

Chapter Three

Another Modest Proposal: In Defence of the Prohibition against Torture

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Introduction

François Marie Arouet was born in 1694 when the *Ancien Régime* — the iron fist of Louis XIV in the velvet glove of Versailles — seemed insouciant, eternal, and impervious to change. Yet by the time of Arouet's death in 1778, the Enlightenment had wrought such a destabilising effect upon the old order that it was on the point of collapse. Arouet, writing under the nom de plume Voltaire,¹ was a pivotal figure in the development of modern Western ideas about government and justice. Playwright, essayist, and critic, he was above all a relentless fighter against cruelty and superstition. I doubt many would disagree with me when I say that we still have need of such fighters. But sometimes we find the advocates of cruelty and superstition in surprising places.

Voltaire's battle cry against the enemies of Enlightenment was '*Écrasez l'infâme*'.² You must wipe out infamy. But what was so infamous as to mandate utter obliteration? On one level, the Catholic Church of his day; on another, the whole system of absolutism that held France, and most of Europe, in thrall. What they had in common was this: a power that was entirely unaccountable, entirely unlimited, and which instilled a climate of fear through the measured dosage of cruelty.

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¹ T Besterman, *Voltaire* (London: Longmans, 1969); A O Aldridge, *Voltaire and the Century of Light* (Princeton, NJ: Princeton University Press, 1975). See also R Pearson, *Voltaire Almighty: A Life in Pursuit of Freedom* (London: Bloomsbury, 2005).

² J Herrick, *Against the Faith: Essays on Deists, Skeptics, and Atheists* (Buffalo, NY: Prometheus Books, 1985, ch 3: Voltaire: *Écrasez l'infâme*, 56); B R Redman (ed), *The Portable Voltaire* (New York: Viking Press 1949 ed).

Voltaire had in mind, in particular, State practices of torture, both private and public, which were common in France. This barbarism sickened him and he knew, father of the Age of Reason though he was, that there was no reasoning with or controlling it. We cannot argue about such cruelty for that is already to dignify it as reasonable. We can only commit ourselves to its destruction. *Écrasez l'infâme*.

One of the cases that most profoundly disturbed Voltaire was the death of Damiens. Convicted of attempting to assassinate Louis XV, he was disgustingly tortured and finally executed over the course of several hours in the main square of the Paris townhall. Michel Foucault wrote at length about this gruesome event, and treated it as emblematic of the world of early modernity.³ Under the *Ancien Régime*, the power of the state was absolute, exercised through public spectacles and through terrors, designed to establish the total control of the state and the total subjection of all those who resisted it. Torture, no less than the great castles and glorious pageantry of the monarchy, was a way of representing that spectacular power.

Antiquity had been a civilization of spectacle. "To render accessible to a multitude of men the inspection of a small number of objects": this was the problem to which the architecture of temples, theatres and circuses responded. With spectacle, there was a predominance of public life, the intensity of festivals, sensual proximity. In these rituals in which blood flowed, society found new vigour and formed for a moment a single great body.⁴

Terrorism, implies Foucault, is above all an attack on the state and its exclusive right to the legitimate use of violence. Unlike a murderer or robber, the terrorist or assassin does not just kill: he claims a legitimacy, even a lawfulness, in doing so. Such acts do not 'break' the law, but seek to impose a new or higher law. In the days of the *Ancien Régime*, public execution re-appropriated that violence to the state, and turned the victim into an unwilling agent of the sovereign's power.⁵ The very bodies of the tortured, such as Damiens, became abject puppets forcibly made to act a part in this pageant play of complete authority. The reduction of a person to a body and a body to the puppet of another's will, as much as pain, defines torture. Torture and execution 'did not re-establish justice; it re-activated power'.⁶ Its point, ultimately, was not to exact retribution or, it goes without saying, to extract information, but to show us all just who was boss.

³ M Foucault, *Discipline and Punish: The Birth of the Prison* (A Sheridan trans, New York: Vintage, 1995 ed), 3-31 [trans of: *Surveiller et Punir: Naissance de la Prison* (first published Paris: Gallimard, 1975)].

⁴ Ibid 216-17.

⁵ Ibid 48-49.

⁶ Ibid 49.

Yet ironically, as the case of Voltaire demonstrates, the very brutality of torture undermined the stability of the state. Many people were naturally horrified by events like the death of Damiens. Many more recalled, or had occasion to experience the *lettres des cachets*, which entitled the French state to lock their opponents up without trial, without explanation, and at His Majesty's pleasure. Thus torture and arbitrary punishment became imbued with a wholly different set of meanings than that intended by the state. It came to show not the power of the state, but its insecurity; to suggest not the divinity of the sovereign but his partiality; to instil not a kind of passivity and submission in the population but on the contrary to generate activity and resistance. These provocations exploded into life at the end of the eighteenth century, wiping out not just these notorious practices but the regime with which they had become synonymous.

Torture in Theory

Foucault argues that since the Enlightenment, power has been exercised in quite different ways: not by the punishment of bodies, but through the disciplining of minds; not through dramatic acts that destroy us utterly, but through tiny daily pressures that encourage us to conform; not in a public square and periodically, but every day in homes, schools, factories, armies, hospitals. The end of torture as a state institution was coupled by the rise of other institutions, less violent and more subtly committed to moulding 'docile bodies'.⁷

But perhaps we have written off the *Ancien Régime* too quickly. In 2005, two Australian academics, Professor Mirko Bagaric and Julie Clarke, attracted widespread attention by arguing that torture is a 'permissible' and even a 'moral' action in certain circumstances.⁸ Within days, Peter Faris, one-time head of the now defunct National Crime Authority, was reported as supporting the 'call'.⁹ And of course in the United States, arguments for the necessity of occasional and exceptional acts of torture or unlimited detention circulate regularly in the halls of government as well as in the pages of the law reviews.¹⁰

⁷ Ibid 135-69.

⁸ M Bagaric and J Clarke, 'The Yes Case Can Outweigh the No', *Sydney Morning Herald* (Sydney), 17 May 2005 (hereinafter Bagaric and Clarke, *SMH*); M Bagaric, 'A Case for Torture', *The Age* (Melbourne), 17 May 2005. See also M Bagaric and J Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 3 (hereinafter Bagaric and Clarke, *USFLR*). I continue to refer in many places to the newspaper articles, particularly *The Sydney Morning Herald* because, perhaps surprisingly, they present both a more explicit and a more coherent argument for why torture is morally justifiable. *USFLR*, though larded with literature reviews, makes the case in a more peremptory and indirect fashion.

⁹ 'Torture Acceptable, Says Former NCA Chief', *Sydney Morning Herald* (Sydney), 22 May 2005.

¹⁰ In addition to Bagaric and Clarke, above n 8, see also Gonzales, below n 18; Wolf Blitzer interview with Alan Dershowitz, 'Dershowitz: Torture can be justified', 3 March 2003, at <<http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz>>; A Dershowitz, 'The Torture Warrant: A response to Professor Strauss' (2004) 48 *New York Law School Review* 275.

In good lawyerly fashion, Bagaric and Clarke discuss the question in abstractions entirely shorn of any social context. The necessity of torture is presented in purely theoretical terms. Torture, they say, is only justifiable where 'it is used as an information-gathering technique to avert a grave risk'.¹¹ Elsewhere, while not ruling out the torture of an 'innocent person' to obtain vital information, they focus on the archetypal hypothesis in which 'torturing a wrongdoer ... is the only means, due to the immediacy of the situation, to save the life of an innocent person'.¹² Now they caveat this argument by conceding that 'none of the recent high profile cases of torture appear to satisfy these criteria'.¹³ Well isn't that nice to know. So the question is presented as a thought experiment designed to help us interrogate, so to speak, our moral instincts; to approach them in a reasoned rather than a merely emotional way. The thought experiment is meant to encourage us to think more clearly about a subject that is often, they tell us, a prey to fuzzy passions,¹⁴ and unfairly tainted by irrational and inappropriate 'pejorative connotations'.¹⁵ Their stated goal is to normalise torture, to encourage us to see it as no different from any other tool of social policy.¹⁶

But it is not remotely plausible to attempt to disassociate the article's reflections on the legality of torture from a social context in which the use of torture by governments is in fact on the rise, and is openly being presented as legitimate and even necessary in the 'post-9/11 world': by government spokesmen and soldiers, television producers and talk-show hosts. The top-rated television show '24' has depicted no less than 67 instances of torture on the part of its heroes in its five years, and the untrammelled sovereignty exhibited by its counter-terrorist star, Jack Bauer, is beginning to exercise a considerable sway over the minds and imagination of many trainee soldiers and interrogators.¹⁷ The legitimacy of torture is undoubtedly back on the agenda.

Neither of course is there anything in the least fictional or coincidental about the discussion of torture at this moment in time. We are familiar with the dismal story of Abu Ghraib. But this was no isolated instance. In pursuit of the so-called 'global war against terrorism', the United States has not only been involved in cases of torture itself, but has routinely sent — the term used is 'rendered' —

¹¹ Bagaric and Clarke, *USFLR* above n 8, 611.

¹² Bagaric and Clarke, *SMH* above n 8; *USFLR* above n 8, 612-14.

¹³ *Ibid* 616.

¹⁴ See in particular Bagaric and Clarke, *SMH* above n 8.

¹⁵ Bagaric and Clarke, *USFLR* above n 8, 583.

¹⁶ *Ibid* 584-85.

¹⁷ J Mayer, 'Whatever it Takes', *New Yorker* (New York), 19 February 2007; see also 'Prime Time Torture' study by Human Rights First organisation: <http://www.humanrightsfirst.org/us_law/etn/primetime/index.asp>.

suspects to third countries in order that they might be tortured there.¹⁸ So too allegations of the kind of practices and calculated cruelties that take place at Guantánamo Bay have surfaced recently with worrying regularity.¹⁹

Above all, the United States Government has over the past several years clearly indicated its desire to claim an absolute sovereignty worthy of the Sun King. The Bush Administration insists on its right, as the executive, to act as *it* sees fit in the 'war on terror', including by the use of torture and unconstrained by either domestic or international law. In 2003, the Working Group Report on Detainee Interrogations in the Global War on Terrorism, authorised by then Secretary of Defense Rumsfeld, insisted that the President's 'ultimate authority' in a time of self-proclaimed and self-defined war was not capable of curtailment by any laws, including United States statutes, against torture. Consequently, 'the prohibition against torture must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief Authority'.²⁰ Alberto Gonzales, at that time Legal Counsel to the White House, advised in 2002 that the 'new paradigm' of counter-terrorism 'renders obsolete Geneva [Convention]'s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions'.²¹ Alberto Gonzales was appointed United States Attorney-General in 2005. In the celebrated words of Lord Steyn, a 'legal black hole'²² has been created in two ways. On the one hand, unrestricted sovereignty is now claimed in interrogating terror suspects. On the other, the United States President has himself declared that the detainees at Guantánamo and elsewhere (over 70,000 people at last count) fall into no cognizable legal category and are

¹⁸ J Barry, M Hirsh and M Isikoff, 'The Roots of Torture', *Newsweek International*, 24 May 2004 at <<http://www.msnbc.msn.com/id/4989481/>>; J Mayer, 'Outsourcing Torture', *New Yorker* (New York), 14 February 2005. See also US Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, 6 March 2003; Office of Legal Counsel US Department of Justice, *Memorandum For Alberto R. Gonzalez, Counsel to the President, and William J. Haynes II General Counsel of the Department of Defense, Re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees*, 22 January 2002. And see Amnesty International, *Guantanamo and Beyond: The Continuing Pursuit of Unchecked Executive Power (Report on the United States)* (2005) at <www.amnesty.org>.

¹⁹ See Amnesty International, *Iraq: Amnesty International Reveals a Pattern of Torture and Ill-Treatment*, 26 May 2004, at <<http://web.amnesty.org/web/web.nsf/prnt/irq-torture-eng>>; Amnesty International Report 2004, *United States of America*, at <<http://web.amnesty.org/web/web.nsf/print/2004-usa-summary-eng>>; J Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006); C Butler (ed), *Guantanamo Bay and the Judicial-Moral Treatment of the Other* (West Lafayette, Ind: Purdue University Press: Published in cooperation with the Institute for Human Rights, Indiana University-Purdue University Fort Wayne, 2007); S Miles, *Oath Betrayed: Torture, Medical Complicity and the War on Terror* (New York: Random House, 2006).

²⁰ US Department of Defense, above n 18, 20-21. See 18 USC § 2340A.

²¹ A Gonzales, 'Memorandum for the President: Decision Re Application of the Geneva Conventions on Prisoners of War', 25 January 2002, in K Greenberg and J Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) 118, 119.

²² Lord Steyn, 'Guantanamo Bay: The Legal Black Hole' (F A Mann Lecture, 25 November 2003), at <<http://www.statewatch.org/news/2003/nov/guantanamo.pdf>>.

therefore unprotected under international law.²³ In the vacuum caused by the infinity of sovereignty and the nullity of its targets, anything is now possible.

Let us be clear about this: the only reason Bagaric and Clarke's article was worth publishing — in the *University of San Francisco Law Review*, let alone in the opinion pages of *The Age* and the *Sydney Morning Herald* — is because the actions of the United States Government in particular has made the subject topical and relevant. Despite their protestations to the contrary, the argument for the legitimacy of torture matters not because it is an intriguing little exercise in moral philosophy, but because it intervenes directly into a real social context. Bagaric and Clarke propose a hypothetical case in which the extraction of information from a suspect must be accomplished urgently so as to avoid the execution of a hostage; Peter Faris refers to the imminent explosion of a bomb. The very same hypotheticals were used by Attorney-General Gonzales to justify discarding the Geneva Convention. 'The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against ... civilians.'²⁴ Yet as we know, this 'torture memo' encouraged the very practices that Bagaric and Clarke themselves judge 'reprehensible'.²⁵ These practices include not only Abu Ghraib,²⁶ but a wide range of interrogation techniques through which, according to Amnesty International's 2005 report, the US Government is even now engaging in torture dressed up in bureaucratic newspeak 'in pursuit of unfettered executive power'.²⁷ Thus a purely theoretical idea about torture gives credence to the very rhetoric that has far from theoretical consequences.

The authors dismiss this as a 'slippery slope' argument. But the use of arguments like those of Bagaric and Clarke to justify ever-expanding practices of torture is not a possibility but a fact, engineered, according to US Government sources, as part of 'a calculated effort to create an atmosphere of legal ambiguity'.²⁸ These Australian academics are seriously implicated in the creation of that atmosphere: that too is not just my fear or my opinion, but a fact. The context in which an argument is made is part of its meaning. This is not a complex point. One is responsible not only for one's words but also for their inevitable and predictable effects.

²³ US White House, *Memorandum: Humane Treatment of Al Qaeda and Taliban Detainees*, 7 February 2002, in Greenberg and Dratel, above n 21, 134-5.

²⁴ Gonzales, above n 21.

²⁵ Bagaric and Clarke, *SMH*, above n 8.

²⁶ S M Hersh, 'Torture at Abu Ghraib', *New Yorker* (New York), 10 May 2004; M Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (London: Granta Books, 2005); and see also Greenberg and Dratel, above n 21.

²⁷ Amnesty International, above n 18 at 2.

²⁸ Barry, Hirsch and Isikoff, above n 18.

Neither do the authors *themselves* sincerely believe that the argument they make is so limited and hypothetical. They attack the ‘misguided’, ‘alarmist’, ‘reflexive’, ‘absolutist’ and ‘short-sighted’ ‘moral indecency’ of our belief that torture is always wrong.²⁹ They describe torture as suffering from ‘pejorative connotations’ [sic] and its critics as ‘illogical’ while their own defence of torture is ‘dispassionate’ and ‘analytical’.³⁰ Poor Voltaire. He has been accused of many things, but rarely all at once. Whatever else we may say of Bagaric and Clarke, their argument is rich in emotion and rhetoric. True enough, they say that their defence of torture is so cautiously phrased that ‘a real-life situation where torture is justifiable [might] not eventuate’. But in the very next paragraph they conclude: ‘the argument in favour of torture in limited circumstances needs to be made because it will encourage the community to think more carefully about moral judgments we collectively hold that are the cause of an enormous amount of suffering in the world’.³¹ I wonder what hasty moral judgments they have in mind as being responsible for ‘an enormous amount of suffering’? The sole example they provide is our fanatical, woolly-headed prohibition of torture. So this is what their argument must mean: the prohibition against torture is doing our society enormous harm and causing enormous suffering not only in some hypothetical thought-world, but *right* now.

Even if we take Bagaric and Clarke’s very modest proposal for torture at face value, it is logically inseparable from the real-world practices they disavow. Torture by its very nature deals with uncertainty; ignorance is the problem that it claims to solve through the exercise of violence. Yet torture produces such exceptionally unreliable information that it is thought to be largely useless.³² All Western legal systems acknowledge this by excluding as unreliable the fruit of torture.³³ But the authors blandly assert, in one short paragraph and on the basis of a single strangely unconvincing anecdote, that ‘the main benefit of torture is that it is an excellent means of gathering information. Humans have an intense desire to avoid pain ... and most will comply with the demands of a torturer to avoid the pain.’³⁴ They appear oblivious to how far short of convincing this ‘argument’ is; nor do they appear to grasp the difference between ‘compliance’ and ‘truth’. Let alone ‘evidence’. The central reason that Australian suspect Mamdouh Habib was finally released from US custody is that he had been tortured, and therefore any confession he made was legally inadmissible in any court.³⁵ Having been tortured, Habib could never be put on trial. Bagaric

²⁹ Bagaric and Clarke, *SMH*, above n 8.

³⁰ Bagaric and Clarke, *USFLR*, above n 8, 583-4.

³¹ Bagaric and Clarke, *SMH*, above n 8.

³² For an historical understanding, see P duBois, *Torture and Truth* (New York: Routledge, 1991).

³³ See, eg, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 December 1984) 1465 UNTS 85, art 15.

³⁴ Bagaric and Clarke, *USFLR*, above n 8, 588.

³⁵ CBS News, 11 January 2005; *Sydney Morning Herald* (Sydney), 11 January 2005.

and Clarke do not explain why they believe that torture produces good evidence. On the contrary, under current law, it produces no evidence at all. Bagaric, at least, apparently thinks that in such circumstances the rules of evidence are hopelessly outdated and irritatingly inconvenient;³⁶ but that is at the very least an argument that would have to be made with some care, and Bagaric and Clarke do not bother to do so.

Now let us look at the problem of ignorance and uncertainty from the torturer's point of view. A licensed torturer cannot *know* that a supposed terrorist (for example) is the only way to locate a bomb; or that there is a bomb; or that he will tell the truth under torture; or even that he is a terrorist. The torturer suspects these things or rather he says he knows these things, and of course he has every reason to say he knows these things, because that is the approach that justifies his actions. It is human nature to see the confused and ambiguous world in the way that is most convenient to us. Suppose our supposed terrorist denies knowing anything. Do we let him go or torture him some more? When exactly do we stop? When exactly do we believe what the victim is telling us when the justification of torture is precisely that we only believe him when he tells us what we want to know, without our already knowing it?

There is a paradox here that leads inexorably to the kind of grey areas or 'slippery slope' in the use of torture by interrogators for which Bagaric and Clarke attempt to deny all responsibility. Given the existence of criteria under which torture becomes acceptable, even the narrow criteria that Bagaric and Clarke provide, the pressure on someone in a volatile and violent situation to see his enemy in a way that *will* justify torture is irresistible. So the question is: how much useless torture is justifiable in these troubled times? The authors concede that their modest proposal may not lead to torture that saves a life. But they do not tell you the logical corollary: it must and will lead to torture, and therefore by their own reasoning it must and will lead to torture that does *not* save a life. I have seen no-one in the whole current debate over the role of torture in counter-terrorism even address this issue. Instead we have fallen victim to the Jack Bauer fallacy. Of the 67 instances of torture on '24', Jack extracts 67 crucial pieces of life-saving information. But that is not our world and never, ever, will be.

Torture in Practice

In our world, it is duplicitous to describe torture, as Bagaric and Clarke do, at least in their newspaper articles, as 'inflicting a relatively small level of harm on a wrongdoer'.³⁷ The article, which appeared in the *University of San Francisco Law Review*, does not repeat this reasoning though the authors argue that once

³⁶ M Bagaric, 'Not everyone is entitled to a trial', *Canberra Times* (Canberra), 8 February 2007.

³⁷ Bagaric and Clarke, *SMH* above n 8.

a threshold of justifiability has been reached 'the higher the figure the more severe the forms of torture that are permissible.'³⁸ In the first place, there seems to be a real lack of understanding as to how the physical aspects of torture work. How effective would a regulated, prescribed, and 'relatively small' dose of torture be? Torture is not like paying a parking fine. The terror and the threat of torture does not come from the pain by itself. Many of us can tolerate a finite dose of pain, even if it is severe: ask a woman what childbirth is like.³⁹ There is surely no reason to think that highly motivated terrorists would find the suffering of a specific 'level of harm' impossible to bear. The power of torture, in most instances, comes instead from the promise that the torturer makes that the pain *will not stop* unless you talk and *will get worse* until you do. It is a logical contradiction to imagine that torture can be regulated, as Bagaric and Clarke seem to imagine, because it is part of its essence as torture that the victim is beyond protection and that resistance is futile. In addition, it is an essential and well-documented part of its psychology that the torturer is the sole arbitrator of life and death.⁴⁰ The whole dynamic of torture involves the reduction of one party to pure power and the other to pure powerlessness. In short, and I believe this is a central point that the authors have not understood, torture gets people to talk (not, of course, to tell the truth, but certainly to talk: you will recall that the authors confuse 'comply with the demands of a torture' and 'an excellent means of gathering information'⁴¹) if and only if the *torturer* is sovereign. I suspect that a torturer-cum-bureaucrat is a contradiction in terms.

It is frankly appalling that so many writers are prepared to trivialise the very practice they advocate. Perhaps Bagaric and Clarke have read nothing about the nature of pain, memory, and fear.⁴² Perhaps they have not read a single thing about the experience of torture and its implications on those who suffer it and those around them.⁴³ Torture is not simply pain. It is an experience of absolute powerlessness that reduces the victim, in their own eyes as well as their torturer's, to an animal, a bare life without will or dignity of any kind.⁴⁴ It is the destruction of identity. Torture is rape just as rape is torture. It is not something to shrug off or even, most of the time, to get over.

³⁸ Bagaric and Clarke, *USFLR* above n 8, 614.

³⁹ See E J Cassell, 'Pain and Suffering' in W T Reich (ed), *Encyclopedia of Bioethics* vol. 4 (New York: Macmillan Library References USA, 1994) 1897-1905; E Cassell, *The Nature of Suffering and the Goals of Medicine* (New York: Oxford University Press, 1991).

⁴⁰ E Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1987 ed).

⁴¹ Bagaric and Clarke, *USFLR*, above n 8, 588, 616.

⁴² *Ibid.*

⁴³ P Elsass, *Treating Victims of Torture and Violence: Theoretical, Cross-cultural, and Clinical Implications* (New York: New York University Press, 1997).

⁴⁴ G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (D Heller-Roasen trans of *Homo sacer: Il potere sovrano e la nuda vita*, (first published Turin: Einaudi, 1995) Stanford: Stanford University Press, 1998).

Neither should we limit our analysis to the impact of torture on a single individual during a single finite emergency, a limiting of the actual costs and effects of torture that Bagaric and Clarke engage in quite explicitly.⁴⁵ In the world we live in and in which Bagaric and Clarke's argument actually matters, torture is never about the emergency rescue of an innocent life. It is used to extract a wide range of information about the functioning of many outlaw groups. But because of the inherent unreliability of its evidence, this is not its main purpose. Torture is used to punish and humiliate dissidents, terrorists, and members of ethnic minorities. And it is used as a calibrated dose of cruelty through which to terrorise the whole community to which they belong.⁴⁶ Just as in the case of Damiens, torture is a demonstration of what the state can do to you and what it can get you to do. The effect is to create a generalised fear about the infinite and random power of the state to destroy lives, and an intense sense of vulnerability in victim populations.

We need to think about the effects of torture not merely on the bodies that suffer pain but on the families and communities around them who live under its constant and unavoidable shadow. Torture affects whole societies: it terrorises them and ultimately, as we saw in Voltaire's Europe, the powerlessness it instils shifts from passivity to rage. The turning point in the lives of many Al Qai'da operatives was their imprisonment and torture in Egyptian, Syrian, and other Middle Eastern prisons: this same Egypt to which the United States *still* 'renders' suspects in order to soften them up.⁴⁷ Torture is in real danger of producing terrorists: whole families and villages of them. That is why the prisoners in Guantánamo Bay — according to the Secretary-General of Amnesty International, part of the 'gulag of our times'⁴⁸ — are proving to be an increasingly insoluble problem for the US, and many fear now that they may never be able to be released. How can they be? Bystanders or warriors initially, they are much greater risks to us now.

To these real and far-reaching consequences, which our society would have to understand, accept, and somehow combat if we were ever to accept Bagaric and Clarke's argument, the authors have paid no attention at all.

Defending It

I have argued, first logically and then practically, that it is impossible to accept this modest proposal for torture in its own neatly limited terms. We still have to imagine to what consequences such a principle would actually lead. But for

⁴⁵ Bagaric and Clarke, *USFLR*, above n 8, 613–4.

⁴⁶ See, eg, J Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* (London: Vision Paperbacks, 2001).

⁴⁷ Mayer, above n 18. See also Human Rights Watch Reports for 2005, particularly in relation to Egypt; and S Grey, 'America's Gulag', *New Statesman* (London), 17 May 2004.

⁴⁸ *New York Times* (New York), 26 May 2005.

the sake of argument let us look a little closer at the ways in which Bagaric and Clarke, amongst others, attempt to defend an entitlement to torture.⁴⁹ Thus it is said that the prohibition against torture has only served, by its unnecessary absolutism, to drive it ‘beneath the radar screen of accountability’; legalisation ‘would reduce the instances of torture’.⁵⁰ It is difficult to see why this assertion would be true. Our societies are not without experience of legal torture. Was there less of it then? Moreover, the emotions that lead to real torture — fear, crisis, hatred — will not be reduced by legality. In what sense will ‘accountability’ make a difference to the practice of torture except to provide a helpful framework in which it can be organised, carried out and defended?

I admit that the radar argument sounds plausible: illegality does not always work and sometimes seems to make matters worse.⁵¹ This is particularly the case, for example, in relation to so-called victimless crimes such as drug use. Indeed, Bagaric and Clarke are explicit in adopting for themselves a discourse of ‘harm minimisation’ drawn from that literature.⁵² But torture is hardly victimless. Let us look a little closer to see where the analogy falls down. With drug use or prostitution, the argument is that legalisation will clean up the secretive conditions in which they occur and therefore not lessen the incidence of them but instead make them safer. In general, the scholars of what is called ‘harm minimisation’ *do not contend* that a more open approach to drugs will lead to less use; only that it will dramatically improve the social and health conditions of users.⁵³ But it is not the *conditions* under which torture is practised that are the problem. Danger and pain are not a by-product of torture (as they are, for example, to a considerable degree a by-product of the current regime of drug prohibition); they are the purpose of it. Were torture done in public, were it supervised by a qualified medical practitioner in an hygienic environment, were it made respectable — tell me, would any of this make torture better? Once again Voltaire comes to mind: ‘If we believe absurdities, we shall commit atrocities.’⁵⁴

The centre-piece of Bagaric and Clarke’s defence offers as obvious example of begging the question as I have seen. They argue by analogy to ‘the right to

⁴⁹ I leave aside their criticism of the ‘slippery slope’ argument to which I have referred above.

⁵⁰ Bagaric and Clarke, *USFLR*, above n 8, 615; their argument here draws strongly on Dershowitz, ‘Torture Can be Justified’ and ‘The Torture Warrant’, above n 10.

⁵¹ I have written about this at considerable length elsewhere: D Manderson, *From Mr Sin to Mr Big: A History of Australian Drug Laws* (Melbourne: Oxford University Press, 1993).

⁵² Bagaric and Clarke, *USFLR*, above n 8, 583, 608.

⁵³ A Wodak and T Moore, *Modernising Australia’s Drug Policy* (Sydney: UNSW Press, 2002); A Wodak and R Owens, *Drug Prohibition: A Call for Change* (Sydney: UNSW Press, 1996); M Hamilton et al (eds), *Drug Use in Australia: A Harm Minimisation Approach* (Melbourne: Oxford University Press, 1998); P Erikson et al (eds), *Harm Reduction: A New Direction for Drug Policies and Programs* (Toronto: University of Toronto Press, 1997).

⁵⁴ Translation of ‘*Certainement qui est en droit de vous rendre absurde est en droit de vous rendre injuste.*’ Voltaire, *Questions sur les Miracles* (1765) (Louis Moland (ed), *OEuvres complètes de Voltaire*, Paris: Garnier, 1877-1885, tome 25 (357-450)).

self-defence, which extends to the right to defend another'.⁵⁵ Just as we are entitled to respond with violence to a murderous attack, they say, we are entitled to protect others; if the only way to protect them is by torturing somebody for information, then torture must be legitimate too. But the analogy falls down in at least three ways. First, the principle of self-defence recognises a reality: when it is 'him or me' a law that said I could not respond to an attacker would be simply unenforceable.⁵⁶ Here the violence of torture is a choice deliberately made and carried out, and not purely responsive.

Second, their analogy assumes the only point it needs to prove. One can legally defend oneself; one can even kill an attacker if necessary; but what legal system has ever authorised a case of torture 'in self-defence'? Why do the authors assume that self-defence, which is strictly limited to a direct, minimal and reasonable response to threat,⁵⁷ is in any way equivalent to torture, which is by its very nature indirect and maximal? In fact, our societies have, at least since the Enlightenment, feared pain more than death,⁵⁸ believed that human dignity requires absolute protection under all circumstances, and for that very reason thought torture a more serious act than execution. Legal systems throughout the world outlawed torture long, long before capital punishment. In the US, torture has always been contrary to the 8th Amendment; it is the paradigmatic example of 'cruel and unusual punishment'.⁵⁹ Yet the death penalty continues to be applied — as painlessly as possible.⁶⁰ So clearly in the US, throughout the world, and by most people, it is generally considered worse to torture than to kill.⁶¹ As Bagaric and Clarke go to some lengths to point out, we do indeed often ask many people, including civilians, to make the ultimate sacrifice for the good of others, for example in times of war.⁶² Bagaric and Clarke think it obvious that if we can kill someone in self-defence, or require them to die for us, *therefore* it must be all right to torture them. But this is precisely what the absolute prohibition of torture rejects. Bagaric and Clarke could certainly make an argument against this orthodoxy. But neither they nor, to the best of my knowledge, other apologists for torture have attempted to do so. They simply assert their position as self-evident. It is nothing of the kind.

⁵⁵ Bagaric and Clarke, *USFLR*, above n 8, 603. The argument is developed more clearly in the newspaper articles: see *SMH*, above n 8.

⁵⁶ See L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

⁵⁷ *Viro v The Queen* (1978) 141 CLR 88; *Zecevic v DPP* (1987) 162 CLR 645.

⁵⁸ See P Ariès, *The Hour of Our Death* (H Weaver trans of *L'homme devant la mort* (first published 1981) New York: Knopf; distributed by Random House, 1981).

⁵⁹ *Constitution, Amendment VIII* (US); see *Wilkerson v Utah* (1878) 99 US 130 (US).

⁶⁰ *Gregg v Georgia* (1976) 428 US 153 (US).

⁶¹ See *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171, art 6, which likewise permits the death penalty but (in art 7) outlaws torture.

⁶² Bagaric and Clarke, *USFLR*, above n 8, 606-9.

There is a third, and to my mind even more important way in which the analogy between self-defence and torture fails. Self-defence is about individual action, torture is about government action: the limits are not necessarily the same. There is a profound difference between individual acts of violence and a system of government-regulated torture. There is a difference between kidnapping and government sponsored 'disappearance'. There is a difference between murder — even mass murder — and genocide.⁶³ The difference is the government sanction and the government power that stands behind it in each case.⁶⁴ Government action — law — carries a mark of legitimacy with it. Self-defence, which leads to murder, or even revenge, might elicit our sympathy. We might even in some way excuse it. But it is not the same thing as a government program, which establishes, institutionalises, administers, and authorises torture. No matter how limited, torture is thereby made *right* in a way that no act of personal self-defence ever makes murder right. We hold governments to higher standards for a good reason.

So too, the reach and mechanisms of government power make torture a weapon from which no member of the community will feel immune. If the state could torture any one of us — they probably would not but they *could* — what sort of a society would we live in? Now Bagaric and Clarke attempt to avoid this problem by implying that torture would only affect the very few that in some sense deserved it. Although they admit that there may be situations in which 'torturing the innocent' to extract information would be justifiable if enough lives were thereby saved, the purchase of their argument as to the moral justifiability of torture rests on distinguishing those who are in danger and 'blameless', from those who are 'wrongdoers.'⁶⁵ In the newspaper articles written at the same time, the authors make this distinction central to their construction of the moral basis for torture. There, they insist that it is 'verging on moral indecency ... to favour the interests of wrongdoers over those of the innocent'.⁶⁶ One way or another, the notion of wrongdoing underlies their assumption that we have the right person; that their suffering can be used to save another's life; and that even if the torture fails to elicit information the loss is not in the end so very terrible.

But who are these 'wrongdoers' who, according to the general assumptions that underscore this whole debate, can be legitimately made to suffer so that the innocent might live? Perhaps they are only the associates of terrorists, or family members; and in any case any torture that takes place will very probably precede

⁶³ G Andreopoulos, *Genocide: Conceptual and Historical Dimensions* (Philadelphia: University of Pennsylvania Press, 1994).

⁶⁴ In relation to genocide, see D Manderson, 'Apocryphal Jurisprudence' (2001) 26 *Australian Journal of Legal Philosophy* 27.

⁶⁵ Bagaric and Clarke, *USFLR*, above n 8, 584, 607-9, 612-13.

⁶⁶ Bagaric and Clarke, *SMH*, above n 8.

a trial that might establish just how culpable they are. After all, as both Bagaric and Clarke along with Gonzales insist, the whole point of the argument in favour of torture is our need 'to *quickly* obtain information from captured terrorists [sic] and their sponsors'.⁶⁷ So much for the rule of law: another suspicion has been magically converted into something we just happen to know. In fact, Bagaric and Clarke's own argument shows us exactly how, under the pressure of time, and the urge to get immediate results, even the most modest regime of torture will inexorably corrupt what one might have thought to be core values of this society and of our legal system. 'The investigation and trial process is simply one way of distinguishing wrongdoers from the innocent,' they cheerfully muse. 'To that end, it does not seem a particularly effective process. There are other ways of forming such conclusions.'⁶⁸ Torture, for example?

In the real world, which again I realise it might be considered bad form to bring up, there are many reasons why we might all live in fear of a government that had reserved to itself some kind of right to torture suspects who it has determined in some way are 'wrongdoers'. Perhaps it might just be a case of mistaken identity, or maybe you happened to be born with a foreign sounding name, or maybe you look suspicious or are the wrong colour, or come from a country with a violent history, or are otherwise associated with the wrong people, or perhaps you were just known for holding unpopular opinions at one time or other. How much torture might it take to show that you were not really a 'wrongdoer' after all? And what effect would that endemic, nagging fear have on all our lives and our relationship to the state? Peter Faris, former head of the National Crime Authority, says it would be alright 'to pull out a fingernail of a terrorist in order to save a couple of million lives'.⁶⁹ But the government legitimisation of torture, whatever the reason, would ultimately serve only to cripple a few million lives and corrupt our understanding of law and of justice. Bagaric and Clarke try and avoid these profoundly serious consequences by insisting that 'our decisions in extreme situations will be compartmentalised to desperate predicaments'.⁷⁰ But it is precisely this effort to quarantine our thinking about torture that is inevitably doomed to failure.

Opposing it

The apologists cannot see the difference between self-defence and torture because they are concerned only about outcomes and never about means. For Bagaric and Clarke, it is simply a mathematical calculation: a tortured terrorist versus one innocent life or many. They even offer us a comforting formula at the end:

⁶⁷ Gonzales, above n 21.

⁶⁸ Bagaric and Clarke, *USFR*, above n 8, 612.

⁶⁹ Bagaric and Clarke, *SMH*, above n 8.

⁷⁰ Bagaric and Clarke, *USFR*, above n 8, 607.

W+L+P/T x O = torture.⁷¹ This effort at calculation no doubt underpins *any* argument for the expediency of torture in a 'state of exception'.⁷² It is, of course and as they argue, a version of utilitarianism.⁷³ The authors are at pains to defend the validity of utilitarianism as a moral theory. But they do so dishonestly because they have made no serious effort to take into account the *actual* costs of the balancing act they propose. In most versions of the utilitarian calculus, which one hears in defence of such extreme measures, and Bagaric and Clarke's version is no exception, the real benefits are a sheer fantasy and the real costs are wholly and shamefully ignored.

Against utilitarianism, there is not much to say that has not been said many times before. Ethics means that there are some things you do not do *even though* it might advantage you (or the whole society) to do them. Ethics means that we impose limits on our actions that cannot be reduced to a calculation about winners and losers. Slavery, for example, would not be less wrong if more people gained from it than lost. It would not be less wrong even if we only enslaved 'wrongdoers'. The wrong is intrinsic and irredeemable. It is not negotiable in terms of costs and benefits.⁷⁴ Bagaric and Clarke argue that the problem with absolutist theories is that there is no fundamental virtue that grounds them.⁷⁵ This misses the point. The particular instances are the virtues. The prohibition of slavery is one, irreducible to some other more abstract principle. The prohibition against torture is another.

So too, human rights protect not just good people but all people, and not just some of the time but all of the time: they are not to be weighed up, or sacrificed. It is in the nature of a human right that it is incalculable. We might feel that certain people have acted in such a way that they no longer *deserve* to be treated humanely, and if society as a whole were to gain by torturing them a little, then we should be allowed to do so. But human rights are not something we deserve. They protect each of us from abuse by protecting all of us unconditionally. These rights recognise as inviolable the core of our autonomy as human beings, *regardless* of the temptation or the need to violate them. The argument is undoubtedly partial and problematic⁷⁶ and Bagaric and Clarke are right to draw our attention to how nebulous, fluid and ambiguous the claims of rights (like

⁷¹ Ibid 613.

⁷² G Agamben, *State of Exception* (K Attell trans of *Stato di eccezione*, (first published Turin: Bollati Boringhieri, 2003) Chicago: University of Chicago Press, 2005).

⁷³ Bagaric and Clarke, *USFLR*, above n 8, 605-11; J S Mill, *Utilitarianism* (G Sher (ed), Indianapolis: Hackett, 2001, original work published 1861); P Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1993).

⁷⁴ J Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); B Williams, *Ethics and the Limits of Philosophy* (Cambridge, Mass: Harvard University Press, 1985).

⁷⁵ Bagaric and Clarke, *USFLR*, above n 8, 602.

⁷⁶ C Douzinas, *The End of Human Rights* (Oxford: Hart, 2000); M Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Maxwell Macmillan, 1990).

any theoretical claim at all) often are.⁷⁷ Nevertheless, if there is anything at all that we have a right to protect against the government and against all of society, it is not just our bodily integrity but our sanity, our very self. That is the absolute right of which torture threatens to deprive us. Simply in terms of 'weighing up' the costs and benefits, in order to evaluate *seriously* the prohibition against torture in utilitarian terms, rather more than a fingernail is at stake.

Torture is wrong under all circumstances, not because it leads to certain bad outcomes, but for no reason: simply and inherently. This is not a perverse argument. Love, for example, is good not because it might lead us to wealth or happiness, but for no reason.⁷⁸ It just is. In fact, to continue to look for reasons, to ask 'what is love good *for?*' or 'how does loving someone benefit *me?*' is the logic of a psychopath. Now if Bagaric and Clarke, amongst many others, cannot see the inherent wrong of torture, it is hard to see how to communicate with them. But let me suggest two possible approaches intended to communicate what I see as intrinsically true to those who clearly do not see it that way.

The first approach is literary. When Voltaire was a relatively young man, Jonathan Swift, author of *Gulliver's Travels*, wrote 'A Modest Proposal' of his own. What will we do about the poor children of Ireland, he asked, who are such a burden to their parents?

I have been assured by a very knowing American of my acquaintance in London, that a young healthy child well nursed is at a year old a most delicious, nourishing, and wholesome food, whether stewed, roasted, baked, or boiled; and I make no doubt that it will equally serve in a fricassee or a ragout.⁷⁹

There's a solution to famine for you, and what after all is wrong with it? If children seem too innocent, we could just eat those in the reformatories, wrongdoers each and every one. Without a sense of our limits, the calibration of costs and benefits is unstoppable: and we *shall* be led to commit atrocities. It strikes me that the current modest proposal for torture makes the same mistakes: slipping seamlessly and without argument across fundamental distinctions, ignoring the social context it echoes, blind to the horrific practical implications of the system it envisages, far too confident of the reliability and accuracy of its own judgments. But Swift's modest proposal was satire, while Bagaric and Clarke's is not.

⁷⁷ Bagaric and Clarke, *USFLR*, above n 8, 597-604.

⁷⁸ See E Levinas, *Totality and Infinity* (A Lingis trans of *Totalite et infi* (first published 1961, Pittsburgh: Duquesne University, 1969); E Levinas, *Otherwise Than Being* (A Lingis trans of *Autrement qu'être* (2nd ed, 1978) Hague; Boston: M Nijhoff; Hingham, MA: Distributors for the US and Canada, Kluwer Boston, 1981); D Manderson, *Proximity, Levinas and the Soul of Law* (Montreal; Ithaca: McGill-Queen's University Press, 2006).

⁷⁹ J Swift, 'A Modest Proposal' (1729) in *A Modest Proposal and Other Satires* (Amherst, MA: Prometheus Books, 1994), 257 at 259.

The second approach is historical. Both proposals, above all, display that dangerous human quality of arrogance, which assumes that we can and should weigh up one person's pain and a community's fear, against another's life. It is the economists' approach to life and the tyrant's approach to politics: everything is a calculation, and no calculation is too ambitious to be foresworn. The use of such formulae will offer an easy answer to all our problems, but the easy answers are usually wrong. We know all about the Western history of state-sanctioned torture, *l'amende honorable* and the Inquisition. It is not a tradition worth reviving.

Our repugnance is not simply the instinctive and 'reflex rejection of torture' that Bagaric and Clarke disparage.⁸⁰ Disgust, like shame, is not a pointless emotion. On the contrary, it is an exceptionally powerful way to change the behaviour of people and of communities.⁸¹ A great deal of effort and thought has been expended giving torture the 'pejorative connotations' it has today. We have *learnt* this feeling of disgust over several centuries. Voltaire would weep to read the arguments now being used to justify a new-found tolerance of torture and tyranny. He saw torture and he knew what it smelled like. And he also knew that at some point the arguments must stop so that the disgust might begin. *Écrasez l'infâme*. Don't negotiate: wipe it out.

⁸⁰ Bagaric and Clarke claim that when faced with the kind of hypothetical on which their argument is built, 'not many' people would find torture unacceptable. But the statistic they cite does not even remotely justify this particular lithe assertion: see *USFLR*, above n 8, 583 fn 8. If Bagaric and Clarke's idea of 'not many' people is 53 per cent then I fear for the way in which they would put in practice the neat mathematical calculation called 'The Formula' they think will clarify for us when torture is justified. The point is not trivial. When investigators justify torture, as when intellectuals interpret statistics, they are prone to see what they want to see, to justify the result they want to achieve.

⁸¹ M Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton, NJ: Princeton University Press, 2004); J Braithwaite, *Crime, Shame, and Reintegration* (Cambridge, UK; New York: Cambridge University Press, 1989).