

# Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke

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*"[T]here is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics"*

—Henry Shue<sup>1</sup>

IT WAS NOT SO LONG AGO that many Australian lawyers, human rights campaigners, and organizations looked aghast when a number of their counterparts in the United States began debating whether the regulated use of torture was acceptable in "limited" circumstances. The surprise and distress induced by this debate was compounded by two developments in 2004. First, in August the United Kingdom Court of Appeal ruled that the British government was entitled to rely on torture evidence in special terrorism cases, provided Britain "neither procured nor connived at" the torture.<sup>2</sup> Second, it was revealed that United States military panels reviewing the detention of foreigners as enemy combatants are allowed to use evidence obtained by torture when deciding whether to keep them imprisoned at Guantánamo Bay.<sup>3</sup>

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1. Henry Shue, *Torture*, in *TORTURE: A COLLECTION* 57 (Sanford Levinson ed., 2004).

2. See Press Release, Hum. Rts. Watch, U.K.: Highest Court to Rule on Torture Evidence (Oct. 14, 2005) available at <http://hrw.org/english/docs/2005/10/14/uk11877.htm>.

3. See Michael J. Sniffen, Associated Press, *Torture Can Be Used to Detain U.S. Enemies*, Dec. 3, 2004, available at Westlaw AP Online, 12/3/04 APONLINE.

With Seth Kreimer, we assumed that we would never have to debate whether the dark art of torture could be sanctioned and that nations that purport to promote human rights would ever attempt to abolish the absolute proscription against this barbaric practice.<sup>4</sup>

However, since two Australian legal academics, Mirko Bagaric and Julie Clarke,<sup>5</sup> have thrown their support behind Allen Dershowitz's<sup>6</sup> legalized warrants proposal, we feel compelled to discuss this previously undiscussable topic.

Bagaric, Clarke, and other intellectual apologists for torture object to its formal prohibition on the grounds that it is "morally unsound and pragmatically unworkable."<sup>7</sup> By implication, they also deride advocates of the absolutist position against torture as naïve and idealistic.<sup>8</sup> But, as MacMaster, in a paper examining the damage done by institutionalized torture in relation to the French in Algiers, points out, much of the apologists' contribution is itself naïve. It is naïve not least because it has been conducted "*de nouveau*, reinventing the wheel as it were, without any reference to the huge field of historical, ethical, philosophical and legal knowledge that exists in relation to the practice of torture."<sup>9</sup> Bagaric and Clarke fit this mold well for they provide little evidence to support their position and instead offer an abstract argument that has been much rehearsed and challenged elsewhere. In so doing, they ignore much of the theoretical case previously made against their position and the empirical evidence that demonstrates official programs of torture often lead to the corrosion and breakdown of key institutions, such as the military, police, judiciary, and government.<sup>10</sup>

In this Article we analyze Bagaric and Clarke's position, and by implication Dershowitz's justification for legalized torture. In so do-

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4. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 278 (2003).

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

6. ALAN DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 141 (2002); see also Alan Dershowitz, *Torture Without Visibility and Accountability Is Worse than with It*, 6 U. PA. J. CONST. L. 326 (2003); Ken Roth & Alan Dershowitz, *Dershowitz: Torture Could Be Justified*, CNN.COM, Mar. 4, 2003, <http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/>.

7. Bagaric & Clarke, *supra* note 5, at 616.

8. See *id.*

9. Neil MacMaster, *From Algiers to Abu Ghraib*, 46 RACE & CLASS 1, 2 (2004).

10. See Jean Maria Arrigo, *A Consequentialist Argument Against Torture Interrogation of Terrorists* (2003) (unpublished manuscript), available at <http://atlas.usafa.af.mil/jscope/JSCOPE03/Arrigo03.html> (2003 Joint Services Conference on Professional Ethics) (last visited Aug. 17, 2005).

ing we validate the absolute prohibition against torture and the moral arguments underpinning that proscription.

We begin, in Part I, by highlighting the weakness of Bagaric and Clarke's article by offering evidence that challenges a number of their core claims. Part II argues that these advocates fail to consider the full consequences of the practice of torture and the social decay or breakdown of key democratic institutions which may involve a second order effect involving the loss of an incalculable number of lives. Finally, in Part III we apply a game-theoretic critique to the ticking bomb scenario that lies at the core of Bagaric and Clarke's assertion that torture is "an excellent means of gathering information."<sup>11</sup>

## I. Bagaric and Clarke Use Flawed Propositions to Justify Torture

Bagaric and Clarke's demand for legalized torture rests on a number of flawed propositions. In this section of the Article we highlight three of their claims that we deem to be particularly weak. First, they assert that torture is an excellent information gathering device<sup>12</sup> and should be permissible in certain circumstances,<sup>13</sup> correlating to the hypothetical ticking bomb scenario.<sup>14</sup> Second, they declare the "floodgate" or "slippery slope" argument is unmeritorious as the floodgates are already open, and legalization would reduce its instance.<sup>15</sup> Third, they argue that given torture is widespread,<sup>16</sup> despite its absolute prohibition, we need to adopt a "more realistic" and dispassionate analysis of the propriety of torture to enable authorities to properly regulate its use.<sup>17</sup>

First, Bagaric and Clarke claim that the "main benefit of torture is that it is an excellent means of gathering information."<sup>18</sup> We concede that in some instances torture may provide accurate and useful information, but note that the bulk of historical, medical, legal, and military evidence undermines the efficacy of torture as an information gathering device. According to Mary Strauss, Professor of Law at Loyola Law School, Los Angeles, "studies are replete with examples of

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11. Bagaric & Clarke, *supra* note 5, at 588.

12. *See id.* at 588.

13. *See id.* at 611.

14. *See id.* at 583.

15. *See id.* at 615.

16. *See id.* at 589–96.

17. *See id.* at 583.

18. *Id.* at 588.

false confessions under conditions less egregious than torture. Even the CIA has come to the conclusion that physical abuse usually is ineffective in ferreting out the truth.”<sup>19</sup> In 2005, Clint Van Zandt, a former FBI hostage negotiator and now president of Van Zandt Associates, a risk and threat assessment group, observed of the Abu Ghraib torture scandal: “[T]he fact is that no ‘trial by ordeal,’ be it physical, psychological, or chemical will insure that we can: (1) actually get information from the detainee, and (2) guarantee that whatever information extracted is true, a reality with which most interrogation ‘experts’ will agree.”<sup>20</sup> Likewise, Professor Michael LaBossiere states that:

[E]xtensive studies of torture show that it is largely ineffective as a means of gathering correct information. For example, the Gestapo’s use of torture against the French resistance in the 1940s and the French use of torture against the Algerian resistance in the 1950s both proved largely ineffective. As another example, Diederik Lohman, a senior researcher for Human Rights Watch, found that the torture of suspected criminals typically yields information that is not accurate. A final, and rather famous example is that of Ibn al-Shaykh al-Libi. Under torture, al-Libi claimed that Al Qaeda had significant links to Iraq. However, as he himself later admitted [and we now know to be correct] there were no such links. Thus, the historical record seems to count against the effectiveness of torture.<sup>21</sup>

In addition to being decidedly less than an “excellent means of gathering information,” the use of torture can actually serve to encourage rather than undermine terrorist groups and by strengthening hatred of the torturers, strengthen the will of victims to resist. As MacMaster explains, the use of torture may drive civilians into the political or social movement that the regime/officials perpetrating this behavior oppose: “[A]s was clear from both Algeria and Vietnam, the deployment of inhumane violence merely served to deepen resistance and drive most civilians into the arms of the FLN [Front de Libération National] or the Vietminh.”<sup>22</sup> Far from diminishing the power of the

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19. Mary Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 261–62 (2004); see also Richard J. Ofshe & Richard A. Leo, *The Consequences of False Confession: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998); Tim Weiner, *CIA Taught then Dropped Mental Torture in Latin America*, N.Y. TIMES, Jan. 29, 1997, at A11.

20. Clint Van Zandt, Commentary, *Does Torture Really Work?*, MSNBC.COM, June 13, 2005, <http://www.msnbc.msn.com/id/7516880/> (last visited Aug. 17, 2005).

21. Michael LaBossiere, *Provocations: Torture and Terror*, TPM ONLINE, PHILOSOPHERS’ MAC., 2004, available at [http://www.philosophersnet.com/cafe/archive\\_article.php?id=25&name=provocations](http://www.philosophersnet.com/cafe/archive_article.php?id=25&name=provocations) (last visited Aug. 17, 2005).

22. MacMaster, *supra* note 9, at 12.

“terrorist” groups, the practice of torture contributed to the growth in support for these groups.

Second, the slippery slope argument that Bagaric and Clarke dismiss with the assertion that capital punishment is limited to a relatively small number of crimes is not underpinned by substantial logic or empirical evidence. Indeed, they undermine their own case when they accept the proposition that “[p]eople who are simply aware of the threatened harm, that is innocent people, may in some circumstances also be subjected to torture.”<sup>23</sup> They move from the Dershowitz proposition that torture can be justified in some circumstances to conceding that witnesses and innocent people may also be tortured.<sup>24</sup> This concession essentially undermines their own argument that torture can be restricted to legitimate, legal, or clinical torture in specific circumstances. Bagaric and Clarke, have in fact and perhaps unwittingly, given support to the slippery slope argument put forth by the moral absolutists.

The third claim proffered by Bagaric and Clarke is that as torture is widespread it is better to adopt a “realistic” rather than moral approach and regulate the practice, thereby making it more accountable.<sup>25</sup> This is an absurd argument. The mere presence of torture does not mandate its legality. Brian Walters, Senior Counsel and President of Liberty Victoria (an Australian equivalent to the ACLU), has demonstrated the absurdity of this “logic” by observing that the same argument could be used to justify regulating crime: society could clean up crime and create more accountability by allowing criminals to apply for a license to commit their preferred felony within specific circumstances or conditions specified under license.<sup>26</sup>

## **II. Bagaric and Clarke Do Not Consider the Corrosive Effects that Torture Has on Broader Social and Democratic Institutions**

### **A. The Legalization of Torture Presents a Large-Scale Threat to Society**

In this section we argue that the costs of torture are seriously understated by Bagaric and Clarke and hence their utilitarian, cost-bene-

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23. Bagaric & Clarke, *supra* note 5, at 612.

24. *Id.* at 582, 612.

25. *Id.* at 614–15.

26. Brian Walters SC, President, the Victorian Council for Civil Liberties Inc., Speech for Public Forum, Melbourne, Australia (May 20, 2005).

fit claim that the gains associated with legalized torture outweigh any potential loss is without substance.

Much research that has been undertaken by academics in the fields of law, medicine, psychiatry, and politics demonstrates that when societies engage in, or legitimize, violent previously abhorred practices, the changes cannot be isolated and often promote corresponding transformations in other areas.

When violence is institutionalized and normalized, concepts of morality become increasingly distorted, as units within the repressive machine begin to compete for deadly goals: higher arrest rates; uncovering critical intelligence; quick extraction of confessions; and total annihilation of the enemy. Eventually these actions become not merely corrosive but implosive, as the atrocity environment turns against itself.<sup>27</sup>

Drawing from the fields of criminology, organizational theory, historical records, and interviews, Dr. Jean Arrigo, a social psychologist who engaged in volunteer human rights work in Central America during the 1980s, examined the institutional dynamics resulting from the practice of torture. She argues that official programs of torture interrogation repeatedly lead to serious dysfunctions in major institutions such as health care, biomedical research, police, the judiciary, the military, and the government.<sup>28</sup> By way of example, Arrigo points to the unintended consequences of biomedical research on torture where in the past it has resulted in, or provides, an "opportunity for secret, illegal research on human beings for other purposes."<sup>29</sup> That this is the case not just under authoritarian regimes but in democratic countries such as the United States was revealed when "government-sponsored ethics investigations of the CIA's mind-control Project MKULTRA and the Department of Energy's radiation studies exposed extraneous, excessive, and criminal human subjects research."<sup>30</sup>

A further example of torture's long-term impact on institutional and political structures and individuals is provided by MacMaster's discussion of the French in Algeria:

The consensus that emerged in France, one accepted by the main stream Left and centre-Right political parties, as well as by many ex-soldiers who had served in Algeria, was that the use of torture had constituted an unspeakable catastrophe. It had irreparably dam-

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27. Kara Martinez, *Structures of Violence: The Proliferation of Atrocity Environments Under the Brazilian Military Government and the Bush Administration*, 5 HUM. RTS. & HUM. WELFARE 293, 298 (2005).

28. Arrigo, *supra* note 10, at 2.

29. *Id.* at 10.

30. *Id.*

aged both the victims and the perpetrators. The psychologist Marie-Odile Godard estimated that some 350,000 French ex-combatants still suffer from psychiatric disorders and trauma (insomnia, nightmares, hallucinations, flashbacks, depression, suicidal impulses). Torture, widely referred to as "*la gangrene*", was seen as a form of cancer that inexorably led to the degeneration of the liberal democratic state, its institutions (particularly the army and the judiciary), its core values and fundamental respect for human rights and dignity. The centrality of torture to the debate on the Algerian war lay not in the grim horrors of the practice as taken in isolation, but rather in the extent to which it served as a symbol of a deeper corruption, both of the state and of the structures of the military, administrative and judicial power that had made it possible.<sup>31</sup>

Judicial integrity may also be affected by instituting a legal mechanism of torture warrants.<sup>32</sup> Oren Gross argues that "issuing torture warrants will make judges 'allied with bad acts,' or, at the very least, appear to be so allied. This will have significant costs in the context of the public perception of the judicial system [and may result in judges becoming] 'adjunct law enforcement officers'"<sup>33</sup> and mere rubber stamps for the police or military apparatus.<sup>34</sup>

Gross provides an example by way of an analysis of the Foreign Intelligence Surveillance Court ("FISC"). Established in 1978, FISC meets in secret and is composed of eleven federal district judges who are authorized to issue *ex ante* surveillance orders and search warrants.<sup>35</sup> According to Gross, the "combined effect of secrecy and the courts' general proclivity to defer to the executive in matters of national security is clearly demonstrated by FISC's record."<sup>36</sup> Since its inception the court has approved "all but less than a handful of applications."<sup>37</sup> A total of 1228 applications were made to the court for surveillance and physical searches in 2002—all were approved.<sup>38</sup> Having the judiciary act subserviently to the government undermines

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31. MacMaster, *supra* note 9, at 9.

32. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1540 (2004); see also Robert M. Bloom, *Judicial Integrity: A Call for Its Re-emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462 (1993); Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193, 207–09 (2003) (reviewing ALAN DERSHOWITZ, *WHY TERRORIST WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* (2002)).

33. Gross, *supra* note 32, at 1540–41.

34. *Id.* at 1541.

35. *Id.* at 1547.

36. *Id.* at 1547–48.

37. *Id.* at 1548.

38. *Id.*

their independence, a development compounded by the creation of closed courts—instruments that can all too easily become an apparatus of tyranny.

## B. Torture Has Devastating Effects on Democracy

In addition to its troubling sociological effects, the acceptance of torture in principle or practice threatens democracy. Bagaric, Clarke, and Dershowitz assume that once the genie escapes the bottle, democratic governance and judicial oversight will be able to regulate its behavior. The authors ignore the numerous empirical studies that have demonstrated this presumption to be false. In countries where torture has been allowed, a corroding process whereby the practice proliferates throughout the security and police apparatus has been repeatedly documented. This has been the case both in democratic countries such as France that allowed torture in Algeria, and in nations that limit democracy to a select proportion of the population, as with Israel in relation to the Palestinians.<sup>39</sup>

Nor do Bagaric and Clarke address the contradiction and irreconcilability between the philosophical and legal principles underpinning democracy and the practice of torture. Cohen addresses this contradiction when he notes: “[A]ssuming that the rule of law in a liberal democratic society is built on the foundation of respect for individuals and human rights, inserting a legal element that contradicts those values fractures the internal coherence of the entire construct.”<sup>40</sup> Similarly, Gross states that “by the mere incorporation of a

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39. See generally MacMaster, *supra* note 9; see also PIERRE VIDAL-NAQUET, TORTURE: CANCER OF DEMOCRACY (1963); Sanford Levison, “Precommitment” and “Postcommitment”: The Ban on Torture in the Wake of September 11, 81 TEX. L. REV. 2013 (2003); André Jacques, *Breaking the Silence on the War in Algeria—The Fight for Truth and Reconciliation*, 2 WORLD ASS’N FOR CHRISTIAN COMM. MEDIA DEV., Apr. 2002, available at <http://www.wacc.org.uk/wacc/content/pdf/669> (last visited Sep. 20, 2005); Pierre Vidal-Naquet, *Torture: Implement of Conformity*, 14 NATION, June 12, 1972, at 746, 747; Raphaëlle Branche, *The French Army and Torture During the Algerian War (1954–1962)* (Nov. 18, 2004) (unpublished manuscript), available at [http://www.mfo.ac.uk/uk/publications\\_uk/lecturereports\\_uk/branche\\_uk.htm](http://www.mfo.ac.uk/uk/publications_uk/lecturereports_uk/branche_uk.htm) Maison Française d’Oxford Lecture Rep.) (last visited Aug. 18, 2005); Darius Rejali, *Lecture: Torture, Democracy and the New Discourse of Terror* (Jul. 8, 2002) (unpublished manuscript), available at [http://academic.reed.edu/poli\\_sci/faculty/rejali/rejali/articles/Torture\\_Dem-Terror/hum](http://academic.reed.edu/poli_sci/faculty/rejali/rejali/articles/Torture_Dem-Terror/hum) (last visited Aug. 18, 2005). In relation to Israel, see HUMAN RIGHTS WATCH, ISRAEL’S RECORD OF OCCUPATION: VIOLATIONS OF CIVIL AND POLITICAL RIGHTS (1998), <http://www.hrw.org/reports98/israel/> (last visited Aug. 18, 2005); Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System’s Failure to Prevent Torture in the Occupied Territories*, 12 IND. INT’L & COMP. L. REV. 75 (2002); Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR. L. REV. 345 (1989).

40. Cohen, *supra* note 39, at 91.



set of extraordinary governmental powers into the legal system, a weakening of that legal system's resolve against using torture will have already taken place."<sup>41</sup> Poorly constructed arguments in favor of torture cannot make torture and democracy compatible. Rather, the fact that these arguments are considered the subject of reasonable debate illustrates that democracy itself is in trouble and suggests that we are entering a dangerous post-liberal or post-democratic phase.

A question that needs to be addressed in this discussion is why is there now a case for torture? What gave it a serious speaking voice? The catalyst was the terror attacks of September 11, 2001. Since that time a dangerous hyperbole has insisted that these events changed the world and demand a new approach to terrorism that can overrule past principles and practices. Undoubtedly the events of September 11, 2001 were a tragedy of monumental proportions. Nevertheless, this needs to be put into perspective. The last century witnessed genocide, beginning in Armenia in 1915, followed by the Holocaust in Nazi Germany, then Cambodia, Bosnia, Rwanda, and now Darfur, amongst others. This period was dominated by repression, torture, and mass killings in different parts of the world. In many instances the genocide was ignored by Western governments until the posthumous cries were so deafening that it could no longer be neglected, but by that time hundreds of thousands had already been killed. These events cannot be weighed against each other, and all demand a response from the global community. That response should not be further repression, torture, and a retreat from the rule of law, but a serious, rather than rhetorical, commitment to international law and human rights.

Bagaric and Clarke, and other intellectual apologists who view the current climate as somehow new, ignore the fact that the Universal Declaration of Human Rights<sup>42</sup> and the drafting of other international instruments protecting human rights were undertaken in the aftermath of one of the bloodiest wars in history, World War II. Amidst the chaos and ruin of that war, left and right were able to join together in an attempt to ensure that future generations would not descend into barbarity in times of duress. To continue to argue that the context is somehow new, and "that our rights were created in the absence of threats to our community is to misunderstand history."<sup>43</sup> It

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41. Gross, *supra* note 32, at 1542.

42. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. DocA/810 (Dec. 12, 1948).

43. Mathew Zagor, *Terrorism Is No Excuse for Torture*, TIMES (Canberra), May 24, 2005, available at 2005 WLNR 8155409.

was precisely because of the horror and malignancy of the war, and the recognition that the practice of repression, torture, and genocide that occurs under conditions of hostilities can lead to regimes of brutality, that a commitment was made to institute human rights both nationally and internationally.<sup>44</sup> What is apparent in the response by the Bush Administration and those who clamor for the use of torture is that they have failed to learn the lessons from history, and the consequence of that loss of memory is that they have also “failed to learn from the profound damage that torture inflicts, not only on the victims, but also on the individuals and regimes that deploy it.”<sup>45</sup>

Instituting a legal mechanism for torture in a democratic country cannot be undertaken unless an environment for such measures is created. One must convince a populace that has been taught that torture is incompatible with democracy to suddenly inculcate a different premise. How is this to be accomplished? Ideologies of national security must be advanced in which torture is nurtured and justified, creating an ever-expanding category of enemy others<sup>46</sup>—Muslims, human rights activists, liberals, and critics of government policy and practice. Concurrently, an atmosphere of fear must be created through which the values underlying democracy, such as tolerance, pluralism, and openness can be turned into intolerance, conformity, and suspicion. “Fear,” as Huggins states, “grants legitimacy to torture.”<sup>47</sup> When the threat is seen to be “operat[ing] outside civilized law, [it is then] argued that the response can and must be uncivilized.”<sup>48</sup> Alongside these changes “ad-hoc legalism is employed” whereby official executive-level decisions are made which further legitimize torture.<sup>49</sup> Thus, the process of the rule of law and democratic governance begins to breakdown, and other questionable and extralegal practices emerge. Practices such as the detention of suspects without trial,<sup>50</sup> the non-

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44. *See id.*

45. MacMaster, *supra* note 9, at 16.

46. Martha K. Huggins, Professor Human Relations, Tulane Univ., Torture 101, Presentation Before American Association for the Advancement of Science 9 (June 28, 2004), available at <http://www.aaas.org/news/releases/2004/0625torture-Huggins.pdf>.

47. *Id.*

48. *Id.*

49. *Id.* at 7.

50. *See United States of America*, in AMNESTY INTERNATIONAL, REPORT 2005, available at <http://web.amnesty.org/report2005/usa-summary-eng> (last visited Sept. 16, 2005); Memorandum from Timothy H. Edgar, Legislative Counsel, ACLU, to Interested Persons, Regarding the Indefinite Detention Without Charge of American Citizens as “Enemy Combatants” (Sept. 13, 2002), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=10673&c=206&Type=s> (last visited Sept. 16, 2005); News Release, Hum. Rts. Watch, United States: Guantánamo Two Years on, U.S. Detentions Undermine the Rule of

compliance with international law and the Geneva Conventions,<sup>51</sup> the establishment of military tribunals to avoid judicial review and due process, the practice of rendition (wherein a suspect can be sent to nations that allow torture in order to gain information), and denying suspects the right to access a lawyer, are all embedded within a broader patriotic cultism.

Indications of the latter trend became manifest in the United States not long after the September 11 attacks. In this period, “thousands of individuals were arrested and held without criminal charges, under a shroud of secrecy. Attorney General John Ashcroft compromised the Sixth Amendment right to effective legal counsel by ordering officials to wiretap attorney-client telephone calls without judicial approval.”<sup>52</sup> This was followed by the establishment of secret military tribunals to deal with terrorist suspects. Military courts, as Anthony Pereira explains, differ fundamentally from ordinary civilian courts in that they have judges who are:

[A]ctive duty-officers and enlisted personnel, temporarily assigned to the court, who answer to commanding officers who themselves may have an interest in the outcome of the case being judged. Military justice contains a pre-liberal vision of justice that antedates Montesquieu’s separation of powers because it embodies the principle that “who commands may judge,” and mixes the administrative-disciplinary power of the commander-in-chief with the penal power. In its very structure, therefore, military justice lacks an important element that can serve to protect the rights of the accused in civilian court systems.<sup>53</sup>

Military courts are the favored justice mechanism of fascist and authoritarian military regimes.<sup>54</sup> Nazi Germany greatly expanded the use of military courts,<sup>55</sup> as did the Brazilian<sup>56</sup> and Chilean<sup>57</sup> regimes, who persecuted alleged terrorists and opponents of the government;

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Law (Jan. 9, 2004), available at <http://hrw.org/english/docs/2004/01/09/usdom6917.htm> (last visited Sept. 16, 2005).

51. See Steven R. Ratner, Crimes of War Project, Rethinking the Geneva Conventions, Jan. 30 2003, <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>; see also AMNESTY INT’L, UNITED STATES OF AMERICA HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE ‘WAR ON TERROR’ (2004), available at [http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/\\$File/AMR5114504.pdf](http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/$File/AMR5114504.pdf).

52. James X. Dempsey, *Civil Liberties in a Time of Crisis*, 29 HUM. RTS. 8, 8 (2002).

53. Anthony W. Pereira, *Military Justice Before and After September 11*, 9 CONSTELLATIONS, 477, 478 (2002).

54. See *id.* at 479–80.

55. See *id.* at 479.

56. See *id.* at 480.

57. See *id.*

by contrast, social democratic governments, such as Sweden, abolished military justice in 1949.<sup>58</sup>

In addition, the Bush Administration, as is evident in a series of legal memoranda, deliberately set out to evade international law. One of the most significant of the legal memos was the opinion written by the Head of the Office of Legal Counsel (“OLC”), Jay S. Bybee (“Bybee Memo”), “on the question of whether harsh interrogation tactics violate United States obligations under the Torture Convention and its implementing statutes.”<sup>59</sup> The Bybee Memo concluded:

[T]hat the infliction of pain rises to the level of torture only if the pain is as severe as that accompanying “death, organ failure, or serious impairment of body functions”;

[T]hat the infliction of psychological pain rises to the level of torture only if the interrogator specifically intended it to cause “lasting . . . damage” such as post-traumatic stress disorder;

[T]hat it would be unconstitutional to apply anti-torture laws to interrogations authorized by the President in the war on terror; and

[T]hat, “under current circumstances, necessity or self-defense may justify interrogation methods that violate” the . . . prohibition on torture.<sup>60</sup>

The Bybee Memo proved vitally important to Defense Secretary, Donald Rumsfeld, who later formed a working group on interrogation techniques.<sup>61</sup> This memorandum helped establish the framework for torture that resulted in a pantheon of abuses at both Guantánamo Bay and Abu Ghraib and in other countries via the practice of rendition. David Luban concludes that:

Abu Ghraib is the fully predictable image of what a torture culture looks like. Abu Ghraib is not a few bad apples. It is the apple tree. And you cannot reasonably expect that interrogators in a torture culture will be fastidious and well-meaning torturers that the liberal ideology fantasizes.<sup>62</sup>

Luban’s point is that what happened in Abu Ghraib is not an aberration. That once torture is sanctioned by a government or regime, Abu Ghraib is the necessary result. In this sense, torture cultures are not something that occur only in third world military dictatorships or Middle-Eastern theocracies, but rather can develop within Western

58. *Id.* at 479–80.

59. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1454 (2005).

60. *Id.* (quoting Memorandum from Jay S. Bybee, Office of Legal Counsel, U.S. Dept. of Justice to White House Legal Counsel Alberto R. Gonzales (Aug. 1, 2002) [hereinafter “Bybee Memo”]).

61. *Id.*

62. *Id.* at 1452.

democracies once a government places itself outside the dictates of the prohibition on torture or outside the rule of law.

### C. The Legalization of Torture Harms Torturers

In assessing the costs of torture, Bagaric and Clarke pay no attention to the torturers themselves.<sup>63</sup> Though research has shown this is a cost that both individuals and society have repeatedly been compelled to confront. This omission is unacceptable, given the numerous studies undertaken on the education of a torturer. Many of these studies—from University of Florida psychologist Molly Harrower's examination of Nazi war criminals,<sup>64</sup> Stanley Milgram's laboratory examinations on the willingness of average Americans to administer electric shocks,<sup>65</sup> and Craig Haney, W. Curtis Banks, and Phillip Zimbardo's simulation of prison life,<sup>66</sup> amongst others—come to the disturbing conclusion that there is nothing inherently evil about torturers. Rather, most people under the right circumstances, and in obedience to authority, will deliberately inflict pain on others.<sup>67</sup> In order for the torture to occur, the victim(s), must be defined as the "other," that is, the victimized must be de-humanized. Edward Peters, Professor of History at the University of Pennsylvania, states that evidence from official trial records, such as the Greek trials in 1975, indicates that torturers were "recruited from conscript soldiers with family

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63. See generally Bagaric & Clarke, *supra* note 5.

64. See generally ERIC A. ZILLMER ET AL., THE QUEST FOR THE NAZI PERSONALITY: A PSYCHOLOGICAL INVESTIGATION OF NAZI WAR CRIMINALS (1995) (detailing the results of Rorschach reports of Nazi war criminals such as Rudolf Hess, Hermann Goering, Adolph Eichmann, amongst others, to determine whether a Nazi personality type existed and finding that war criminals did not have psychopathological personalities but in fact exhibited different personality types, many appearing normal).

65. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974). Milgram conducted experiments designed to test how much pain an ordinary person would inflict on another simply because he/she was ordered to do. The results showed that there was a strong willingness to inflict pain on the command of a person in authority. *Id.*

66. Craig Haney, Curtis Banks, & Philip Zimbardo, *A Study of Prisoners and Guards in a Simulated Prison*, in NAVAL RESEARCH REVIEWS (1973), available at <http://www.zimbardo.com/zimbardo.html> (follow the "Publications" hyperlink; then follow the "Downloads" hyperlink; then follow the "A Study of Prisoners and Guards in a Simulated Prison (1973)" hyperlink). This simulation involved the university students playing the role of guards and prisoners, in just after a week, the students took on characteristics of their real life counterparts, those playing guards became aggressive and authoritarian, while those playing prisoners became passive and vulnerable. *Id.*

67. See Janice T. Gibson & Mika Haritos-Fatouros, *The Education of a Torturer: There Is a Cruel Method in the Madness of Teaching People to Torture, Almost Anyone Can Learn It*, 20 PSYCHOL. TODAY 50, 58 (1986).

backgrounds politically sympathetic to the current [political] regime, or from lower-level police personnel.”<sup>68</sup> They received “intensive political indoctrination” that emphasized the danger to the country constituted by “communists,” “fascists,” “terrorists,” or “imperialists.”<sup>69</sup> According to Peters, torture then tends to proliferate throughout the security and police apparatus:

As legal or other governmental safeguards of civilian rights are relaxed, the practice of torture generally spreads from victims charged with active terrorism or political mischief to other classes of victims, until the work of the torturer, himself conditioned to torture anyone at all, may be applied to any victim suspected of any sort of opposition to the government or indeed of any activities, such as labour union work or certain kinds of journalism or legal advocacy, that the government disapproves of. By this stage in his career, the torturer is hardly in a position to discriminate among his victims.<sup>70</sup>

Luban also highlights studies that support the escalation thesis that once torture is sanctioned, the torturer cannot be expected to contain the practice to limited parameters of use. He points to the work of Mark Osiel, who, in his examination of the Argentinean military, reports that initially many torturers had qualms about what they were doing, “until their priests reassured them that they were fighting God’s fight.”<sup>71</sup> Likewise, pointing to work undertaken by Simpson and Bennett, Luban states that by the end of the war, such qualms were gone: “[H]ardened young officers were placing bets on who could kidnap the prettiest girl to rape and torture.”<sup>72</sup>

The torturer and the torture culture cannot be separated. Peters, discussing Hannah Arendt’s study of the Eichmann case<sup>73</sup> notes that Arendt claimed that “if there was not quite a potential torturer in Everyman, then there at least was, in the kind of society in which Eichmann worked, the possibility that a functionary might be so distanced

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68. EDWARD PETERS, *TORTURE* 182 (1985).

69. *Id.*

70. *Id.* at 183.

71. Luban, *supra* note 59, at 1447 (citing MARK J. OSIEL, *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR* (2001)).

72. *Id.* (citing JOHN SIMPSON & JANA BENNETT, *THE DISAPPEARED AND THE MOTHERS OF THE PLAZA: THE STORY OF THE 11,000 ARGENTINIANS WHO VANISHED* 109 (1985)).

73. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963). This case involved Adolf Eichman, a Nazi lieutenant colonel, who was alleged to have been responsible for transporting Jews to concentration camps, and hence to their deaths. After World War II he escaped capture by leaving Germany and lived in Argentina under a false name. In 1969 he was kidnapped by Israeli intelligence and brought to Israel to face fifteen charges, including crimes against the Jewish people, war crimes, and crimes against humanity. See *id.* at 21.

from reality that in his detachment he failed to realize the consequences"<sup>74</sup> of his actions. In observing Eichmann during his trial, Arendt concluded that:

Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III "to prove a villain." Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. And this diligence in itself was in no way criminal; he certainly would never have murdered his superior in order to inherit his post. He *merely*, to put the matter colloquially, *never realized what he was doing*.<sup>75</sup>

Arendt's point about Eichmann was the dreadful banality of the man. According to Bergen, "Arendt's thesis of the banality of evil is in part a damning critique of the thoughtlessness of modern bureaucratic man who follows rules blindly and mechanistically," and in so doing renounces his "moral autonomy."<sup>76</sup> Eichmann is simply a functionary—a cog in the juridical machine—a "law-abiding citizen" of "frightening mediocrity,"<sup>77</sup> who carries out his duties under the law, under a "legalized warrant." It is difficult to determine which is the more damaging—the torturer who suffers from depression and suicidal impulses, and perhaps some notion of guilt as a consequence of inflicting pain on others, or the Eichmanns—functionaries who do not display any moral ambivalence regarding the harm they inflict. Both are damaged, and both are damaging to society.

Bagaric and Clarke would probably dismiss their advocacy of legalized torture as a long way from Nazi Germany, however as Van Bergen points out, "regulating rather than forbidding a wrong act makes it seem right,"<sup>78</sup> and it expunges the torturer of any sense of guilt or remorse for their actions. Furthermore, there are numerous psychological studies of torturers that indicate that the majority of torturers develop significant psychological impairment as a direct result of their

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74. PETERS, *supra* note 68, at 181.

75. ARENDT, *supra* note 73 at 287.

76. David B. Levy, Book Note, *Hannah Arendt and the Shoah: Banality of Evil? Radical Evil? Or Both?*, H-HOLOCAUST, Aug. 1999, at 2 (reviewing BERNARD J. BERGEN, *THE BANALITY OF EVIL: HANNAH ARENDT AND "THE FINAL SOLUTION REVIEW"* (1998)), available at <http://www.h-net.msu.edu/reviews/showpdf.cgi?path=18645999013447> (last visited Aug. 17, 2005).

77. Malte Goebel, Book Note (reviewing HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1998)), [http://www.informatik.hu\\_berlin.de/~goebel/ha/ha\\_eich.htm](http://www.informatik.hu_berlin.de/~goebel/ha/ha_eich.htm) (last visited Aug. 17, 2005) (unpublished book review).

78. Jennifer Van Bergen, *If They Lie in Public, What Would They Do in Secret? National Security Courts and Torture Warrants*, COUNTERPUNCH, Aug. 20, 2004, available at <http://www.counterpunch.org/bergen08202004.html> (last visited Aug. 17, 2005).

work.<sup>79</sup> While many torturers are viewed as serving the interests of their country, once hostilities end or an authoritarian regime is defeated, there are considerable problems reintegrating these men and women into the social body.<sup>80</sup> Professor Wolfgang Heinz, in his study of the military and torture, found that in United States military history, members of the Office of Strategic Services who engaged in conduct just short of torture “often experienced the contempt of the regular army.”<sup>81</sup> Similarly, Arrigo states that “[a]fter the fall of the Pinochet regime in Chile, the navy and air force did not take back officers who had worked in the secret service but considered them to be ‘defiled.’”<sup>82</sup> If the intellectual apologists are serious about their torture proposal, then they need to also develop a detailed social and psychological repair model to deal with the institutional breakdowns and individual pathologies that are a consequence of the torture culture they advocate.

Bagaric and Clarke fail to understand that the clinical functionary who would dispense torture under a judicial warrant is the same as the functionary in Nazi Germany.<sup>83</sup> Naïvely, they assert that a democratic government can regulate torture without corresponding reactions in other key institutions or in the broader culture—history, politics, and psychology prove their thesis unambiguously incorrect. The torture in Abu Ghraib did not occur in a vacuum; it was part and parcel of other changes in the justice and administrative system that are in conflict with the rule of law.

### III. The Ticking Bomb

A key element in the case advanced by Bagaric and Clarke is the ticking bomb thesis. Given the centrality of the ticking bomb to the demand for legalized torture, in this Part we demonstrate that it is a less convincing justification than its advocates would have us believe.

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79. Arrigo, *supra* note 10 (citing many of these studies including ALISTAIR HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954–1962 (1977), which provides details such as the case of a European police officer found guilty of torturing his wife and children who formerly conducted torture in Algeria; see also RACHEL M. MACNAIR, PERPETRATION-INDUCED TRAUMATIC STRESS: THE PSYCHOLOGICAL CONSEQUENCES OF KILLING (2002); THE POLITICS OF PAIN: TORTURERS AND THEIR MASTERS (Ronald D. Crelinsten & Alex Peter Schmid eds., 1994).

80. See MacMaster, *supra* note 9, at 9.

81. Arrigo, *supra* note 10, at 30 n.60 (quoting WOLFGANG S. HEINZ, THE MILITARY, TORTURE AND HUMAN RIGHTS (1993)).

82. See *id.* at 12.

83. Van Bergen, *supra* note 78.



The so called “ticking bomb” aims to be seductive in its simplicity. Bagaric and Clarke state it as:

A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying over three hundred passengers that is flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknown to him, he was under police surveillance and is immediately apprehended by the police. The terrorist leader refuses to answer any questions of the police, declaring that the passengers must die and will do so shortly.<sup>84</sup>

Having detailed a hypothetical replete with many specific implicit assumptions (such as the ability to verify that the detainee is indeed the terrorist mastermind, has the requisite information, and would reveal said information under the “right” circumstances (i.e., sufficient force, etc.)), Bagaric and Clarke then implore us: “Who in the world would deny that all possible means should be used to extract the details of the plane and the location of the bomb?”<sup>85</sup>

Falling just short of the “what if it were your child on the plane” argument, they contend that reasonable people would be willing to waive any absolute proscription against torture if the circumstance was of immediate consequence to them. The paucity of academic rigor in this reasoning is disappointing. That it forms the basis on which the legal sanctioning of torture in certain circumstances is being seriously considered by policymakers around the world is alarming.

Having detailed in the first part of this Article the moral and philosophical objections to the state sanctioned use of torture, we now turn to demonstrating the logical inconsistencies in the seemingly simple and (self proclaimed) compelling case for torture put forth by Bagaric and Clarke. To extend earlier refutations of this stratagem, we engage in a short foray into game-theory. The latter is essentially the study of strategic behavior amongst agents (whether they are people, firms, or states).<sup>86</sup> In particular, the key insight of the game-theoretic lens is the observation that there exists a world of strategic interdepen-

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84. Bagaric & Clarke, *supra* note 5, at 583.

85. *Id.*

86. There is extensive literature on game-theoretical methods in fields ranging from evolutionary biology to auction theory. See generally AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY: THE COMPETITIVE EDGE IN BUSINESS, POLITICS, AND EVERYDAY LIFE (1991), for a non-technical introduction.

dence. Thus, the payoffs to any agent (their utility, profits, or whatever it is that they are seeking to maximize in life) depends not just on the actions that they take, but also on the actions and reactions that all the other players in the game undertake (which in turn, will depend on their objective functions). Thus, in analyzing a game, we start by trying to identify all the players, what their objective functions are, and delineate their strategy space (identifying their actions contingent on the actions and reactions of others).

Applying game-theory to Bagaric and Clarke's ticking bomb hypothetical shows many players in this game: the state, the torturer, the detainee, the innocent victims, etc. This discussion limits its attention to the state appointed torturer and the person currently in captivity suspected of having information about the location of the bomb.<sup>87</sup> This discussion assumes further that the torturer is only interested in saving the lives of as many people as possible.<sup>88</sup> The detainee can either know the required information, or not.<sup>89</sup> First, this Article examines the case where he has the requisite information. It assumes further that his objective function is to threaten the global compact, and the means is by successfully rendering acts of terror on innocent civilians. Apart from all the assumptions that we have already delineated to this point, the further presumption in the Bagaric and Clarke hypothesis is that by pursuing torture as part of the interrogation process, the detainee will divulge information (accurately) that would not otherwise be forthcoming.<sup>90</sup> Why would we believe this to be true? Bagaric and Clarke appeal to anecdotal evidence to contend that torture is "an excellent means of gathering information."<sup>91</sup> They appeal to the observation that: "Humans have an intense desire to avoid pain, no matter how short term, and most will comply with the demands of a torturer to avoid the pain."<sup>92</sup>

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87. The game between the State (as representative of the democratic polity) and the torturer is also interesting but tangential to the main thrust of the Bagaric and Clarke article. In practice, given the perception that torture may yield information in a torture warrants game, the torturer weighs the risk of *ex post* being found derelict in his duty (legal scholars, commentators, politicians, the public, lamenting the failure to use all means possible to extract information).

88. Note that this is not the same as wanting to extract information. Extracting information is only relevant insofar as it enables the State to save lives.

89. Indeed, in the state of the world where the captor is not privy to the sought after information, that could either be because he is innocent or just not in possession of the information.

90. See Bagaric & Clarke, *supra* note 5, at 588.

91. *Id.*

92. *Id.*

But what of our detainee's objective function? Indeed, one might also conjecture that humans have a desire to avoid death, and yet we see many instances of terrorists willingly engaging in suicide bombing missions when their desire to inflict that harm overrides their desire for self-preservation. How do we know that the same will not hold for stages of torture? Worse yet, how do we know that the information that they offer during the stage of torture is in fact correct?<sup>93</sup> Consider a detainee whose willingness to inflict harm has been so refined that he has been trained to (subconsciously) deliver misinformation in the event of capture. So now the ticking bomb actually works against the torturer. Having subjected the detainee to many hours of "interrogation" we are delivered information that the armed forces act upon erroneously. Resources are deployed on a wild goose chase that could have usefully been engaged in other means of trying to avert the impending disaster, but our faith in the veracity of information gleaned through our torture methods led us down the wrong path.

Suppose instead that our detainee does not have the requisite information. Bagaric and Clarke suggest that torture should only be used against individuals that possess the relevant information, but they provide little guidance as to how this can be assured. Their suggestion that polygraphs be employed, with the claim that they are accurate 80% of the time, is little comfort 20% of the time when officials have the wrong person. Those trained in subversive terrorist tactics are unlikely to succumb easily to polygraphs or truth serum. Therefore, the probability that the polygraphs are in fact going to deliver guilty parties is probably well under the stated 80%.

Moreover, consider the case where the detainee is not privy to the information sought. If they are part of the terrorist network but just not in possession of the relevant information, then whatever information is delivered is either deliberate misinformation (the wild goose chase again) or the coerced confessions that result from "our intense desire to avoid pain."<sup>94</sup> In either case, the torture regime has exacerbated our problem by diverting resources to the wrong areas. If the detainee is truly an innocent, whose only real connection to the terrorists is that his name is Mohammed, then the torture will either re-

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93. Leonard Wantchekon and Andrew Healy posit an explanation around the prevalence of torture by modeling the institutional structure (between state, torturer and victim) as a game of incomplete information. While an interesting analytical exercise, their crucial assumption that the State has the means to verify the validity of information provided by the detainee seems unreasonable. See Leonard Wantchekon & Andrew Healy, *The Game of Torture*, 43 J. CONFLICT RESOL. 596 (1999).

94. Bagaric & Clarke, *supra* note 5, at 588.

sult in a failure to extract any information, or wrong information that results from the detainee's desire to avoid pain.

A cursory examination of the incentives, objectives, and information sets of the players in the "game of torture" demonstrates that what Bagaric and Clarke take as patently obvious—that torture is justified from a utilitarian perspective in the ticking bomb scenario—is in fact a very specific case that assumes many unlikely concurrences. We have to believe that we have the right person, that they have the requisite information, that they will deliver that information, if and only if, they are tortured, that they will deliver it accurately, and that the torturer's motives are just and designed solely to serve the common good. In the event that any of those assumptions proves false, the torture regime will in fact exacerbate the immediate problem by misdirecting resources based on misinformation.

Bagaric and Clarke positing that torture is morally justifiable in certain circumstances—the ticking bomb scenario—is little more than a rehashing of the old utilitarian line that justifies actions that are in the greater good. Of course the evaluation of the greater good is an extremely complex task (as many public choice theorists and practitioners have found) when we go beyond counting the number of lives saved versus those lost.<sup>95</sup> To bolster their claims they present evidence of the existence of torture in many regimes around the world today. Apart from padding out their article, it is not clear exactly how this relates to the formal sanctioning of torture. The leap from covert torture operations to legalized torture is a heroic one. It is, moreover, a leap that will increase the likelihood the torturers will progress father down the slippery slope than even they may wish to travel. In the ticking bomb scenario, if torturers have the capacity to sanction or directly engage in torture and choose not to do so because they are not fully convinced that this will produce a positive outcome for the population they run the risk they will be blamed should the hypothetical bomb explode. Situated in such circumstance, the torturer must ask himself: shall I torture and have the victim bear the cost or refrain and carry the risk that I will be punished for having failed to go further than I believe to be wise?

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95. Suppose that torturing the detainee is not yielding the desired result. The State then allows for the detainee's three-year old child to be tortured in front of the detainee until the requisite information is obtained. Unfortunately, we made a mistake. It turns out that the detainee really does not have any information, and the three-year old is "collateral damage."

The problem with Bagaric and Clarke's article is that not only can it be refuted on moral and philosophical grounds (and many learned scholars have done just that), but in fact it does not even stand up to scrutiny within the feeble consequentialist fabric that they espouse. The logical inconsistencies are evident in the presumption of the ability to achieve the "greater good" through torture. The commentary proffered above on the shortcoming of their reasoning from a game-theoretic perspective is only a second tier refutation of their basic thesis. In fact, as detailed in Part II of this Article, if one were to encompass the second-order effects to institutions and the decay of the fundamental democratic principles that all too often necessarily accompanies state-sanctioned torture, then consequentialism itself would suggest that torture could never be for the greater good. We may save hundreds of lives (assuming the stars are aligned right to overcome the informational problems detailed above), but that cannot be for the greater good if we consider the social welfare implications of the decay of fundamental democratic institutions.<sup>96</sup>

A final point comes from Luban who states that "ticking bomb stories are built on a set of assumptions that amount to intellectual fraud."<sup>97</sup> Luban argues there are two rhetorical goals underpinning the ticking bomb scenario.<sup>98</sup> First, the ticking bomb is a trap designed to get liberals to breach their moral principles, to concede that torture is acceptable in the ticking bomb scenario, once conceded it is "*gotcha*," then the haggling over price begins—how far should we go?<sup>99</sup> Secondly, it attempts to reconcile torture with liberal values whereby torturers can be viewed in a different light.<sup>100</sup> The torturer becomes "a conscientious public servant, heroic the way that New York fire-fighters were heroic, willing to do desperate things only because the plight is so desperate and so many innocent lives are weighing on the public servant's conscience."<sup>101</sup> We should not be tricked into accepting the ticking bomb scenario because essentially it poses the wrong question. As Arrigo states:

The moral error in reasoning from in the ticking bomb scenario arises from weighing the harm to the guilty terrorist against the harm to the prospective innocent victims. Instead, the harm to innocent terrorist victims should be weighed against the breakdown

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96. See discussion *supra* Part I.

97. Luban, *supra* note 59, at 1427.

98. *Id.* at 1440–41.

99. *Id.*

100. *Id.* at 1441.

101. *Id.*

of key social institutions and the state-sponsored torture of many innocents.<sup>102</sup>

The apologists can only raise the ticking bomb problem because they choose to ignore the historical, medical, psychological, and legal knowledge discussed in this Article.

## Conclusion

In their conclusion, Bagaric and Clarke state that “[t]here is a need for measured discussion regarding the merits of torture as an information gathering device.”<sup>103</sup> We believe that because Bagaric and Clarke do not consider arguments disproving the efficacy of torture or provide evidence demonstrating the broader effects torture has on democracy and society, they have failed to meet their own objective. They fail, moreover, because they wish to debate whether an unspeakable act, abolished in Britain in 1772,<sup>104</sup> should be deemed acceptable in the modern world. We make no apologies for maintaining our support for the absolutist position. There is no case for a democracy to establish a legal framework to suit the often used but misguided ticking bomb hypothetical. The claim that those who advocate torture would go no further than is suggested by this imaginary scenario is not only without substance, but it has been shown to be so in the time since Bagaric and Clarke presumably drafted their contribution. In short, neither the United Kingdom Court of Appeal’s decision allowing evidence derived by torture nor the United States military panel’s decision to embrace a similar position, limit the use of torture to the unlikely scenario depicted in the ticking bomb example. These decisions are already past the point in the slope that Bagaric and Clarke insist can be maintained should we embrace that which legislators and jurists who were only just leaving feudalism deemed unacceptable.

There is already a legal framework in place, one established in response to past atrocities, namely the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which states that the prohibition against torture is absolute and applies in times of peace and war.<sup>105</sup> The international human

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102. Arrigo, *supra* note 10, at 21.

103. Bagaric & Clarke, *supra* note 5, at 616.

104. See Martin Bright, *The Politics Column—Martin Bright Finds Torture Is Now Tolerable*, NEW STATESMAN, Oct. 24, 2005, available at <http://www.newstatesman.com/200510240003>.

105. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pt. I, art. 2(2), *adopted* Dec. 10, 1984, 1465 U.N.T.S. 24841 114 (“No exceptional circumstances whatsoever, whether a state of war or a threat of

rights conventions are neither “morally unsound”<sup>106</sup> or “pragmatically unworkable”;<sup>107</sup> political expediency and lack of commitment are the things that obstruct real compliance with human rights instruments. Instead of looking backwards to the Inquisition—the rack and the screw, nails under fingernails—for inspiration, we need to affirm the values that underpin the human rights instruments and need to ensure that in combating terrorism we do not undermine democracy, the rule of law, or the integrity of our judicial system. In Bagaric’s view the “belief that torture is always wrong is . . . misguided and symptomatic of the alarmist and reflexive responses typically emanating from social commentators.”<sup>108</sup> But as Zagor responds, our visceral reaction against “the proposition that torture should be legalised should . . . not be considered as mere ill-informed populism. It reflects deeply seated values and legal rules, an emotional intelligence borne of historical experience.”<sup>109</sup>

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war, internal political instability or any other public emergency, may be invoked as a justification for torture.”).

106. Bagaric & Clarke, *supra* note 5, at 616.

107. *Id.*

108. Mirko Bagaric, *A Case for Torture*, ACE, May 17, 2005, at 13.

109. Zagor, *supra* note 43.

