Tortured Responses (A Reply to Our Critics): Physically Persuading Suspects Is Morally Preferable to Allowing the Innocent to Be Murdered

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IT IS NO EXAGGERATION TO STATE that our first article on torture—"Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable"[1] in Volume 39 of this Law Review provoked a furious debate. This was initially sparked by an opinion piece published in a Melbourne newspaper[2] that summarized the main arguments in the article. Responses and commentaries on the issues flooded in not only from academics but from large numbers of lay people and politicians past and present—including a former Australian Prime Minister.

Because there have been dozens of critical responses to our article, it is not feasible to respond to them all. In this Article we focus on the most persuasive and pervasive criticisms that have been leveled against our position. Since some readers will not have the opportunity to read either our first article or the responses, a summary of the debate is in order.

The proposal in our original article is straightforward. Torture is morally permissible where it is the only means available to save innocent lives.[3] Torture should only be used when (1) the threat is imminent, (2) there are no other means of alleviating the threat, and (3)

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1. *See* 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).

2. *See generally* Mirko Bagaric, *A Case for Torture*, AGE (Melbourne), May 17, 2005, at 13.

3. *See* Bagaric & Clarke, *supra* note 1, at 585.

the suspect is known to have the relevant information. Torture is justifiable in these circumstances because it is a lesser evil to inflict physical harm on a person than to allow large numbers of people, or even a single person, to die. When rights clash and only one right can be protected we should opt for the higher order right. To this end, the right to life is more important than the right to physical integrity.[4]

We used the following example as a situation in which torture would be justified: 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 this instant. Via a statement on the Internet, the leader of the terrorist organization announces that the bomb is set to explode in thirty minutes. Further, 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. Unbeknownst to him, he was under police surveillance and is immediately apprehended by police. The captured terrorist leader refuses to answer any questions from the police, declaring that the passengers must and will die shortly. If the terrorist provides details regarding which plane the bomb is on and exactly where on the plane it is located this will give the crew an opportunity to disarm the bomb. In this scenario, we asserted that the morally correct course of action is to torture the suspect.[5]

We condone torture only in the lifesaving circumstances illustrated above. To our knowledge, no incidents of torture that have been committed would fall within our criteria. As is discussed below, torture has been used effectively on many occasions to thwart attacks against civilians, but it is not clear that there were not other means available to prevent these attacks. Thus, our proposal would not legitimize, albeit retrospectively, any reported instance of torture that has occurred. It is important to spell this out early in our response because much ink has been wasted by the critics discussing reported instances of torture, implying that in some way we countenance such conduct.

There have been four main lines of attack by the critics. The first is a slippery slope or thin edge of the wedge argument.[6] If torture is condoned in the circumstances we set out, it will, so the argument

4. *Id.*

5. *Id.*

6. *See* sources cited *infra* note 18.

goes, result in the widespread use of torture.[7] Secondly, and related to the first point, is the argument that legalizing torture will dehumanize society.[8] Third, a more pragmatic objection to our proposal is that torture does not work. This line of criticism purports that suspects that are tortured supposedly will not "fess up," or that they may not know the relevant information.[9] The fourth point made by some critics is that legalization of torture would be "anti-democratic."[10]

Our responses are relatively short. Our task has been attenuated by the fact that the critics have not attempted to undermine the underlying consequentialist ethic upon which our proposal is based.[11] Rather they have taken issue with the outcome to which the application of the utilitarian ethic commits us and have doubted whether a proper consideration of all the relevant variables leads us to condoning torture in any circumstances. There has been no attempt by the critics to develop an alternative normative theory that justifies their stance on torture and that can be invoked to provide answers across a range of moral issues.

There is one qualification to the statement that the critics have not sought to undermine the moral ethic we endorse. Many critics have stated that our proposal is flawed because "the ends do not justify the means."[12] This is more akin to a throw-away-line than a developed and measured criticism. But regardless of how one chooses to characterize the criticism, it has been said often and loudly enough to merit a response.

This Article addresses two other central matters. The first is what we consider the most powerful objection to our proposal: that rights do not clash in the situations where we believe lifesaving torture is permissible because if innocent people are killed by others we bear no responsibility for this.[13] We believe that this argument is flawed but think it gets to the heart of the issue and offers the best explanation as to why the torture debate has been so divisive.

An explanation is fitting because it is rare for a proposed legal reform to generate so much outrage. The critics of our proposal are

7. *See* sources cited *infra* note 18.
8. *See* sources cited *infra* note 29.
9. *See* sources cited *infra* note 29.
10. *See infra* Part II.C.
11. Consequentialism is the view that in evaluating the moral status of an act the main consideration is the consequences that it produces. *See generally* Bagaric & Clarke, *supra* note 1.
12. *See infra* Part III.
13. *See infra* Part IV.

obviously well intentioned, and their responses are driven by an understandable revulsion towards the prospect of torturing a person. We too find torture abhorrent, but less so than allowing innocent people to be murdered. If we are all so appalled by the prospect of deliberately inflicting pain and accept that it is an important moral maxim, how can it be that such vastly different conclusions are reached regarding the moral status of torture? This conflict is addressed in Part IV of this Article.

The second matter, discussed in Part V, is an explanation of why torture matters, far beyond the contours of the discussion at hand. The circumstances in which lifesaving torture are justifiable will occur infrequently—perhaps never. Nevertheless, the debate is important because it has implications well beyond the narrow practice of torture. The supposed absolute ban on torture highlights much about what is wrong with contemporary moral thinking. The critics are committed to the indefensible conclusion that the right to physical integrity of the suspect is more important than the right to life of the potential victims and seem resolute in their convictions not to extend their sphere of moral concern beyond the interests of the suspect to other affected parties, namely the victims. An analysis of this type can only occur in the context of a moral fog, which is where contemporary moral thought finds itself.

It is in the context of such an environment that moral issues are often resolved—not on the basis of clear thinking and reasoned analysis, but according to who makes the loudest emotive retort. To this end, we undertake a meta-analysis of the debate at hand and the way it has played out. The emotion that this debate has generated underscores the view that moral debates, at least in part, often turn into emotion venting episodes.

Before elaborating on these matters we summarize our responses to the main criticisms that have been leveled at us.

I. Summary of Our Responses

The slippery slope argument, though probably the most common criticism of our proposal, is the easiest to rebut. Sometimes there are no slippery slopes or wedges with thin parts to be found—not even a trickle behind the floodgates. Such is the case with our proposal to legalize lifesaving torture. There is no evidence to suggest that an institutionalized practice of inflicting pain on one person to save another or for the common good will lead to abuses. Capital punishment and kidney and bone marrow transplants illustrate this.

Torture for compassionate reasons is no more an act of brutality than surgery to transplant a kidney from one person to save another person. That is the path we are going down, not brutalizing people out of hatred.

We condone torture in only one circumstance: as a means to save innocent lives. We condone it only for one reason: compassion. This is central to human flourishing and, as we shall see below in the context of the analogy with live organ transplants, is at the core of practices where the interests of one agent are sacrificed for those of another. A framework based on these criteria has little prospect of being extended to encompass malevolent practices. The slippery slope argument is a distraction in the context of our proposal. Slippery slopes, thin-ended wedges, and icebergs with small tips cannot be plucked out of thin air to fill logical deficiencies in one's argument. They have to be verified and proven.

The slippery slope argument in the context of this debate is an illustration of intellectual sloppiness or expedience. The analysis is sloppy because the critics have failed to discern the salient aspects of the torture-to-save-lives proposal and thereby misrepresented where it might lead us.

The slippery slope argument is an expedience in this debate by some critics as a basis to avoid considering the *actual proposal* at hand (torture to save lives), and instead is used as a launching pad to embark on a non-responsive dissertation about practices that have little connection with the proposal. Torture for lifesaving purposes is far removed from any of the instances of the barbaric, punitive forms of torture mentioned by the critics. Yes, we all hate the thought of torture, but torture as it has been practiced throughout history has at best a remote connection with our proposal.

The dehumanizing criticism is misguided to the point of being contradictory. If standing idly by allowing innocent people to be killed does not dehumanize society, inflicting physical persuasion on a suspect logically cannot either. Moreover, all nations permit individuals and security officials to inflict far higher levels of harm, such as killing in self-defense, than torture.[14] If we are not dehumanized now, practicing torture will not make any difference.

There is no relevant evidence that torture cannot work in the circumstances we outline. The "evidence" to the contrary that is prof-

14. *See* Alasdair Palmer, *Is Torture Always Wrong?*, SPECTATOR, Sept. 24, 2005, at 40 (noting that the ban on torture is inconsistent with the acceptance of a shoot-to-kill policy in some circumstances).

fered by the critics has been overstated in terms of its relevance to our proposal. The empirical data cited by the critics regarding the outcome of other incidents of torture can be dismissed on the basis that these incidents occurred in different settings than the one we propose. Reported incidents of torture are invariably crude acts of violence done for reasons of punishment, domination, and humiliation in circumstances where there is little basis for believing that the victim has relevant information. This is qualitatively different than inflicting physical persuasion in a clinical setting where the suspect is known to have the relevant information. Having said that, even in relation to the crude forms of torture that have been practiced, the evidence shows that torture has been effective to save many lives.[15]

A related criticism posits that we should never torture because we can never be sure that the suspect has the relevant information. This is simply wrong. We can be sure of this, at least to the same degree of certainty as is required before we take other decisive steps, such as acting in self-defense, imprisoning or executing prisoners, or going to war against other countries. Like all decisions, we must base our choices on the best evidence available at the time. A requirement of perfect knowledge as a precondition to action would freeze all human activity—we would not even go to work in the morning because we could never be sure that we would not be hit by the next bus. There is no logical basis for demanding perfect knowledge only in proposed cases of torture. This shows this argument to be a furphy.[16]

The anti-democratic criticism is factually wrong. The history of humankind shows that when societies are threatened they prioritize the common good over individual interests.[17] The critics have not proffered a single counter-example to our claim.

The "ends do not justify the means" criticism works against critics far more than it does our proposal. The critics presumably have some ends in mind as well. At least we have declared what we believe the ultimate ends to be—net human flourishing, where each person's interests counts equally. If the ends (measured in human flourishing) do not justify the means, what then does? At best the critics' ends seem to be that torture should be banned absolutely. This, however, is not a principle. It is a narrow rule applyied to a specific moral dilemma. Presumably it is derived from the pursuit of a wider objective. Until this wider objective is revealed there is no basis for believing that

15. *See* discussion *infra* Part II.C.
16. Furphy is Australian slang for a rumor, or an erroneous or improbable story.
17. *See* Bagaric & Clarke, *supra* note 1, at 605–11 (Part II.B).

the conclusions reached by some of the critics are other than pre-reflective visceral responses to our proposal. It is far better to have a stated, albeit contentious, end than none at all. Otherwise, uncertainty will continue to be the one constant of our collective moral sentiments.

We now consider these arguments in greater detail.

II. Responses to the Main Criticisms

A. Slippery Slopes Need to Be Proven, Not Imagined

The slippery slope or the dangerous precedent argument (also often run under the banners of "thin end of the wedge," "the tip of the iceberg," or the "floodgates" argument) has loomed large in this debate. The critics argue that if our proposal for limited torture is accepted, it will lead to the greater use of torture—extending well beyond the narrow parameters of lifesaving torture.[18]

The slippery slope criticism is a distraction in this debate. It deflects attention from practices that would take place under our actual proposal and diverts readers to profoundly immoral forms of torture. There is no demonstrated connection between the two practices other than the inventive imagination of the critics.

A proposed social or legal reform cannot be rejected merely by stating that it *might* lead to bad outcomes because it *might* lead to similar undesirable practices. If this were the case, even unquestionably desirable practices would be thwarted. For example, the suggestion that we should donate more to the developing world to feed the 13,000 children that starve daily[19] could be rebutted by retort that it might lead the starving world down the slippery slope of relying on handouts (instead of being self-sufficient). Slopes, wedges, icebergs, and floods cannot be plucked out on a whim. They need to be constructed or at least verified.

18. *E.g.*, Anne O'Rourke, Vivek Chaudhri & Chris Nyland, *Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs: An Australian Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 85 (2005); Philip N.S. Rumney, *Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke*, 40 U.S.F. L. REV. 479 (2006); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 265–68 (2004).

19. A recent United Nations report notes that present levels of hunger cause the death of more than five million children a year. In terms of more comprehensible figures, this equates to more than 13,000 daily deaths from hunger. *Road Map Towards the Implementation of the United Nations Millennium Declaration*, U.N. GAOR, 56th Sess., at 19, U.N. Doc. A/56/326 (2001).

This is not to say that the slippery slope argument is always a fallacy. The slippery slope argument has been criticized on the basis that it logically prevents change and advancement. It has been suggested that it amounts to the proposition that:

> you should not now do an admittedly right action for fear you . . . should not have the courage to do right in some future case, which, *ex hypothesi*, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or, if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time.[20]

We do not accept this. The suggestion fails to recognize the real force behind the slippery slope argument, which lies in our propensity to justify "progress" by analogizing from one situation to another, and our fallibility in discerning the relevant and significant factors about the practices we are comparing. There are in fact two versions of the slippery slope argument: the logical and empirical.

The logical form of the argument is the view that clear boundaries cannot be drawn around the practice under consideration. In the context of lifesaving torture, this form of the argument is unconvincing. The *reasons* advanced in favor of lifesaving torture, namely the compassionate desire to save innocent life, are clear and pointed considerations. So clear that none of the known incidences of torture that have ever been committed throughout the history of humankind demonstrably fit within the criteria set out above. A bright line can be drawn between using torture as a last resort to save innocent lives, and using torture as an act of suppression, domination, or cruelty.

The empirical version of the slippery slope argument provides that if torture is condoned in any circumstances, it will as a matter of fact lead to a greater preparedness to use it in other circumstances where it is not justifiable. This argument is also flawed.

First, as noted in our original article, torture is already widely practiced—despite the absolute legal prohibition against it.[21] Amnesty International has documented reports of torture and ill-treatment from 132 countries, including the United States, Canada, and France.[22] Given the widespread use of torture, it is most unlikely that legalizing the practice in a very narrow context would increase its incidence.

20. F. M. CORNFORD, MICROCOSMOGRAPHIA ACADEMICA 23 (1908).

21. Bagaric & Clarke, *supra* note 1, at 588.

22. *Id.* at 590.

Second, we elaborate on the point in our first article that there is no evidence that lifesaving torture will lead to the violation of other rights where the pre-conditions for the practice are clearly delineated.[23] Empirically based slippery slope arguments only obtain some traction where there is evidence that a practice similar to that being proposed has expanded beyond its intended scope of application after the practice was sanctioned. In order for the empirical version of the slippery argument to be plausible, it is necessary to point to a situation where condoning the lifesaving torture has yielded widespread abuses. We accept that this is obviously too high a standard in the case at hand, given that torture has never been legalized in the circumstances that we propose. The very least that can be expected in such cases is a close analogy, whereby a state sanctioned practice that was founded on a desire to save innocent lives has resulted in large scale abuses. There are no such analogies. In fact the closest analogies to our proposal lead to the opposite conclusion.

The salient features of our proposal are (1) the motivation for the practice is compassion; (2) it involves sacrificing a lower interest of one person to confer a greater benefit on another; (3) it is almost certain that the suspect has the relevant information; and (4) consent must be obtained by a state official (preferably a judge) before the activity can proceed.

While there are no institutionalized practices that have these precise four elements, there are some practices that come very close, and none of them have resulted in widespread abuses. The closest parallel is live donor organ transplants. Elements (1) and (2) are identical; the analogy with element (3) is obvious given that in most cases we are almost certain that the organ will be a match, and in relation to (4), in the place of a judge is a doctor.

Advances in medicine now make it possible to successfully perform procedures such as kidney and bone narrow transplants. These cause considerable pain to the donors, but confer a great benefit to the recipients. Less pain is caused by donating blood, but the underlying rationale is the same—hurting one person to benefit another. The practice of live donor transplants has not resulted in large scale abuse. In countries where there is a relatively high level of law and order, people are not plucked from the streets to have their organs plundered. Of course, the difference between this and our torture proposal is that the organ transfer process is consensual. This is not a

23. *Id.* at 614–16.

relevant difference because non-consensual practices based on the same rationales have not led to abuses.

To this end, a clear example is the process of criminal punishment. All nations imprison people that are regarded as being a risk to other members of the community.[24] Some nations even kill their worst offenders. This institutionalized system of harm infliction has not resulted in widespread abuses regarding the use of detention or state sanctioned execution.

Even laws that permit citizens to use self-help measures to inflict serious, and even lethal, harm such as self-defense and necessity, have not resulted in significant abuses. This is despite the fact that such laws are generally "grey" in application, and the lawfulness of the conduct is generally evaluated after that fact.

The trend flows only one way. Compassion-based laws that involve direct harm to one person for the benefit of another person or the wider community do not lead to widespread abuses. There is no reason to believe that the situation would be any different in relation to our proposal.

This is not to say that the empirical version of the slippery slope argument is always without foundation. In fact one us (Bagaric) has relied on it heavily in the context of the voluntary euthanasia debate to argue that the practice should not be legalized in Western countries because it is likely to lead to abuses in the form of non-voluntary euthanasia.[25] This argument is based on wide-ranging data from the Netherlands, which showed that in a climate where voluntary euthanasia is permitted, a large number of incidents of involuntary euthanasia occur.[26] The important aspect of this line of reasoning is that the slippery slope argument was not invented, rather it was empirically grounded.[27] Of course there is room to argue against the validity of a slippery slope argument in the euthanasia context. For example, it could be suggested that despite the apparent similarity between the Netherlands and many other Western nations there are in fact subtle unique social and cultural dynamics in the Netherlands. Nevertheless, in the case of euthanasia a foundation for the slippery slope argument

24. While some theorists believe that this has a retributive rationale, in our view the key justification for sentencing is utilitarianism. *See* MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH 41–44 (2001).

25. KUMAR AMARASEKAR & MIRKO BAGARIC, EUTHANASIA, MORALITY AND THE LAW 63–71 (2002).

26. *Id.*

27. Conclusions drawn regarding euthanasia cannot be applied to the torture setting since euthanasia does not involve balancing one person's interests against another.

was laid. This is not so in the case of the torture debate—here the critics have not passed the creative thinking stage.

So why is it that compassion-motivated practices that involve setting off the interests of one individual against those of another or the common good do not result in widespread abuses? There is no clear reason for this. We speculate that it is because most people seem to have a genuine dislike towards the concept of harming others and, rightly, give less weight to speculative benefits than certain harms. We are never quite sure that the bone marrow transplant will work or that capital punishment or imprisonment are effective, but we are sure that they cause hardship to the donor and the wrongdoer. Thus, we tread warily when it comes to engaging in such practices. Rather than building slippery slopes we erect increasingly high barriers to such practices. Such is likely to be the case with lifesaving torture.

The critics have catalogued past episodes of torture at great length. They missed one elementary point—none of the abuses in places such as Guantanamo Bay, Algiers, Northern Ireland, Iraq (by Iraqi and United States forces), Greece, Israel,[28] and any of the more than 100 other locations where torture has occurred were caused by a slide down the slippery slope from lifesaving torture to torture for reasons of punishment and domination. These incidences of torture generally occurred against the backdrop of widespread hatred and anger in war or war-like situations where there was a suspension of even the most fundamental moral standards. Torture did not cause this, it was a symptom of the intense hatred that occurred when groups started killing each other for reasons such as race, land disputes, and religious differences. Alternatively, the incidents of torture cited by the critics relate to clandestine activities by misguided security officials "fishing" for information—the dissimilarity with our proposal is evident.

Thus, in the context of the torture debate, the only evidence of the slippery slope argument is that many of the critics have lost their

28. The Israeli experience comes closest to our proposal, but there are enormous differences. The criteria for torture was extremely broad: "[S]o long as the interrogator reasonably believes the lesser evil of force is necessary to get information that would prevent the greater evil of loss of innocent lives." John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 U. PITT. L. REV. 743, 757 (2002). Note there is no requirement that torture is used as a last resort and that it is almost certain that the suspect has the relevant knowledge. The torture guidelines were not law, but internal police guidelines, and there was no meaningful overview of practices. *See id.* at 757–58. It could only be in such a climate that eighty-five percent of Palestinian detainees were reported to have been tortured. B'TSELEM, ROUTINE TORTURE: INTERROGATION METHODS OF THE GENERAL SECURITY SERVICE 5 (1998).

intellectual balance and slid down the slope of placing undue reliance on the slippery slope argument.

B. Livesaving Torture Is a Humane Practice

The argument that condoning torture in any circumstance will brutalize or dehumanize[29] the torturer or society in general is flawed because it takes an unduly narrow perspective of the proposal at hand and mischaracterizes the motivation for the proposal.

It should be noted that this criticism is sometimes put as a stand alone argument, while on other occasions it is a premise of the slippery slope argument, along the lines that any torture will result in more torture because it will desensitize people to the suffering of others.

We agree that inflicting pain on people is undesirable. In our view the reduction of pain should be one of the highest-order moral imperatives. But there is no basis for ranking one person's pain above that of another. When we are confronted with a situation where we must choose between who will bear unavoidable pain, we need to take a pain minimization approach. To this end, there is no question that causing even intense physical pain to a suspect results in less pain than allowing many people to be killed. The ensuing pain that would be felt by the relatives of the victims grossly outweighs the physical pain inflicted on the suspect.

In assessing the potential dehumanizing aspect of a proposal, there is no logical or moral basis for focusing only on the interests of one agent in the dilemma. All affected parties must be given equal consideration. Sure speculative consequences (in this case the likelihood that the attack will be actually averted) weigh less than certain consequences (the pain inflicted on the suspect), but at some point the speculative side of the scales (where, for example, there are a large number of lives at stake) are so heavy that they outweigh certain negative consequences.

The critics fail to extend their moral horizons beyond the interests of the suspect. This individualistic account of morality represents a far greater threat to our humanity than torturing suspects to save lives. A society that stood by and refused to take all reasonable steps to save innocent life would be vastly different than the one in which we currently live. Rescuers would not be permitted to push aside bystand-

29. This is a point made by several critics. *E.g.*, John Kleinig, *Ticking Bombs and Torture Warrants*, 10 DEAKIN L. REV. 614, 620 (2005).

ers for fear of bruising them, ambulances would not rush to save sick people for fear of colliding into other cars, police would not pursue criminals for the same reason, people would not undergo security checks at airports before they got onto planes because it would interfere with their right to liberty and privacy, and we would be content with stating what a pity it was that many innocent people were murdered in a possibly preventable incident on the basis that we did not want to subject a suspect to physical persuasion. This is approaching moral nihilism.

A related objection that has been raised to lifesaving torture is that it will dehumanize the torturer, as opposed to society in general.[30] The evidence, however, is to the contrary. Throughout history people have inflicted pain on individuals and sustained no demonstrable moral bruises. Currently, surgeons do it as part of their daily practice. While in many countries anesthetics remove the pain during surgery, some forms of surgery cause significant pain and discomfort during the recuperation phase. Moreover, prior to the discovery of anesthetics, surgeons would perform procedures that caused almost unthinkable levels of pain, such as limb amputations. Nowadays prison guards lock up prisoners in small cells, some parents still strike their children, and some people kill in self-defense. Yet, there is no evidence that such people typically suffer undue levels of trauma.

Some critics give examples of torturers who have regretted their actions once they have come to learn that their cause was unjust.[31] This is irrelevant to our proposal. We leave no scope for issues of moral subjectivism or relativism or for changed perceptions regarding the justness of torture. Killing innocent people is undesirable—nearly always so—irrespective of which ideological or normative position one happens to adopt at any point in time. Proportionate actions taken to prevent this are objectively morally sound,[32] and hence there is no rational scope for regret about such matters.

C. Torture Is Effective—At Least Sometimes

The argument that we should not use torture in any circumstances because suspects will not provide the relevant information po-

30. *Id.*

31. *See, e.g.*, O'Rourke, Chaudhri & Nyland, *supra* note 18, at 92–97 (Part II.C); *see also* Sarahj Jopesh & Marius Smith, *Defending the Indefensible: Torture Is Inhuman, Illegal and Futile*, AGE (Melbourne), May 18, 2005.

32. *See* Mirko Bagaric, *A Utilitarian Argument: Laying the Foundation for a Coherent System of Law*, 10 OTAGO L. REV. 163 (2002) (arguing that morality is an objective inquiry).

tentially invalidates our proposal. Certainly, if this objection was valid we would change our mind and not countenance torture in any circumstances. However, this argument is defective because it does not challenge the principles of our proposal. Rather, it demonstrates a supposed practical flaw identified with lifesaving torture. Presumably, if this obstacle was overcome the critics would then agree with the proposal.

The ineffectiveness of torture criticism has been advanced by many critics. The most persuasive article on the issue was written by Philip N.S. Rumney.[33] The article is well-measured in its analysis and well-researched in its scope. Rumney concludes that torture suspects often do not divulge the information that is sought from them and that torture is not necessarily an excellent information gathering device.[34]

There are, however, two fundamental flaws in his article in the context of the discussion at hand. None of the instances of torture that Rumney considers are similar to the circumstances in which we advocate torture should occur or to the limited means in which it should be administered. Nearly all of the torture cases discussed by the critics involve torture for reasons of punishment or domination and humiliation where there is little evidence to suggest that the victims actually possess the relevant information. Moreover, the pain was inflicted in a crude manner, rather than in a clinical institutional setting, where the means used are designed to cause the minimum pain necessary while having the least possible long-term effects. Secondly, the wide-ranging examples Rumney refers to are no more than anecdotal accounts—as set out below, it is easy to give as many contrary examples.

Concededly, torture often did not work because the victim did not actually have the relevant information and, as a result, was forced to lie. Other times it would not have had the desired outcome because unsophisticated pain inducing means were invoked. This is not what is being countenanced by our proposal. Fishing expeditions are not permitted—it must be virtually certain that the suspect has the information.

Despite the crude nature of previous incidents of torture (thereby making accurate information virtually impossible to obtain), there is no question that sometimes torture can be effective at elicit-

33. Rumney, *supra* note 18.
34. *Id.*

ing information, and it can save innocent lives.[35] This is a point accepted by most of the critics.[36] For example, Israeli authorities claim to have foiled ninety terrorist attacks by using coercive interrogation.[37] It is also claimed that information provided as a result of torture enabled the French to foil terrorist attacks in the Algiers.[38] One of the people doing the torturing in the Algiers was General Paul Aussaresses. In his book he cites "a string of instances in which he was able to find bombs and break up terrorist cells as a result of torture. He claims that he quickly discovered that 'the best way to make a terrorist talk when he refused to say what he knew was to torture him.' "[39]

An aide to United States President George W. Bush recently noted that "torture light" is an essential tool:

> "We're talking about the most successful intelligence gained in the war on terror coming from these programs," he says. Details are hard to come by, but Sen. Kit Bond, a member of the Senate intelligence committee, [said] . . . that "enhanced interrogation techniques" worked with at least one high-level Qaeda operative, 9/11 mastermind Khalid Shaikh Mohammed, to thwart a plot. Bond would not say which one, but among foiled plots vaguely described by the White House and linked to "KSM" was a scheme to attack targets on the West Coast of the United States with hijacked airlines. The planning for such a "second wave" attack may have been in the early stages.[40]

Further, a United States investigator, Chris Mackey, who went to Afghanistan to question al-Qaeda suspects following the United States invasion in 2001 has commented that effective interrogation is not possible without the use of torture.[41] According to Mackey, under the international definition of torture, any effective form of interrogation is perceived as torture and thus prohibited.[42]

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35. Even O'Rourke, Chaudhri & Nyland, *supra* note 18, at 88–89, concede this.

36. *Id.*; *see also* Strauss, *supra* note 18, at 264.

37. Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?* 13 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 84, 2005).

38. Sanford Levinson, *Contemplating Torture: An Introduction, in* TORTURE: A COLLECTION 23, 34 (Sanford Levinson ed., 2004) (quoting Adam Shatz, *The Torture of Algiers*, N.Y. REV. OF BOOKS, Nov. 21, 2002, at 57).

39. Palmer, *supra* note 14, at 40–41 (citing PAUL AUSSARESSES, THE BATTLE OF THE CASBAH: TERRORISM AND COUNTER-TERRORISM IN ALGERIA, 1955–1957 (Robert L. Miller trans., Enigma Books 1st English ed., 2002)).

40. Evan Thomas & Michelle Hirsch, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 27, *available at* http://www.msnbc.msn.com/id/10020629/site/newsweek.

41. CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL-QA'EDA (2004), *cited in* Palmer, *supra* note 14, at 41.

42. MACKEY & MILLER, *supra* note 41, *cited in* Palmer, *supra* note 14, at 41.

Alasdair Palmer also notes that, in 1995, the Philippines intelligence service provided information obtained through torture to America that helped foil an al-Qaeda plan to crash eleven airplanes carrying 4000 people into the ocean and to crash a small aircraft filled with explosives into Central Intelligence Agency ("CIA") headquarters.[43] Marcy Strauss gives the example of famous terrorist Abu Nidel who was "broken" by Jordanian officials, and the 1993 World Trade Center bombings that were cracked by the Philippines when they threatened to torture a suspect.[44]

Much has been made by the critics of CIA manuals (the Kubark Counterintelligence Manual and the Human Resource Exploitation Manual) that, in parts, indicate that torture is often ineffective.[45] It is foolhardy, however, to believe that these documents, which are dated 1963 and 1983 respectively, encompass the sum experiences or collective attitudes of even the CIA towards torture.

If the considered view of the CIA was that torture was not effective in most cases, it seems incredulous that President Bush and Vice President Cheney would have so vigorously lobbied Congress to exempt the CIA from legislation (sponsored by John McCain) that bans "cruel, inhuman and degrading treatment of prisoners in the detention of the US Government" and allows the CIA to torture suspects where it is necessary to prevent a terrorist attack.[46]

President Bush initially refused to endorse the proposal, stating that he hoped to reach agreement with McCain in relation to the matter. The agreement being sought related to a proposed narrower definition of torture, which would probably allow some form of harm to be inflicted on wrongdoers.[47] Ultimately, the Bush Administration buckled under congressional pressure that repeated prisoner-abuse scandals were proving to be too damaging to America's international reputation. However, this was not until some important concessions were introduced into the legislation, including a defense for people

43. Palmer, *supra* note 14, at 40. He goes on to give numerous other examples of where torture has been effective to obtain information and thwart attacks on innocent people.

44. Strauss, *supra* note 18, at 263 n.212 (citing Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 48).

45. *See, e.g.*, Rumney, *supra* note 18, at 13–18.

46. David Espo & Liz Sidoti, *Cheney Bid for Torture Ban Exemption*, AGE (Melbourne), Nov. 6, 2005, at 9.

47. David Sanger, *Bush Confident of Deal in Tough Questions*, AGE (Melbourne), Dec. 14, 2005, at 17.

who violated the prohibition in circumstances where they believed they were following a legal order.[48]

After the bill was passed Senator John McCain conceded that it might not apply in the extremely rare case of a suspect who knew of an imminent attack. In the bill, torture and cruel, inhumane treatment is defined as that which "shocks the conscience."[49] McCain stated that torture in the ticking time situation, "would not shock the conscience. And in that million-to-one situation, then the President of the United States would authorize it and take responsibility for it."[50]

During this debate, a former top adviser to President Bush in Iraq, Robert Blackwill, who was national security adviser during Bush's first term, said that torture should never be totally ruled out. He stated:

> Of course torture should not be widespread and of course there should be extraordinarily stringent top-down requirements in this respect. But never? . . . I wouldn't say never.
>
> [Blackwill, answering questions from the audience, said that when he taught a class for executives at Harvard University's John F. Kennedy School of Government, the case which caused the most "confusion" involved a fictional detainee whose organization was threatening to detonate a nuclear weapon in New York City.]
>
> You have reason to believe he knows where it is. Do you torture him? . . . It does seem to me that circumstances matter here and . . . I'm not an absolutist in this regard.[51]

Thus, torture is effective sometimes—possibly often. The critics' examples of failed torture can be rebutted by giving at least an equal number of examples where it has been effective and further rebutted by the realization that the torture events referred to were often punitive fishing expedition—certainly there is no evidence to suggest that the torturers were overly concerned with ensuring that the suspect had the requisite information before they commenced the torture.

The underlying problem with the way this aspect of the debate has developed is that it is in danger of degenerating into a distracting and superficial numbers game—with the winner supposedly being the side that can provide the most number of examples to support their contention. As is discussed below, the above examples of effective tor-

48. *See generally* Tim Reid, *Bush Forced to Accept Torture Ban*, TIMES (London), Dec. 16, 2005.

49. *Torture Ban Has Exceptions*, HERALD SUN (Melbourne), Dec. 20, 2005, *available at* http://www.heraldsun.news.com.au/common/story_page/0,5478,17609059%255E1702,00.html.

50. *Id.*

51. *Id.*

ture are not catalogued to claim victory on this issue, but rather to illustrate how easily the numbers game can be played.

Before moving to more sagacious matters, we underline the futility of the numbers process engaged in by some of the critics. This is a device that has not been confined to the ultimate effectiveness of torture. Some critics have also gone to lengths to discuss the reasons why torture is supposedly unlikely to work.[52] This has even been in relation to issues where the numbers avalanche is against them.

Some critics have argued that our proposal is unsound because of the difficulties involved in identifying persons who have the relevant knowledge.[53] To buttress their argument they give examples of errors made by police and security officials in making false arrests.[54] The fallacy in this argument is that it attempts to extrapolate the exception into the rule. For every false arrest it would be possible, literally, to give hundreds and perhaps thousands of examples of the right person being detained or questioned. Often there is little doubt that a person is involved in a criminal activity. Sometimes they make admissions; other times they are caught from surveillance cameras before the attack (as were the London bombers on July 7, 2005—although the tape was not noticed until after the bombs went off). The fact that mistakes regarding identity are sometimes made is no more of an argument against our proposal than it is for closing the entire criminal justice system given the number of innocent people that are falsely imprisoned.

Given the clandestine nature of torture and the almost total dearth of reliable data kept on such events, it is verging on intellectual dishonesty to purport to provide an overarching account or precise summary of the extent to which torture victims fess up.[55] The only salient points to be drawn about the effectiveness of torture are (1) that we know as a fact that humans dislike pain and will try to avoid it, and (2) all the information from past instances of torture reveals only the following: sometimes it has resulted in suspects divulging information to security officials who have used the information to save other people; sometimes it has not been effective.

It is not easy to find situations where torturers take at least some steps to ensure that the suspect has the relevant knowledge and torture is not at least partially motivated by an institutionalized dislike of

52. *E.g.*, Rumney, *supra* note 18, at 506–09.
53. *Id.*
54. *Id.*
55. *See* Strauss, *supra* note 18, at 263.

the victim, as is normally the case in wartime situations. Yet, it is possible to obtain some useful data regarding the effectiveness of torture.

In this regard we need to look to more mundane incidents of torture, as opposed to torture in war-like settings, which is often motivated by intense hatred towards the victim (as opposed to a genuine desire to obtain information—especially information that is known to be in the possession of the victim) and in circumstances where the rule of law is often suspended.

The closest analogy that can be made to our proposal relates to garden variety police investigations. Police normally do not have a strong desire to punish any particular sections of the community and take some steps to ensure that they only arrest people where there is evidence of involvement in the crime in question. Sometimes police break the law and assault suspects in a bid to ascertain the truth. Given that they do not normally have a preexisting dislike of the suspect, their techniques are presumably motivated at least largely by reasons of information gathering so that the crime can be solved. The ultimate motivation, one assumes, is to enhance community safety, as opposed to a desire to humiliate or punish the suspect.

Courts have highlighted a number of instances where the will of suspects has been overborne as a result of police beatings, threats, and other acts of thuggery. We are not talking about contrived confessions to stop the beatings and the like, but reliable confessions made to stop the pain.[56]

And if suspects are willing to betray themselves by confessing to crimes that will result in their long term incarceration, it follows that they will betray their cause and provide information that will save innocent lives.

Thus, the argument that torture never works is unsupportable. Rather, the most accurate assessment of the efficacy of torture as an information gathering device is that it will sometimes fail, while on other occasions it will succeed. We agree with Rumney that the issue of effectiveness is central in this debate.[57] The way forward here is to obtain more pointed data regarding the circumstances in which tor-

56. *See generally* Strauss, *supra* note 18 (citing Brown v. Mississippi, 297 U.S. 278 (1936) (sheriff obtained confessions from three black suspects by whipping them until they made confessions); Leon v. State, 410 So. 2d 201 (Fla. Dist. Ct. App. 1982) (police physically abused a kidnapper by twisting his arm behind his back and choking him until he revealed the location where the victim (whose life police feared was in imminent danger) was being held; police then rescued the victim); *see also* CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 401 (4th ed. 2000).

57. Rumney, *supra* note 18, at 481.

ture has been effective and when it has failed. The study could only be retrospective—no one would seriously contemplate actually torturing people for experimental purposes.

The surveyed cases should be confined to instances of torture that as closely as possible resemble the torture framework we suggest, i.e. where the mistreatment is not for punitive reasons, and the suspect is known to have the relevant information. To this end, the only viable respondents would consist of former and current police officers, who would need to be given absolute immunity from prosecution for the information that they disclosed.

It is important to note that the results of such a study cannot lead to the conclusion that torture is never justifiable. If it transpires that even the most effective torture techniques only elicit the relevant information in a small number of cases, this would mean that the plus side of the scales would need to be heavier than first proposed for torture to be justified. If thousands of lives were at stake, even a twenty percent likelihood that torture would be effective would justify the use of torture.

Ultimately, we cannot guarantee that torture will work in any given instance, but we can be virtually certain that doing nothing will fail when we are faced with an imminent catastrophe.

D. Torture Is Not Anti-Democratic

Another supposed downside of torture is that it is anti-democratic or will corrupt democracy. Some critics have even said that it will have a "devastating effect" on democracy.[58] This is a confusing argument because its main premise is not articulated. Democracy is a complex and ill-defined notion. If it means majoritarianism, as many believe to be the case, then a lawfully elected government can obviously legalize torture through its normal political process. If the normal law-making process is observed, then lifesaving torture and democracy sit harmoniously.

It is certainly not inconceivable that a robust and free democracy would permit lifesaving torture. The latest *Newsweek* poll on the subject shows that a clear majority of Americans support torture in roughly the circumstances we indicate.

> [Forty-four] percent of the public thinks torture is often or sometimes justified as a way to obtain important information, while 51 percent say it is rarely or never justified. A clear majority—58 per-

58. O'Rourke, Chaudhri & Nyland, *supra* note 18, at 92.

> cent—would support torture to thwart a terrorist attack, but asked if they would still support torture if that made it more likely enemies would use it against Americans, 57 percent said no. Some 73 percent agree that America's image abroad has been hurt by the torture allegations.[59]

Moreover, as we noted in our first article, when democratic societies have their backs to the wall and are forced to make difficult choices, they invariably go down the path of least harm.[60] This harm is often less than that involved in torturing a suspect. In the first article we gave several examples of the preparedness of governments to sacrifice the interests of individuals for the greater good, such as forcing soldiers to go to war.[61] The principle behind such decisions has not been challenged by the critics. But for illustrative purposes we add to the catalogue of situations that make it clear that when forced to chose between two evils, we always elect for the lesser evil.

The English Court of Appeal in the case of *In re A (Children)*[62] in 2000 held that it was permissible to kill one conjoined twin in order to improve the chances that the other would live—even with no guarantee that the twin would survive the operation.[63] Why did the court make this decision? Pressed to make a choice between important conflicting rights, the Ward LJ resolved the matter "by choosing the lesser of the two evils and so finding the least detrimental alternative."[64]

For another "real life" example of what we do in extreme cases, refer to the Zeebrugge disaster in 1987.[65] Dozens of people were in the water and in a danger of drowning. They were near the foot of a rope ladder, but their route to safety was blocked for at least ten minutes by a young man who was petrified by cold or fear (or both) and was unable to move. The Corporal gave instructions to push him off the ladder. He was never seen again.[66] What if instead of blocking the ladder the young man refused to provide the PIN number to release the ladder? There is little doubt that he would have been subjected to some "physical persuasion."

Continuing with the real life theme (to finally bury the claim that the examples we cite belong in the realms of fiction), most countries

59. Thomas & Hirsch, *supra* note 40, at 29.
60. Bagaric & Clarke, *supra* note 1, at 607.
61. *Id.*
62. *In re* A (Children) (2001) Fam. 147 (C.A.) (U.K.).
63. Mirko Bagaric, *The Jodie and Marie Siamese Twins Case—The Problem with Rights*, 8 J.L. & MED. 311–21 (2001).
64. *A (Children)* (2001) Fam., at 147.
65. *Id.*
66. *Id.*

have laws that compel witnesses to give evidence in court. We compel them to do so, regardless of the level of mental anguish it causes or the level of danger that it places them in.

A recent illustration involves twenty-seven year old Melbourne lawyer, Zarah Garde-Wilson. She was found guilty of contempt of court for refusing to testify against two "gangsters" who had murdered her boyfriend.[67] The murders were in the context of unprecedented underworld killings in Melbourne, resulting in the execution-style killings of over twenty "gangland" figures over several years. During questioning by the judge about her involvement with the victim (her former boyfriend) she wept in the witness box and responded that she was "unable to answer questions due to fear for my safety."[68] One of the accused threatened her and she said that she believed she would get her "head blown off" if she gave evidence.[69] She applied to enter a police witness protection program, but was rejected.[70] Still the fact that Ms. Garde-Wilson thought she would be killed if she gave evidence and was obviously traumatized by the prospect of giving evidence did not find much favor with the judge. In finding her guilty of contempt for refusing to answer the questions, Justice Harper stated that her fear was no excuse for not giving evidence and that if other witnesses in murder trials also refused to testify, "no system of justice could survive."[71]

Thus, we have a situation where the criminal justice system is using the threat of imprisonment to coerce information from a traumatized innocent individual who has reasonable grounds for believing that she will be killed if she obeys the law. Given a choice between this ordeal and a dose of physical persuasion, there would no doubt be many people that would prefer the former. As a community we often treat individuals very harshly when the common good is at stake. It is an undeniable fact. Yet democracy remains intact.

As a side issue, there is an absence of the arguments that are used against our lifesaving torture proposal in the context of compelled witness disclosure. In this context, there are no utterances along the lines that we should not force witnesses to give evidence because we can never be sure that the witness has the evidence, the witness might

67. R v. Garde-Wilson (2005) V.S. Ct. 441.

68. *Id.*

69. *Id.*

70. *Id.*

71. Stephen Moynihan, *Underworld Lawyer Found Guilty of Contempt*, AGE (Melbourne), Nov. 15, 2005, at 3.

lie, and so on. These arguments resonate very strongly with the torture critics but are muted in the context of other institutionalized practices that can have a crushing impact on individuals. These arguments are just as flawed and futile in the context of torture.

Some critics have sought to bolster the notion of democracy slightly by arguing that it is built on the foundation of respect for individuals and human rights, and that torture runs counter to this.[72] This, in essence, is the dehumanizing point repeated under a different banner. If democracy does entail respect for individuals and human rights, then surely each individual counts equally in this process, including potential victims.

Even if we move from strictly majoritarianism accounts of democracy to more expansive and sophisticated accounts of the nature of democracy, which contend that democracy is a substantive rather than procedural concept, there seems no scope for labeling the institutionalization of lifesaving torture as a threat to democracy. For example, the democratic ideal adopted by Samuel Freeman provides that the only political and social institutions that are justifiable by democratic sovereignty are those that reflect the interests common to all people.[73] It can hardly be doubted that the highest order interest shared by most people is the right to life.

Moreover, as noted by Palmer, countries such as France, Britain, and Israel have all used torture widely over the past fifty years and "none have sunk into barbarism, or ceased to be a law-governed democracy."[74]

If the critics want to persuasively advance the democracy argument, they need to spell out the key indicia of such a concept and how it is incompatible with going down the path of the least evil. The critics have much work to do on this front.

III. The Real Divide: Where Responsibility Starts and Ends

Despite the apparent divide between us and the critics, there is considerable consensus in important respects. We both approach the issue from the perspective that it is bad to inflict pain, and we agree that compassion should drive moral outcomes. While there is disagreement regarding the effectiveness of torture, this relates to a differ-

72. O'Rourke, Chaudhri & Nyland, *supra* note 18, at 92–93.

73. Samuel Freeman, *Original Meaning, Democratic Interpretation, and the Constitution*, 21 PHIL. & PUB. AFFS. 3, 22 (1992).

74. Palmer, *supra* note 14, at 41.

ence in degree, not nature (the critics do not contend that torture never works). Additionally, we are confident that the critics would agree that the right to life is more important that the right to physical integrity—at least we doubt that a tenable argument could be mounted to the contrary. Thus, the central point of difference that remains is the application of the slippery slope argument. This does not appear sufficient to explain the gulf between our respective views.

In our view, a large part of the reason for the difference in our conclusions on torture relates to a notion that has not featured in the surface nature of the debate. This is the notion of responsibility. The fundamental divide between us and the critics is that invariably when they present their views they focus on the brutality of torture.[75] On the other hand, we focus on the need to save innocent lives. The critics rarely comment on the other side of their anti-torture proposal—the cruelty associated with standing idly by as the innocent are killed. This point is also made by Louis Seidman:

> [Opponents of torture] focus on the human suffering imposed by the use of certain techniques, but are unwilling to broaden their concern to suffering that might be caused by the failure to use them. Instead, many of them adopt as an article of faith the proposition that these techniques are never useful.[76]

The moral horizons of the critics, it seems, are arbitrarily transfixed on the plight of the suspect. The critics need to lift their horizons and consider the interests of all the parties whose interests are likely to be affected by the decision regarding whether or not to torture the suspect. This is a glaring failure on behalf of the critics. Thus, we are not told, for example, what response is suitable to give to the relatives of innocent people killed in a potentially preventable murderous act. A copy of the Convention Against Torture,[77] even if framed, would surely not suffice.

This involves some speculation, but the reason that the critics do not go *there*—and spell out which principle justifies not acting to save the innocent people—we believe is because they are (indirectly) relying on what is potentially the strongest counterargument to the proposal to allow lifesaving torture.[78]

75. Louis M. Seidman, *Torture's Truth*, 72 U. CHI. L. REV. 881, 883 (2005).

76. *Id.*

77. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, at 197, 39 U.N. GAOR, Supp. No. 51 (Dec. 10, 1984).

78. Posner & Vermeule, *supra* note 37, also examine reasons why torture is for many taboo. They speculate that it might be in part due to "concern for reputation, social influences, and the fear of ostracism" along with the common "herding" process where people blindly follow the lead of others. *Id.* at 33.

A criticism that is often made of utilitarianism is that it does not give sufficient space for people to pursue their individual projects and requires us to take too much responsibility for actions and events not of our doing. The classic illustration of this is the famous Jim and Pedro example by Bernard Williams.[79]

Jim is a botanist on an expedition in a small South American town where the ruthless government regards him as an honored visitor from another land. He goes into town and sees twenty Indians tied up. Pedro, the captain in charge, explains that the Indians are a random group of inhabitants who, after recent protests against the government, are about to be executed to deter others from protesting. Since Jim is an honored guest, Pedro offers him the "privilege" of killing one of the Indians himself. If he accepts, as a special mark of the occasion, the other Indians will be spared. If he refuses, they will all be killed. Jim realizes it is impossible to take the guns and kill Pedro and the large number of other soldiers. The Indians and other soldiers understand the situation, and the Indians are begging for him to take up the offer.[80]

Williams argues that if Jim were a utilitarian he would kill the Indian.[81] Williams himself has trouble accepting this outcome. Williams's quarrel is not necessarily with the result that utilitarianism commits one to (in fact he has subsequently stated that he too would shoot the Indian), but with the reasoning process employed by the utilitarian to resolve the dilemma. Williams contends that utilitarianism cuts out considerations that most would think integral to such cases, such as the idea that each of us is specially responsible for what he or she does, rather than what others do.[82] This, therefore, makes utilitarianism unintelligible because it fails to appreciate the relationship between a man and his projects.

At least implicitly, anti-torture proponents seem to be endorsing this account of personal responsibility by failing to expressly consider the interests of the innocent people at risk. There is some merit in this view. As individuals we cannot be expected to take responsibility and attempt to correct all the potential injustices that we can potentially correct. This would make life intolerable and cut us off from many of the activities that give life meaning and purpose. People achieve hap-

79. Bernard Williams, *A Critique of Utilitarianism*, *in* UTILITARIANISM: FOR AND AGAINST 96, 98 (J.J.C. Smart & B. Williams eds., 1973).

80. *Id.* at 99.

81. *Id.*

82. *Id.*

piness not only by making other people happy but through a vast range of projects such as being committed to persons, causes, institutions, or any other of a multitude of activities.[83]

The notion of personal responsibility, however, is ultimately not so narrow to enable societies to avoid responsibility for preventable deaths. At the personal level, one of us (Bagaric) has argued that our obligations are circumscribed by the maxim of positive duty. This is the view that we must assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to ourselves.[84]

There are occasions when acting morally requires us to do more than merely refrain from certain behavior—where we must actually *do* something. Morality defined exhaustively as a set of negative proscriptions fails to explain why it is morally repugnant for Bill Gates to refuse to give his loose change to the starving peasant whose path he crosses, or why it is wrong to decline to save the child drowning in a puddle in order to avoid getting our shoes wet, or to refuse to throw a life rope to the person drowning beside the pier. Torturing a suspect to save other people from being killed arguably does not come within this principle—inflicting pain on another person is no minor inconvenience.

However, different considerations apply regarding governmental obligations and the institutionalization of practices. Governments have a duty to implement practices and processes that balance the countervailing interests of all the citizenry regarding actual and foreseeable practices and events. Thus, governments are required to form defense forces, police forces, courts, and hospitals. In the operation of such institutions, each individual's interests must count equally.

Given that it is foreseeable that people will continue to engage in activities that threaten the lives of others, it would be remiss for the government not to develop a framework for dealing with such scenarios. The number of situations where such a framework may be utilized will be rare, but given the enormity of issues that are relevant, the matter cannot be ignored.

Thus, the critics have no basis for considering only one aspect of the torture equation when they are developing their responses. If torture is never permissible, they are required to explain which account

83. *Id.* at 112.

84. *See* Mirko Bagaric & Penny Dimopoulos, *International Human Rights Law: All Show, No Go*, 4 J. HUM. RTS. 3 (2005).

of responsibility shields them from being responsible for the deaths of innocent people whom they refused to assist.

IV. Why the Torture Debate *Really* Matters (and Why a Meta Analysis of the Torture Debate Supports Our Argument)

Hopefully, we will never find ourselves in a situation where a torture warrant may be issued. Despite the scarcity with which such situations may occur, the torture debate is important. This is because it highlights many of the failings of current moral thinking that are responsible for an enormous amount of preventable suffering in the world. As noted in our first article, contemporary moral discourse is dominated by (non-consequentialist) rights-based theories.[85]

One of us (Bagaric) has previously argued that these theories are flawed.[86] They have no foundation and are unable to provide persuasive answers to central issues such as: What is the justification for rights? How can we distinguish real from fanciful rights? And which right takes priority in the event of conflicting rights?[87] As Jeremy Bentham taught us two hundred years ago, rights as used in conventional moral discourse are "nonsense on stilts."[88]

In the end, there is no basis upon which to distinguish real from illusory rights and no way of determining which right wins when there is a clash of rights. Given that rights have no justification, when they clash the winner is often the person who yells the loudest.

Despite the fact that rights are nonsense, we like rights. They appeal to those of us who have a self-focused approach to moral issues. But buried only slightly beneath such an approach are the inescapable realities that as people we live in communities, communities are merely the sum of a number of other individuals, and the actions of one person exercising his or her rights can have a negative effect on the interests of others. While rights seek to "atomize" people, the reality of the human condition is that we do not and cannot function happily without the involvement of others.[89]

85. *Id.*; Bagaric & Clarke, *supra* note 1, at 597–605 (Part II.A).

86. *See generally* Bagaric & Dimopoulos, *supra* note 84.

87. Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J. LEGAL PHIL. 95, 121–43 (1999).

88. 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 501 (Simpkin, Marshall & Co. 1843).

89. Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1, 12 (2005).

The two principal problems associated with endorsing a moral code that approaches moral dilemmas through the prism of rights is that the moral horizon is limited to oneself and those directly within one's view, and there is no mechanism for ranking rights. This makes it very easy for us to be preoccupied with our interests and place our minor concerns above life and death concerns of other—especially distant—people. Rights are a good apparatus for deflecting moral responsibility.

As a result, human rights discourse is effective only at the conversational level. The promises of grandiose international and national rights-based-documents have bypassed a large portion of the world's population. Many people are not even capable of reading the documents or are too hungry or too hot or too cold to summon the energy to inquire what they contain. Thus, while the surface nature of our language and discourse almost unquestionably accepts the existence of human rights—and "universal" ones at that—there is a huge gap between our acts and words when it comes to rights.[90] We are good at talking up rights and even asserting *our* rights but deficient when it comes to securing the rights of others—especially the people we are not directly confronted with.

"Enough grain alone is produced to provide every human being on the planet with 3500 calories a day—enough to make most people fat . . . ."[91] Yet more than 13,000 people are starving daily while much of the Western world is gorging itself to ill health on super-size meals.[92] How can we let this situation occur?

A significant part of the answer rests in the fact that we operate in a moral framework that is individualizing, has no express regard for the common good, and provides no clear guidance regarding the interests that matter most to human flourishing. One of us (Bagaric) has previously argued that we must debunk a number of existing normative and psychological fallacies from our collective psyches in order to eradicate the gross inequities in the world.[93] This includes a belief in baseless forms of rights.

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90. *See also* Bagaric & Dimopoulos, *supra* note 84.

91. Pamela Bone, *We Can Be What We Eat*, AGE (Melbourne), Mar. 12, 2005, at 12. The problem is also one of democracy. As noted by Amartya Sen, "No democratic country with a free press has suffered a famine. Governments that can be thrown out by the people have a vested interest in making sure the people can eat." *Id.*

92. *See* Mirko Bagaric & Sharon Erbacher, *Fat and the Law: Who Should Take the Blame*, 12 J.L. & MED. 323 (2005).

93. Bagaric & Dimopoulous, *supra* note 84, at 3–21.

The subject of torture provides an excellent illustration of much of what is wrong with prevailing rights orthodoxy. It highlights: (1) the horizon limiting effect of such theories. As noted above, the critics do not address the rights of the innocent whose lives are at risk, instead confining their gaze to the person immediately before them (the suspect); (2) the absence of a mechanism for ranking rights and the problems associated with a belief in absolute rights. Thus, we see that the critics are committed to the untenable position that the right to life is lower down the rights hierarchy than the right to physical integrity; and (3) given the formless nature of contemporary rights-based theories, the fact that moral debates are often dominated not by reasoned arguments but emotive utterances—without any degree of apparent coherency or impertinence—thereby stifling moral progress.

The third point is aptly illustrated by the manner in which this debate has been played out, particularly in the Australian context where passion trumped clear thinking.[94]

This chest-thumping and disparaging approach to moral discourse was not confined to the utterances of lay people, who may have understandably been jarred by the proposal to allow torture in, albeit, limited circumstances.

Thus, we see that in the article by O'Rourke in Volume 40-1 of this Law Review, we are referred to as "apologists" for torture—several times, just in case the point was missed the first time.[95] This is despite the fact that we do not condone a single incident of torture that has occurred in the history of the world. We are no more apologists for torture than O'Rourke is an apologist for the murder of the lives she is unprepared to try to save. We have little doubt that this point was not missed on her, but it is only in the context of a moral code whose contours are so formless that this type of approach would be regarded as being credible.

The President of an organization called Liberty Victoria (who is thanked by O'Rourke in her paper for his helpful comments) stated that the article in which we proposed lifesaving torture was a "stain"

94. This is not to suggest that all the critics of our proposal have fallen into the trap of allowing emotion to win the day. As noted above the article by Rumney is excellent. Although not a response to our proposal other measured and clear thinking pieces that take a contrary approach to our proposal include: Kleinig, *supra* note 29; Parry & White, *supra* note 28; Strauss, *supra* note 18.

95. O'Rourke, Chaudhri & Nyland, *supra* note 18, at 86.

on the reputation of our law school.[96] Apparently the concepts of free speech and prohibition of guilt by association do not rank highly on that organization's ideals. The Immigration Lawyers Association of Australasia stated that our views were "offensive, unforgivable and even barbaric."[97] Comparisons were made between one of us (Bagaric) and Adolf Hitler[98] by a community ethnic leader. Letters were sent to editors of this Law Review urging it not to publish the original paper, and some law groups and even politicians called for one of us (Bagaric) to be fired from his position as a member of the Refugee Review Tribunal.[99]

This type of discourse by seemingly intelligent and well-intentioned people could only occur in the context of a discipline that has few, if any, boundaries.[100] To this end, the most telling aspect of this debate is that none of the critics have attempted to develop an alternative moral framework to the consequentialist ethic that we endorse. O'Rourke refers to our underlying theory as built upon a "feeble consequentialist fabric,"[101] apparently with little regard to the fact that utilitarianism has been the main driver of political and social development for at least two centuries, until the past several decades.

Certainly, it is appropriate to criticize utilitarianism, but to do so requires reasons in support of such a contention. The remark that it must be wrong because it leads to bad outcomes was dealt with in the previous article[102]—as a society when we find ourselves in a jam we do (and should) follow the path of harm minimization—this is the ultimate "tie breaker." To persuasively criticize our account requires the advancement of an alternative moral theory that can provide coherent answers across the whole spectrum of moral issues that we as individuals, and together as a society, face from time to time. Absent such a theory we get randomness or, worse still, the domination of those prone to high emotion with loud voices—the antithesis of a moral code.

96. *See* Liz Minchin, *Make Torture Legal Say Two Academics*, AGE (Melbourne), May 17, 2005, at 1.

97. Kate Gibbs, *Profession Condemns Torture Vision*, LAWS. WKLY., May 27, 2005, at 1.

98. Daniel Fogarty, *Torture Proposal Repulses Leader*, GEELONG ADVERTISER, May 19, 2005, at 4.

99. Gibbs, *supra* note 97, at 1.

100. Posner & Vermeule, *supra* note 37, believe that there are other reasons for the taboo in relation to torture. They speculate that it might be in part due to "concern for reputation, social influences, and fear of ostracism" along with the common "herding" process where people blindly follow the "lead" of others. *Id.* at 33.

101. O'Rourke, Chaudhri & Nyland, *supra* note 18, at 105.

102. Bagaric & Clarke, *supra* note 1, at 605.

To illustrate this point, we provide two examples of the problems that beset theorists who do not endorse a utilitarian approach. They come from rebuttals to our paper published in the Deakin Law Review. The first is an article by John Kleinig who elegantly advances many of the criticisms that we rebut in this Article.[103] Ostensibly, many readers will be attracted to some of his arguments, but his approach collapses when he finally addresses the proposal at hand. At a lecture on the subject of torture, delivered several days after our opinion piece was published in *The Age*, he said that our proposal was illogical.[104] "[T]he Deakin lecturers' argument—that torture in extreme situations may be justified because the interests of many can outweigh the suffering of a few—was inhumane and illogical."[105]

"However, he then conceded that if Melbourne were under threat of a nuclear attack, which was then averted by torturing a confession from a suspect, he would be relieved."[106] His resolution of this apparent contradiction: "That may be the one situation where we as a society might say, 'You went out on a limb and did something we're totally opposed to, but it had a good result, so we forgive you.'"[107]

This is the sort of confusion that occurs if moral dilemmas are approached on the basis of piecemeal solutions without the support of underlying theories. When non-consequentialist theories are applied to hard cases they become unstable—often leading to unprincipled compromises. This is because they are lacking in substance, meaning that their proponents are reduced to relying on "fine phrases [that] are the last resource of those who have run out of arguments."[108]

This is highlighted by Desmond Manderson's contribution to the debate. He offers an impassioned argument against torture. In the end, his reasons for dismissing lifesaving torture are:

> 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. It just is. In fact, to look for reasons, to ask "what is love good *for*" or "how does loving someone benefit *me*?" is a sign of psychopathy. If

103. *See generally* Kleinig, *supra* note 29.

104. Liz Minchin, *Deakin Staff, Students Rally on Torture Backing*, AGE (Melbourne), May 27, 2005, at 8.

105. *Id.*

106. *Id.*

107. *Id.*

108. Peter Singer, *All Animals Are Equal*, *in* APPLIED ETHICS, 215, 228 (Peter Singer ed., 1986).

> Bagaric and Clarke and Faris cannot see the inherent wrong of torture, it is hard to see how to communicate with them.[109]

In fact, moral discourse does require reasons—otherwise, as noted above, yelling wins the day. The emptiness of Manderson's "reasoning" is highlighted by substituting "women's rights" for "torture" in the above quote and studying the evolution of the women's movement in the United States as recently as 150 years ago or in contemporary Iran or Saudi Arabia. Moreover, love is not self-evidently good—hence the reason for so many domestic killings in the name of love. In the end, only consequences matter.

The manner in which this debate has been played out provides a good example of the distortions in moral belief and social commentary that can occur in a moral vacuum. Perhaps in the end moral judgments are simply emotive retorts that are dressed up in a veneer of objectivity in order that they can be used as argumentative levers to attempt to shape the behavior of others. The once popular meta-ethical theory of emotivism suggested this.[110] However, in our view it is premature to give up searching for universal moral standards. This can only be frustrated by providing a receptive ear to emotional retorts, no matter how loudly or frequently they are expressed.

As illustrated by consideration of the subject of torture, the problems with rights-based theories provide compelling reasons for endorsing the moral theory that we advanced in our first paper: utilitarianism. In this context there is a clear framework for settling moral disputes. The proposal that prevails is that which will best enhance human flourishing, where each person's interest counts equally—whether they are a suspect or potential victim and irrespective of where in the world they have the fortune or misfortune of being born.

Perhaps the most surprising aspect of the emotion generated by our torture paper—and why we are relatively confident that the critics lost perspective of the wider issues at hand and were swept away by the pejorative connotation attached to the word torture—is that if our proposal to allow warrants to be issued in lifesaving circumstances was adopted it would probably narrow the circumstances in which torture is currently lawful.

The common law defense of necessity (which has at its base the same utilitarian foundation as self-defense) has three requirements: (1) the act (the infliction of physical pain) is needed to avoid inevita-

109. Desmond Manderson, *Another Modest Proposal*, 10 DEAKIN L. REV. 640, 651–52 (2005) (footnotes omitted).

110. *See* Bagaric & Clarke, *supra* note 1.

ble and irreparable evil (the death of innocent people); (2) no more should be done than is reasonably necessary for the purpose to be achieved; and (3) the evil inflicted must not be disproportionate to the evil avoided.

In the United States the defense is typically articulated in simpler terms but has the same key features. Necessity applies where an accused reasonably believed his or her harmful actions "were necessary to avert a greater, imminent harm."[111]

Now juxtapose this with the circumstances in which we suggest that torture is permissible. Torture should be permissible where the following conditions are satisfied: (1) when *innocent lives* (not other lesser interests) are at risk; (2) there is a *near certainty* that the suspect has the relevant information; and (3) the pain inflicted is the minimum necessary to elicit the information and aims to have no lasting effects.

Our proposal has the additional safeguard that torture must be approved by a judicial officer before it occurs, rather than leaving it to law enforcement officers to make the judgment and then testing after the event whether they complied with the law.

Our standard is narrower because the only threats that justify torture are to life (not lesser interests), and we require a higher level of confidence that the suspect has the information.[112]

It is also noteworthy that while the law previously held that necessity could not justify killing another person to ward off a greater threat, this no longer seems to be the case, at least in the United Kingdom, following the decision in *In re A (Children).* In our home state of Victoria, legislation was recently passed removing any doubt that, in fact, necessity is a defense to killing. The *Crimes (Homicide) Act* introduces a defense of "sudden or extraordinary emergency," which exculpates killing where it is reasonable in the circumstances.[113] This

111. *See* Parry & White, *supra* note 28, at 764.

112. For an argument that necessity does not permit torture, see Paola Gaeta, *May Necessity Be Available as a Defence for Torture in the Interrogation of Suspected Terrorists?*, 2 J. INT'L CRIM. JUST. 785 (2004). *But see* Parry & White, *supra* note 28; O'Rourke, Chaudhri & Nyland, *supra* note 18, at 96 (citing a memo by Jay S. Bybee, Office of Legal Counsel for the Bush Administration).

113. Crimes Act 1958, § 9AI (Vict.) The new provisions state:

(1) A person is not guilty of a relevant offence in respect of conduct carried out by him or her in response to circumstances of sudden or extraordinary emergency.

(2) This section applies if and only if the person carrying out the conduct reasonably believes that—

(a) circumstances of sudden or extraordinary emergency exist; and

could extend to torture. If the victim/suspect does not die, the common law of necessity will continue to apply.

It is astounding that these points were missed in the context of an informed debate, especially by lawyers and legal academics. The explanation for this is that the debate has not been informed at all. It is a classic example of emotion trumping clear thinking. The fact that our contemporary moral thinking is so blurred that such arguments still have a veneer of plausibility provides a strong reason for moving to a new moral framework.

V. Clarification of Incidental Matters

There are two points of clarification that are in order from our first paper. First, the point about torturing innocent people has been grossly distorted. These people have information that can save many lives. If questioned they are morally required to provide the information. As noted above, it would be morally wrong for them to decline to do so, for the same reasons that it is wrong for a person to refuse to save a baby drowning in a puddle. Also, the point about torturing to death is exaggerated. No information can be gathered after a suspect is dead. This point is merely a concession to the fact that, unfortunately, we cannot always predict with certainty the consequence of harming a person—the "thin skull" conundrum. Again, torture techniques should aim to inflict high levels of pain that cause the minimum level of long-term discomfort.

Conclusion

The torture debate highlights the failings of contemporary moral discourse. The circumstances in which torture is morally permissible will hopefully be rare, but they are foreseeable. If they do arise it is important that we adopt the life-affirming approach. It is obviously bad to inflict physical pain on suspects, but it is much worse to allow innocent people to be murdered. This conclusion is evident from the fact that there is no underlying theory that even purports to justify the view that the right to life is less important than the right to physical integrity.

(b) committing the offence is the only reasonable way to deal with the emergency; and

(c) the conduct is a reasonable response to the emergency.

(3) This section only applies in the case of murder if the emergency involves a risk of death or really serious injury.

Critics reject the proposal that lifesaving torture is morally permissible principally because they do not extend their moral horizons far enough to consider the interests of the innocent people whose lives are at stake. This, however, is largely not their fault. Non-willful blindness is a byproduct of the warped and largely formless moral code that transcends much of contemporary Western thinking.

The most important lesson from the torture debate is that the only absolute principle is that there is no absolute principle. The closest we get to an ultimate moral standard is that we must act to maximize human flourishing, where each individual's interest counts equally—even those who are not immediately before us.

While the critics have been confused, one hopes that they are not incorrigible and that they finally take a few steps up the moral mountain beyond the rights fog in which they are currently enveloped. It would make the world a far better place.