individuals not infringing on moral rights, then if we start with a rights-respecting state and proceed via changes in the moral landscape none of which infringe on someone's right, then we end up with a rights-respecting outcome, that is, a just state. Note that my account is independent of the issue of what grounds moral rights.

³ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 160-64. My account is designed to be independent of how people acquire moral rights, whether they are absolute, and whether they are undermined by the history of injustice that characterizes the current distribution of wealth and resources. The first issue can be seen in Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), chaps. 5-8; Thomas Nagel, "Libertarianism without Foundations," *The Yale Law Journal* 85 (1975), pp. 136-49; and the third in David Lyons, "The New Indian Claims and Original Rights to Land," in *Reading Nozick: Essays on Anarchy, State, and Utopia*, ed. Jeffrey Paul (Totowa, NJ: Rowman & Littlefield, 1981), pp. 355-79. It is also designed to be independent of whether exploitation is an independent, deontological type of wrongfulness. For an argument that it is, see Alan Wertheimer, *Exploitation* (Princeton, NJ: Princeton University Press, 1996).

⁴ An objector might assert that justice is a property of acts, not states. In that case, a state might include a number of acts, and the state is just if the acts contained within it are just.

Given that this account of justice depends on the notion of a just step, we need an account of it:

- (4) *Just Steps as Commitment*: If two persons commit to a proposal in a correct way, then the step from pre- to post-proposal situation is just.

A commitment is a promise, consent, or other act that would change the moral rights of two or more individuals were it done in a correct way (that is, in a valid way). In filling out the notion of a valid commitment, the idea is that a commitment is morally binding when the parties give their voluntary and informed consent to it.

Consider some sufficient conditions for when a commitment to a proposal is valid. Such a commitment is valid if the parties are morally responsible agents, have sufficient knowledge, the commitment is executed and mutually beneficial, and does not reflect coercion or coercive pressure. Even more specifically, it is valid if the parties are (a) morally responsible agents, (b) sufficiently informed about the pre- and post-proposal facts, (c) prefer the post- to pre-proposal situation, and (d) execute their commitment, and (e) the post-proposal situation is mutually beneficial, (f) does not reflect coercive pressure, and (g) is not exploitative. These conditions are probably not all necessary. For example, some theorists reject the notion that commitments must be mutually beneficial.⁵

Note that “justice” is used in the specification of a sufficient condition for a valid commitment. This does not make my analysis circular, because I am not defining or analyzing “valid commitment,” but rather setting out one set of sufficient conditions for it. If “valid commitment” means “voluntary and informed consent or promise,” then this might be a sufficient condition for a just change, but not a circular condition. This assumes that ‘voluntary’ is not defined or analyzed in terms of justice. This might be the case if it is analyzed in terms of the lack of psychological pressure or, perhaps, the absence of coercion analyzed in value-free terms. If ‘voluntary’ is defined or analyzed in terms of justice, then the account is circular and the phrase “valid commitment” is misleading. My argument would then have to set out a notion of endorsement that is sufficient for justice (perhaps [a] through [g]) and then claim that some people endorse their receiving harsh treatment.

An objector, such as G. A. Cohen, might argue that an informed-and-voluntary exchange that moves people from a just state to a second state does not guarantee that the second is just or free.⁶ Cohen argues against Nozick’s

⁵ For example, Charles Fried thinks that unilateral promises are morally binding regardless of whether they are beneficial to the promisor; see Charles Fried, *Contract as Promise* (Cambridge, MA: Harvard University Press, 1981), chaps. 1-3.

⁶ See G. A. Cohen, “Robert Nozick and Wilt Chamberlain: How Patterns Preserve Liberty,” *Erkenntnis* 11 (1977), pp. 5-23.

claims that (1) whatever arises from a just state by just steps is just and (2) fully voluntary transactions are just steps.⁷ Cohen argues that such steps are not just unless one assumes that justice is not a matter of satisfying a patterned or end-state principle, which begs the question in favor of Nozick's principles. Cohen further argues that because interferences, whether the result of non-human events or voluntary exchanges, can cause equal coercive pressure on a person, such an informed-and-voluntary exchange is not sufficient for liberty. Consider, for example, when a wealthy landowner buys all of the property around a laborer's property and builds an insurmountable fence around it. This can cause as much interference or coercive pressure as would a landslide that had a similar effect. Hence, Cohen concludes, informed-and-voluntary exchanges are not obviously sufficient for justice or liberty. His argument also applies to an informed-and-voluntary promise or consent.

Cohen's argument fails if there are other reasons to reject the patterned and end-state principles. One reason is if something like the following picture is true. Justice is thought to capture the respect that is owed people in virtue of their being autonomous. This respect is filled out in terms of rights.⁸ Because these rights are justified by autonomy and because autonomy is best protected by a perimeter within which persons have complete control over their bodies and goods, autonomy justifies full capitalist rights. This can occur if people can acquire full capitalist rights in unowned goods, which then allows them voluntarily to transfer them.

Critics have attacked this picture for a number of reasons. Some critics claim that the Kantian side-constraints on which the picture rests do not exist or are not as stringent as the picture requires. Other critics argue that there is no plausible theory of how unowned goods become owned (or owned through unilateral action). Still other critics argue that even if these problems can be overcome, given that most property comes from a history of violence and injustice, such a picture is irrelevant to the actual world. A number of critics argue that this picture leaves out important moral considerations such as desert, community, and the way in which different moral principles should govern different types of goods. Responding to all of these criticisms is a book-length project. Let me concede that if any of these objections to the above picture holds, my argument is endangered.

Here is a claim about valid commitment and an example of it:

⁷ See Nozick, *Anarchy, State, and Utopia*, p. 151.

⁸ These rights are to be understood in terms of the moral analogue to Hohfeldian claims and, perhaps, powers; see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, ed. Walter Wheeler Cook (New Haven, CT: Yale University Press, 1919), pp. 35-64.

- (5) *Valid-Commitment Claim*: In some cases, persons validly commit to extremely harsh treatment.

The cases in which persons might validly commit to extremely harsh treatment are cases in which they face a proposal in which extremely harsh treatment is the better of the two outcomes. Let us call such cases *Extremely-Harsh-Treatment-Commitment Cases*. Here is one such case:

Rapist: A fraternity brother, Stan, brutally rapes a drunken freshman, Sarah. Their families later discover that as young men, their fathers were friends, having served together in World War II. Given the nature of the rape, Stan is sentenced to six years in prison. All of the relevant parties—including Sarah, her family, Stan, his family, and the surrounding community—prefer to see Stan harshly treated for a short amount of time and then released. Sarah and her family want to see Stan understand the same terror and helplessness she felt because it will in some way recognize her suffering and vindicate her anger. She also doesn't think there is much to be gained by Stan's being incarcerated through much of his twenties. Stan and his family also prefer that he be harshly treated since it will allow him to move on with his life and demonstrate his repentance. The community and state government also prefer it since it promises significant cost savings.

In this case, there is nothing in principle that prevents the parties from validly committing to extremely harsh treatment. More specifically, Sarah, Stan, and the state satisfy (a) through (g). This type of case is easily generated since we simply imagine cases where a person or the state has a right to implement a just punishment or other greatly disvalued state and the person facing this outcome (roughly) gives free and informed consent to substitute extremely harsh treatment for incarceration.

An objector might claim that Sarah is likely to be so depressed or upset that she is not morally responsible for her consent to permit the substitution of extremely harsh treatment. That is, Sarah doesn't satisfy (a) through (g). It's not clear that this would be true of all rape victims. Even if it is true of all rape victims, one can imagine that her guardian might think the agreement satisfies her preferences and is in her interest. This is analogous to the way in which her guardian might grant permission for her to participate in the police investigation or to undergo surgery unrelated to the attack. With these principles in mind, we now turn to the argument for the *Permission Thesis*.

b. Argument for the permission thesis

Here is the argument for the *Permission Thesis* that, in some cases, justice permits extremely harsh treatment. The relevant cases for this thesis are *Extremely-Harsh-Treatment-Commitment Cases*:

- (P1) If individuals begin at one just state and proceed via just steps to a second state, then the second state is just.
- (P2) In some cases, individuals begin at one just state without extremely harsh treatment and proceed via just steps to a second state with extremely harsh treatment.
- (C1) Hence, in some cases, a state with extremely harsh treatment is just. [(P1), (P2)]
- (C2) Hence, in some cases, justice permits extremely harsh treatment. [(C1)]

Premise (P1) rests on *Justice as Steps*. Premise (P2) rests on the notion that *Extremely-Harsh-Treatment-Commitment Cases* are possible. Conclusion (C2) is a restatement of (C1). Let us turn to some objections to this argument.

c. Objections to the permission thesis

1. Objection #1: Reject (P1). An objector might reject (P1). She might argue that justice focuses on end-state principles (where justice requires a mathematical structure of distribution of some benefit or burden of social cooperation but is unconcerned with who gets what) or patterned principles (where justice is concerned with the distribution of some benefit or burden of social cooperation in accord with some property or properties of individuals).⁹ The objector's likely patterned principle is non-historical, meaning that it focuses on some current property (for example, a property had in the current time-slice) rather than one that refers to the past. This distinction is a little murky since one can have a current property (e.g., positive desert) in virtue of what happened in the past (e.g., he sacrificed for others). An example of an end-state principle is one that requires wealth to be distributed equally or in accord with the difference principle (where benefits and burdens are to be distributed equally except where inequality benefits the worst-off group). An example of a patterned principle is one that distributes wealth or punishment in accord with desert or need.¹⁰

⁹ This distinction comes from Nozick, *Anarchy, State, and Utopia*, pp. 150-60.

¹⁰ The Difference Principle comes from John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 75-83. For the role of desert see Joel Feinberg, "Justice and Personal Desert," in Joel Feinberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), chap. 4; James Rachels, "What People Deserve," in *Justice and Economic Distribution*, ed. John Arthur and William Shaw, 2nd ed. (Englewood Cliffs, NJ: Prentice Hall, 1991), pp. 136-48. There are other accounts, which seem to involve hybrid principles. For example, Bernard Williams and Michael Walzer argue that some goods should be distributed according to the type of good they are. For example, medicine should be given to the sick. See Bernard Williams, "The Idea of Equality," in *Moral Concepts*, ed. Joel Feinberg (New York: Oxford University Press, 1970), pp. 153-71; Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), p. 88 n.

One response to this objection is simply to reject these principles. For example, because it is hard to imagine that justice is unconcerned with who gets what, end-state principles intuitively seem implausible. This is especially true if rights are primarily property rights that allocate Hohfeldian elements (such as claims) with regard to particular things. Similarly, the most plausible time-slice properties are unlikely to ground justice-based claims. A mafia leader's need for a kidney intuitively seems not to ground a claim in others if he spent his early life damaging the kidneys of others as a way of collecting his loan-shark debts.¹¹ Similarly, a person who deserves a job more because he worked harder in developing his skills or sacrificed more to develop those skills than his competitors doesn't seem to have a claim to the job. This is particularly true if one of his competitors is more talented.¹²

A second response is that even if we think that these principles are part or all of justice, it's not clear that they block extremely harsh treatment. For example, desert-based theories might well allow for extremely harsh treatment. Even the Difference Principle might allow for it since basic principles chosen by rational persons under fair and equal choosing conditions might allow for such treatment. If the worst-off group is construed more broadly than those persons who are harshly treated, the deterrent effect of extremely harsh treatment might be a net benefit for them since they are often harmed by violent crime, whether directly or indirectly.¹³

2. Objection #2: Reject (P2). Objection #2a: The state acts unjustly because it infringes on inalienable rights. An objector might instead reject (P2). An objector might claim that because autonomy grounds rights, these rights are inalienable. The idea here is that since autonomy grounds rights, that same ground can't warrant the loss of autonomy-protecting rights.¹⁴ (P2) states that individuals begin at one just state without extremely harsh treatment and proceed via just steps to a second state with

¹¹ The idea for this example comes from Fred Feldman's discussion of the lunch destroyer in his "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," in Fred Feldman, *Utilitarianism, Hedonism, and Desert* (New York: Cambridge University Press, 1997), pp. 154-74, esp. 158-60.

¹² I argue for this in Stephen Kershnar, "Giving Capitalists What They Deserve," *Economics & Philosophy* 21 (2005), pp. 65-87.

¹³ Also, the arguments in the literature don't rest on claims about end-state or patterned principles, and so at the very least any argument in this direction would need to be developed.

¹⁴ The idea for this objection comes from Jeffrie Murphy, "Cruel and Unusual Punishments," in Murphy, *Retribution, Justice, and Therapy*, pp. 223-49. Some opponents of torture focus on torture being an assault on the defenseless; see Henry Shue, "Torture." It is hard to see how being defenseless, as opposed to being bad at defense, is morally relevant, unless it entails the presence of protective rights.

extremely harsh treatment. However, if harsh treatment can only be arrived at via unjust steps, then the type of cases that (P2) focuses on are impossible.

So, for example, a person could not waive or forfeit a right against being lobotomized or a treatment so harsh that it reduces him to the level of an animal. Since a harshly treated person is not autonomous, at least during the period in which he is harshly treated, the right against extremely harsh treatment is inalienable. This objection is independent of whether autonomy is viewed as a set of capacities or the exercise of these capacities.

The first problem with this objection is that certain forms of extremely harsh treatment (for example, extreme sensory or sleep deprivation) need not eliminate autonomy. In fact they might enhance it by giving the attacker, during his recovery, more time and a less distracting atmosphere, via the denial of access to other persons and intoxicating substances, by which to reshape his beliefs, intentions, and perhaps also desires. Hence, this objection only rules out certain types of extremely harsh treatment.

It might be thought that extremely harsh treatment rules out autonomy because the requisite suffering is so great as to rule out self-governed thought. However, it is worth distinguishing the short-term and long-term effects of extremely harsh treatment. The two need not coincide and extremely harsh treatment might increase the likelihood of autonomous thought in the long term, perhaps by causing a person to think hard about what sort of person he wants to be.

A critic might claim that this is a breathtaking claim that presents such torment as merely a time of “time-out” (which is nevertheless expected to break down the resolve of fanatics). She might continue by noting that, by all reports, extreme sleep deprivation is an agonizing experience (that ultimately leads to death), which, like sensory deprivation, undoes the most basic capacities of self-directed thought. This description accurately describes the effects of extremely harsh treatment. However, it is still possible that the extremely harsh treatment causes the individual to reshape his life according to self-chosen principles. Perhaps it does so when an individual is recuperating and wondering how such a horror could have befallen him. Such a scenario is possible, however unlikely. If so, then the long-term effects need not involve the elimination of autonomy and it is not harsh treatment *per se* but autonomy-eliminating acts that are wrong. In any case, as I will argue for below, not every act that eliminates autonomy is wrong.

An objector might say, “Look, it doesn’t matter if autonomy is removed forever; what matters is that it is ever removed—no one has the right to remove the autonomy of another, no matter how temporary.” The issue here is why a person does not have a right to remove his own autonomy. Among the reasons might be because it violates an inalienable right that a person holds against himself, is inconsistent with proper self-respect, or turns the victim’s agency against himself. These notions are discussed below.

The more serious problem with this objection is that it misconstrues the nature of rights that are grounded by autonomy. Autonomy includes a person’s reflexive choice over whether to continue to be autonomous and, if

so, the degree to continue to be autonomous. As a result, autonomy grounds the moral standing by which a person may control the shape and continuation of his autonomous life. In other words, self-determination permits a being to decide whether to continue to be self-determining and, if so, the degree of self-determination he shall have in the future. Since autonomy-grounded rights protect the choice whether to retain these rights, the rights-protecting autonomy may be alienated.

The objector might respond that the existence of a reflexive right to give up one's autonomy is inconsistent with the respect for the value of autonomy.¹⁵ The problem with this is that it misconstrues the value of autonomy. The value of autonomy does not rest on the notion that one should have a *maximal amount of control* over one's life, where the amount of control is the product of the significance of the choices and number of choices that a person can or does make. On this account autonomy would permit a great deal of paternalistic coercion (e.g., banning cigarettes and fatty foods) as a means of increasing the duration, and therefore amount, of control over their lives. Rather, the value of autonomy has to do with *narrative control*, the ability to shape one's life according to self-chosen principles. This can allow for a decrease in the number of choices (e.g., via suicide) or a lessening of the quality of choices (e.g., via the taking of recreational drugs that dull one's thought processes), as long as it is done in accord with a person's own principles. Narrative control even allows for the choice to live with lessened or no rationality, since continued rationality might not be part of a person's life plan. This is analogous to the way in which an author is autonomous with regard to her work when she writes short stories rather than lengthy novels, even though the former involves a smaller number of choices about her characters and perhaps also less significant choices about them. *Narrative control* requires that a person be able to exercise reflexive control even when this disables or eliminates some first-order control.

Objection #2b: The state acts unjustly because trading down is inconsistent with proper self-respect. A second objection to (P2) is that if this account of justice is correct, then a similar trading-down argument can be given for using people for medical experimentation, gladiatorial contests, or as slaves. The objector might continue that the problem with the trading-down argument in these contexts and in the context of extremely harsh treatment is that there are certain kinds of treatments of oneself that a person can never validly consent to, because they are incompatible with proper self-respect, respect for one's autonomy, respect for humanity in one's person, etc.¹⁶ The

¹⁵ An analogous claim can be seen in John Stuart Mill, who argues that the principle of freedom does not allow persons to be free not to be free; see John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis, IN: Hackett, 1978), chap. V, sec. 11, pp. 101-102.

¹⁶ For example, John Kleinig argues that torture undermines the very characteristics that constitute our human distinctiveness and in so doing humiliates, degrades, and

objector might state that to claim that autonomy includes a reflexive choice over whether to continue to be autonomous and, if so, the degree to which to be autonomous, begs the question against this Kantian account. The latter simply does not conceive of the moral significance of autonomy in this way. The objector continues by asserting that this account, then, holds that as a matter of logic, autonomy does not include within its scope its own elimination. This explains why autonomy does not allow people to choose to have lobotomies, kill themselves, or sell themselves into slavery.¹⁷ The objector notes that Immanuel Kant provides a similar argument. He argues that a slavery contract would result in a loss of contractual powers, thereby invalidating the contract itself.¹⁸

The problem here is that it is hard to see why autonomy is not reflexive. By “reflexive,” I mean that “autonomy can be applied to itself.” If it is reflexive, then one can autonomously sacrifice autonomy. There does not appear to be anything in the concept of autonomy that would explain this assertion unless one thought autonomy focused on an individual’s having a *maximal amount of control* over one’s life. One reason to doubt this account, as mentioned above, is that it allows for a significant amount of paternalistic control. For example, we do not respect persons if we prevent them from putting their autonomy (or, more generally, well-being) at risk by volunteering for war or to work a dangerous job. A second reason is that it seems to confuse a person shaping his life according to self-chosen principles, which is at the heart of autonomy, with the requirement that others ensure that his principles have a certain content, which is neither at the heart of autonomy nor clearly related to autonomy-based respect. Autonomy-based respect requires at most that we ensure that a person’s guiding principles are rational, not that they maximize his autonomy, capture a certain view of the good life, or have other substantive content. If this were not the case, then it is hard to see the sense in which they would be chosen by the individual herself.

The objector might claim that we ensure that a person’s guiding principles are rational if we require that the principles be ones that would be chosen by rational individuals. One guide to this is the Rawlsian notion that to respect a person as an end is to treat him in accord with principles that he and others would choose were they perfectly rational and in a fair choosing situation.¹⁹ Here the idea is that such principles would not permit an individual to trade down for extremely harsh treatment.

perverts them; see John Kleinig, “Ticking Bombs and Torture Warrants,” *Deakin Law Review* 10 (2005), pp. 615-27, esp. p. 619.

¹⁷ Mill, *On Liberty*, ed. Rapaport, pp. 101-102.

¹⁸ Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (New York: Cambridge University Press, 1991), sec. 49, pp. 139-40.

¹⁹ Rawls, *A Theory of Justice*.

Another problem is that the Rawlsian approach probably allows for trading down. Allowing trading down to occur does not lessen people's equal maximal liberty, because it increases rather than decreases options. In addition, it likely improves the position of the people who will be so treated because they (reasonably) view it as a beneficial transaction. In decreasing the amount of crime, terrorism, and other destructive acts, it probably even improves the position of the worst-off group, assuming this is a group other than those who consent to be harshly treated. In short, then, Rawls's approach does not clearly capture autonomy-based respect. Even if it does, it likely permits trading down into extremely harsh treatment, because doing so is consistent with the principles that result from the Original Position.

Objection #2c: The state acts wrongly because it turns a victim's agency against himself. David Sussman argues that torture is wrong because it forces a victim to turn his agency against himself.²⁰ This explains why it is worse than other forms of brutality and cruelty:

Torture does not merely insult or damage its victim's agency, but rather turns such agency against itself, forcing the victim to experience herself as helpless yet complicit in her own violation. This is not just an assault on or violation of the victim's autonomy, but also a perversion of it, a kind of systematic mockery of the basic moral relations that an individual bears both to others and to herself.²¹

Sussman also argues that torture is wrong because it involves a person experiencing his body ceasing to be his and becoming another's:

In a sense, his body ceases to be his, to be the substance in which he expresses his own attitudes, intentions, and feelings in a way that can be meaningful for others as a form of self-expression. Since the victim cannot effectively reassert himself physically against the assault (by fighting, fleeing, or shielding himself), his body becomes the medium in which someone else realizes or expresses his agency.²²

On this account, torture results in the victim's body becoming the medium by which someone else realizes or expresses his agency. This objection to torture captures an interpretation of the Kantian notion that torture fails to respect the

²⁰ See Sussman, "What's Wrong with Torture?" pp. 28-33. A similar argument can be seen in Kleinig, "Ticking Bombs and Torture Warrants," pp. 619-20.

²¹ Sussman, "What's Wrong with Torture?" p. 30.

²² *Ibid.*, pp. 31-32.

dignity of the victim as a rationally self-governing agent.²³ Let us apply this argument to extremely harsh treatment.

The first problem with this objection is that it is not clear how this objection works in cases in which the person imposing harsh treatment seeks to impose punishment rather than use the victim to gain information. In such a case, the victim's body is not expressing anyone else's agency any more than it would be were he an incarcerated prisoner. The second problem is that in the trading-down case the victim's body, if it is expressing someone's agency, is expressing the agency of the person who is so treated. In particular, it expresses his project to avoid a harsher punishment and achieve other goals (for example, return to his family).

Third, even in the case of interrogation, it is hard to see how this argument works. If a person is his body, then saying that his body is being used against himself just is saying that he is made to do certain things to which he does not consent. It is hard to see how this varies from incarceration or other involuntary punishments. If a person is not his body, then this is no different from using other things he cares about (for example, his family's well-being, money, and reputation) to leverage someone into doing something he does not want to do. This might be objectionable, but it is hard to see what is distinctively wrong about extremely harsh treatment as opposed to other forms of rights-infringing leverage. Even if we focus on using one's body against himself, incarceration does a similar thing by confining a person's body and thereby preventing him from leaving.

Sussman might argue that extremely harsh treatment is wrong because it removes autonomy. It does so because of the difficulty of reasoning when experiencing extreme pain. If, however, the wrongness of extremely harsh treatment is filled out in terms of the removal of autonomy, then the extremely harsh treatment is wrong for the same reason that murder, involuntary lobotomies, and other reason-ending acts are wrong. This undermines Sussman's central claim that extremely harsh treatment is distinctively wrong.

Objection #2d: The state acts unjustly because the consent is not morally binding. An objector might claim that the consent in this case is not morally binding. One argument is to claim that the consent to extremely harsh treatment is invalid because it is analogous to a slavery contract and that the latter is invalid. Some philosophers argue that a slavery contract whereby a person alienates his autonomy is so irrational as to invalidate the contract. On one version of this argument, this is true because of the impossibility of proper compensation.²⁴ On a second version, the irrationality stems from the possibility of unlimited disvalue in the action that the owner might require of

²³ Ibid., p. 19.

²⁴ Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (New York: Penguin, 1968), p. 55.

the person who has abdicated his autonomy.²⁵ How one measures disvalue depends on one's theory of value and the type of value involved. If autonomy is intrinsically valuable, then the loss of infinite value would involve a comparison between a world (or other value-bearer) where the person has autonomy and one where he does not. On a third version, a contractor can't live up to his promise because it is impossible to do so.²⁶ On a variant of this third version, the promise is impossible to live up to because a person cannot transfer partial or complete control over her body to another.²⁷

Even if these arguments show that slavery contracts are invalid, and this is doubtful, the same reasons do not invalidate the consent to extremely harsh treatment. Contrary to the first version of the argument, proper compensation for some harsh treatments is possible. On one account of just compensation, for example, it is possible to provide enough compensation so that the person to be so treated (or who has been so treated) is indifferent between being so treated and compensated and receiving neither. The second version also fails. Extremely harsh treatment does not have infinite disvalue, particularly when it is limited in means and duration. In general, this version rests on a misunderstanding because unless a slavery or an extremely-harsh-treatment contract affects someone for eternity or affects an infinite number of people, it cannot have infinite disvalue. The third version fails as well. Because the person to be treated harshly need not voluntarily participate once he has consented, the concern about his living up to his promises is irrelevant.

A second argument is that the consent is invalid because it is coerced. To see why this argument fails, consider the following case:

Black Mamba: During an expedition into Africa, a wealthy scientist is bitten by a highly venomous black mamba. He is quickly taken to the house of a local doctor, who offers to sell him the doctor's only potion of mamba antivenin for the market price. The scientist quickly agrees and signs a contract. He is then given the antivenin. After a month of lying near death, the scientist recovers. He then refuses to pay, arguing that the contract is invalid because his consent was coerced.

Absent an exorbitant price that might indicate exploitation, it intuitively seems that the scientist has an obligation to pay for the antivenin even though his consent was coerced or had coercion-level pressures. If so, then either

²⁵ Arthur Kuflik, "The Inalienability of Autonomy," *Philosophy & Public Affairs* 13 (1984), pp. 284-96.

²⁶ Benedict De Spinoza, *Theologico-Political Treatise* (New York: Dover, 1951), chaps. 17 and 20.

²⁷ Randy Barnett, "Contract Remedies and Inalienable Rights," *Social Philosophy & Policy* 4 (1986), pp. 188-89.

voluntary consent is not a necessary condition for a morally valid contract or voluntariness does not require the availability of reasonable alternative actions at the time of the consent.²⁸ Either move is available in the case of the extremely-harsh-treatment contract. Either the alternative of a worse punishment makes the wrongdoer's consent involuntary, but this does not morally invalidate the contract, or the lack of reasonable alternatives, given the historical sequence that brought about this situation, is not sufficient to make his consent involuntary.

A third argument is that the consent is valid but should not be enforced by the state because its terms are unfair, exploitative, or unconscionable. The exact account of exploitation differs. On one account, a contract is exploitative when the stronger party uses his stronger position to take an unfair share of the transaction surplus.²⁹ The transaction surplus is the aggregate benefit to both parties to a contract. On some accounts, an exploitative transaction must have one or more of the following features: the transaction is to be viewed from an *ex ante* perspective, the weaker party must be desperate, and at least one party believes the contract to be unfair.

Even if this is a moral reason for the state to refuse to enforce a contract, this does not apply to the extremely-harsh-treatment contract. In some cases, the person to be so treated gains a fair share of the transaction surplus. If a person to be punished is facing a lifetime in prison and isolation from his family, then his benefit is the difference in his well-being between that state of affairs and one where he is treated extremely harshly. This gain might be considerably greater than the gain to the state or the offender's victim. If so, then the price is not unfair, exploitative, or unconscionable, because the state or the victim is not taking an unfair share of the transaction surplus. The exploitative nature of an extremely-harsh-treatment contract, then, depends on what the baseline treatment is, and this is a contingent fact that depends on the circumstances and individual involved.

The rational gain in the person to be harshly treated also distinguishes this type of case from ones in which the person to be so treated is mentally ill or making an obvious error in his instrumental reasoning. Such an error might occur, for example, if he were to contract with doctors to amputate his legs so as to improve his prospects as a panhandler.

Objection #2e: The state acts unjustly because it expresses contempt for a person. On some completely different accounts of justice, an act that is neither exploitative nor rights-infringing can express contempt for a

²⁸ There is an issue as to whether coercion and threats are moralized notions that view these entities as involving the other contractor's acting in an immoral or, perhaps, unjust manner. For example, consider Robert Nozick, "Coercion," in *Philosophy, Science, and Method*, ed. Sidney Morgenbesser (New York: St. Martin's Press, 1969), pp. 447-53.

²⁹ The idea for this account comes from Wertheimer, *Exploitation*.

person and thereby fail to respect her as a person.³⁰ In general, a behavior is expressive of an attitude or proposition just in case it exhibits that attitude or puts forth a proposition. This is probably a function of the agent's motive, intent, or the social understanding of her act.³¹ For example, where the agent is motivated by the view that the man toward whom she acts has less intrinsic value than other persons, she intends to convey that view, and that is how her act is generally understood, her act expresses contempt for him. On some accounts, this expression is independent of whether the attitude or proposition is actually conveyed to an audience on a particular occasion and on some accounts on all occasions. In the case of criminals, the contempt likely involves the notion that the criminal has less intrinsic value than do other persons.

One response here is that no such attitude is being taken toward the person being harshly treated. Rather, this is a case of respecting her choice in the context of a fair set of rules. On this account, we respect the person as an equal by respecting her decisions. This fits with some Kant-inspired justifications of punishment.³²

A second response is that the objection misconstrues justice. This is because justice focuses on the person who is acted on (that is, the person to be harshly treated), not the agent (that is, the person who imposes the treatment).

³⁰ In the context of punishment, this idea can be seen in Thaddeus Metz, "Censure Theory and Intuitions about Punishment," *Law and Philosophy* 19 (2000), pp. 491-512; Jean Hampton, "An Expressive Theory of Retribution," in *Retributivism and Its Critics*, ed. Wesley Cragg (Stuttgart: F. Steiner Verlag, 1992), pp. 1-25; Igor Primoratz, "Punishment as Language," *Philosophy* 64 (1989), pp. 187-205. In bringing up this theory, I do not mean to endorse it. My view is that, as a non-consequentialist justification of punishment, it is superfluous because it presupposes and trivially follows from the truth of non-expressive retributivism. For an argument in support of this, see Michael Davis, "Punishment as Language: Misleading Analogy for Desert Theorists," *Law and Philosophy* 10 (1991), pp. 311-22.

³¹ More broadly, this might be a function of the speaker meaning, i.e., what the speaker (or punishing body) in uttering a sentence (or imposing a punishment) intends to convey to the hearer. The speaker meaning consists of a nested set of intentions. Alternatively, this might be a function of meaning of the sentence (or punishment) itself. This distinction comes from H. P. Grice, "Meaning," *Philosophical Review* 66 (1957), pp. 377-88; H. P. Grice, "Utterer's Meaning and Intentions," *Philosophical Review* 78 (1969), pp. 147-77. A different but still Gricean analysis can be seen in Robert Nozick's discussion of the idea that punishment should express to the wrongdoer that his act is wrong and to show him its wrongfulness; see Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Harvard University Press, 1981), pp. 366-74, esp. p. 371.

³² See, e.g., Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968), pp. 475-501; Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2 (1973), pp. 217-43.

The focus on the former rather than the latter provides a better explanation of what is involved in wronging a person. I think it also provides a better explanation of the non-consequentialist liberty that a person has to pursue his own projects, but I will not address this issue here. Given that it is a property of the person acted on (for example, his suffering or his autonomy) that explains why he may not be treated in certain ways, the wrongfulness of certain actions is a function of what is done to him. The attitude the agent takes toward the person toward whom he acts is relevant to judging the agent's blameworthiness, viciousness, and dangerousness, but not the act itself.³³ This can be seen in how agent-centered theories that focus on things such as the rationality of the agent's action or the intrinsic badness of his attitude *presuppose* that the treatment in question is bad or wrongful, rather than *explaining* it. That certain acts (e.g., rape and battery) fail properly to respect a person at least in part explains why desiring, intending, or willing them is wrong or bad.

Third, even if extremely harsh treatment expresses the notion that criminals have less value than others, this does not disrespect them if they do have on average less value. To see that they do, consider the following two worlds. The first consists of one million good persons. The second consists of one million rapists and murderers. In both worlds there are equal levels of average and total well-being and in the latter world the legal regime has negated the wrongdoers' future threats through behavioral conditioning (similar to that portrayed in *A Clockwork Orange*). The first world intuitively seems better.³⁴ The best explanation of this intuition and ones like it is that intrinsic value depends at least in part on the desert-adjusted value of persons having a given level of well-being.³⁵ On this account, a person's desert determines whether and the degree to which his doing well makes the world a better place. Since murderers, rapists, and other violent criminals often have negative desert, their well-being often counts for less in making the world a better place and might even make it worse.

Objection #2f: The state acts unjustly because it cannot enter into this sort of agreement even if private parties may do so. An objector

³³ The notion that nonconsequentialism is closely tied to virtue is found in Philippa Foot, "Utilitarianism and the Virtues," *Mind* 94 (1985), pp. 273-83.

³⁴ The idea for this argument and example comes from W. D. Ross, *The Right and the Good* (Indianapolis, IN: Hackett Publishing Company, 1988), p. 138.

³⁵ See Feldman, "Adjusting Utility for Justice," pp. 154-74; Thomas Hurka, *Virtue, Vice, and Value* (New York: Oxford University Press, 2001), chaps. 1-2; Thomas Hurka, "The Common Structure of Virtue and Desert," *Ethics* 112 (2001), pp. 6-31; Shelly Kagan, "Equality and Desert," in *What Do We Deserve?* ed. Louis Pojman and Owen McLeod (New York: Oxford University Press, 1999), pp. 298-314; Neil Feit and Stephen Kershnar, "Explaining the Geometry of Desert," *Public Affairs Quarterly* 18 (2004), pp. 273-98.

might claim that even if extremely-harsh-treatment agreements are valid, the state may not enter into them. This argument is based on an analogy to unconstitutional conditions. The doctrine of unconstitutional conditions asserts that there are cases in which it is unconstitutional for the U.S. government to provide a discretionary benefit in return for an individual's waiving a constitutional right.³⁶ For example, the state cannot provide a welfare benefit to a beneficiary in return for her waiving her right to free speech.³⁷ Because the Eighth Amendment protects against extremely harsh treatment, the extremely-harsh-treatment contract violates this rule because it asks an individual to waive her right against extremely harsh treatment in return for not receiving a legal punishment. The objector might claim that an analogous moral argument applies. What grounds the doctrine and its moral analogue is not clear. It might rest on the proposal being coercive, exploitative, inefficient, or lacking a proper motive.

My interest is in the moral status of such proposals, so I will sidestep the issue of whether trading down violates the U.S. Constitution. Consider the notion that the proposal is coercive. If coercion entails injustice and, for the reasons mentioned above, there is no rights-infringement, then trading down is not coercive. If coercion does not entail injustice, then again it is not clear that this invalidates the consent. In order to see this, consider that the coercion involved in *Black Mamba* did not invalidate the scientist's consent, and that case involved both great psychological pressure and a big difference in the desirability of the two options. This sort of proposal is not obviously exploitative because, as argued for above, it is not clear that the state is taking an unfair share of the transaction surplus. Even if the proposal is inefficient, and it is hard to see why this has to be the case, this is not relevant to whether the proposal and agreement are just.

The proposal might be seen as lacking a proper motive because the state is trying to do directly what it cannot do indirectly.³⁸ It is not clear,

³⁶ See *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 (1910) (Kansas tried to trade the right to do business in Kansas in return for corporations agreeing to a tax on their out-of-state assets); *Speiser v. Randall*, 357 U.S. 513 (1958) (California tried to trade a property-tax exemption to veterans in return for their signing a loyalty oath); *Insurance Co. v. Morse*, 87 U.S. 445 (1974) (Wisconsin tried to trade the right to do business in Wisconsin for corporations in return for their agreeing not to use federal courts); *South Dakota v. Dole*, 483 U.S. 203 (1986) (federal government tried to trade subsidies for highway construction to states in return for their setting the drinking age at 21); and *Lying v. Automobile Workers*, 485 U.S. 360 (1988) (federal government tried to trade food stamps for indigents in return for their agreeing not to strike).

³⁷ A similar example can be seen in Edward Fuhr, "The Doctrine of Unconstitutional Conditions and the First Amendment," *Case Western Law Review* 97 (1989), p. 107; Wertheimer, *Exploitation*, p. 123.

³⁸ On one account, this is what is going on in some of these cases; see Richard Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," *Harvard Law*

though, that an act is wrong or unjust based on the motive from which it is done. On one account, the injustice of an act depends on what is done to an individual and does not depend on the motive. The motive is relevant to the blameworthiness of the agent, but that is a different issue. This might be because there is a conceptual distinction between wrongness and blameworthiness or because agents more directly control their actions when compared to their motives. My response might be seen as entailing that the unconstitutional-conditions doctrine is mistaken. However, the doctrine is a legal one and there are likely a range of strong, forward-looking reasons that might justify it even if justice is not one of them.³⁹

d. Conclusion

The argument for the *Permission Thesis* that, in some cases, justice permits extremely harsh treatment rests on a claim about sufficient conditions for a just state (*Justice as Steps*), a claim about one type of just step (*Valid Commitment Claim*), and a claim that it is possible that persons validly consent to extremely harsh treatment (*Extremely-Harsh-Treatment-Commitment Cases*). Since all three claims are plausible and there do not appear to be strong objections, the argument is likely sound.

Review 102 (1988), p. 6.

³⁹ There are still other objections, which are confined to footnotes as a way of conserving space. First, it might be objected that the state acts unjustly because it performs a free-floating wrong. Even if the individual doing the interrogation doesn't wrong the person being interrogated, he might still act wrongfully if he commits a free-floating wrong. An act is free-floating wrong if it is something a person should not do but that doesn't wrong any individual. Three purported types of free-floating wrongs are exploitation, indecency, and the failure to satisfy a consequentialist duty. Harsh treatment does not appear to fit into the first two types. We can ignore the third, because consequentialist duties are distinct from justice-based ones.

A second objection is that the state acts unjustly because it uses an unreliable procedure. The objector might continue that persons who engage in punitive extremely harsh treatment typically use unreliable procedures in identifying who ought to be punished for serious crimes like murder and rape and thus who would trade down to extremely harsh treatment. One problem with this objection is that it claims to show that our whole criminal justice system is unjust. This claim requires evidence. A second problem is that it doesn't show that extremely harsh treatment is wrong. Using an unreliable procedure to impose harsh treatment via, for example a lottery system, wrongs the whole community. This is independent of whether the harsh treatment itself is wrong when imposed on someone who consented to it, deserves it, forfeited his rights with regard to it, etc. This is true even if the imposition on the correct party is purely a matter of chance.

3. The Argument for the Requirement Thesis

a. *Relevant principle*

Here I argue for the *Requirement Thesis* that, in some cases, justice requires extremely harsh treatment. By “require an act or state,” I mean that “the parties involved ought to perform it or bring it about and that no one else may interfere.” The central principle here is the following:

- (6) *Third-Party Irrelevance*: If all of the parties with relevant rights validly commit to move from one just state to a second state, then as a matter of justice the parties ought to bring about the second state and third parties may not prevent their doing so.

The idea here is that justice is concerned with rights-satisfaction. When a collection of individuals all change their moral world in a way that respects each other’s rights and does not infringe on a third party’s rights, a third party doesn’t have a rights-based claim to interfere with the change. That is, they have no justice-based right to intervene. This principle is designed to be trivially true since, given that justice is filled out in terms of rights and given that all of the relevant rights-holders have, by hypothesis, no rights-based objection, it trivially follows that no one can have a rights-based objection.

b. *The argument for the requirement thesis*

The argument for the *Requirement Thesis* then follows from *Third Party Irrelevance*. Again, the relevant cases are *Extremely-Harsh-Treatment-Commitment Cases*:

- (P1) If all of the parties with relevant rights validly commit to move from one just state to a second state, then as a matter of justice the parties ought to bring about the second state and third parties may not prevent their doing so.
- (P2) In some cases, the parties with relevant rights all validly commit to move from one just state without extremely harsh treatment to a second state with extremely harsh treatment.
- (C1) Hence, as a matter of justice the parties ought to bring about the second state with extremely harsh treatment and third parties may not prevent their doing so. [(P1), (P2)]
- (C2) Hence, in some cases, justice requires extremely harsh treatment. [(C1)]

Premise (P1) just is *Third-Party Irrelevance*. Premise (P2) rests on my description of the *Extremely-Harsh-Treatment Cases*. Conclusion (C2) is a restatement of (C1).⁴⁰

Third-Party Irrelevance might be rejected by legal paternalists and legal moralists. I shall not respond to these objections here as it will take us too far afield. Also, there might be debate over who has a right involved in extremely harsh treatment. For example, an opponent of extremely harsh treatment might assert that the citizens (to whom the government should be responsive) and, perhaps, government workers have a right. The former have a right since they are the employer and what is at issue is what their workers may do. My argument is independent of this issue. If citizens do have such a right, then extremely harsh treatment is just only if they validly commit to it. If they don't, or if their rights are limited, then their rights drop out of the picture. The same is true for government workers, although it is hard to see how they might have additional claims given that they have validly consented to carry out punishment- and, perhaps, harsh-treatment-related tasks. This might limit the *Requirement Thesis* to the rare case when the citizens, the law, and the relevant parties all validly consent to extremely harsh treatment. Given the Eighth Amendment, it is not clear if this will ever occur in the United States.

The argument for the *Requirement Thesis* that, in some cases justice requires extremely harsh treatment, rests on a claim about justice-based obligations (*Third-Party Irrelevance*) and a claim that in some cases all of the parties with relevant rights validly commit to extremely harsh treatment (*Extremely-Harsh-Treatment-Commitment Cases*). Since these claims are extremely plausible, the argument is likely sound.⁴¹

⁴⁰ In this context, "commitment" refers to a promise rather than consent. This explains how a commitment produces a duty in the parties rather than merely a Hohfeldian liberty in the other party; see Hohfeld, *Fundamental Legal Conceptions*, ed. Cook, pp. 35-64. An individual has a liberty against another to do something if the other does not have a claim that she refrain from doing it. In this context, the liberty is moral rather than legal.

⁴¹ An important issue is whether a policy of extremely harsh treatment makes the world a better place and whether consequentialist considerations should be decisive in answering the question of when, if at all, the state should mete out extremely harsh treatment. For example, it's hard to see how retributivists and other Kantians could place much weight on consequentialist considerations. Here I duck the issues as to the effectiveness of extremely harsh treatment and the relevance of this issue to its permissibility. My goal has been the narrower one of showing that justice sometimes permits and requires extremely harsh treatment. The issue of its effectiveness depends at least in part on an estimate of harsh treatment's efficacy for different goals (e.g., punishment, information-acquisition), and this is a question for another day.

4. Conclusion

The commonsense view that extremely harsh treatment is always wrong because it is unjust is mistaken. In some cases, justice permits and even requires extremely harsh treatment. These cases occur when persons give free and informed consent to it because it is their best option. If justice is the sole ground of side-constraints, and I think it is, then whether the government and others should engage in extremely harsh treatment depends on whether and how often these cases occur in the actual world and the degree to which consequentialist considerations are relevant.

