

"A Case for Torture" is the summary of an article written for the *University of San Francisco Law Review* by MIRKO BAGARIC, professor and coordinator of the Graduate Law Program at the Deakin Law School in Melbourne, Australia, and JULIE CLARKE, lecturer in the same program. Bagaric's recent books include *How to Live: Being Happy and Living with Moral Dilemmas* (2006) and *Criminal Laws of Australia*, with Ken Arenson (2004). Clarke's most recent publications include *Contract Law: Commentaries, Cases and Perspectives* (2008), with Philip Clarke and Ming Zhou. Together, Bagaric and Clarke also wrote *Torture: When the Unthinkable Is Morally Permissible* (2006). "A Case for Torture" was published in 2005 in the *Age*, a Melbourne, Australia, newspaper.

A Case for Torture

MIRKO BAGARIC AND JULIE CLARKE

Recent events stemming from the "war on terrorism" have highlighted the prevalence of torture. This is despite the fact that torture is almost universally deplored. The formal prohibition against torture is absolute — there are no exceptions to it.

The belief that torture is always wrong is, however, misguided and symptomatic of the alarmist and reflexive responses typically emanating from social commentators. It is this type of absolutist and short-sighted rhetoric that lies at the core of many distorted moral judgements that we as a community continue to make, resulting in an enormous amount of injustice and suffering in our society and far beyond our borders.

Torture is permissible where the evidence suggests that this is the only means, due to the immediacy of the situation, to save the life of an innocent person. The reason that torture in such a case is defensible and necessary is because the justification manifests from the closest thing we have to an inviolable right: the right to self-defence, which of course extends to the defence of another. Given the choice between inflicting a relatively small level of harm on a wrongdoer and saving an innocent person, it is verging on moral indecency to prefer the interests of the wrongdoer.

The analogy with self-defence is sharpened by considering the hostage-taking scenario, where a wrongdoer takes a hostage and points a gun to the hostage's head, threatening to kill the hostage unless a certain (unreasonable) demand is met. In such a case it is not only permissible, but desirable for police to shoot (and kill) the wrongdoer if they get a "clear shot." This is especially true if it's known that the wrongdoer has a history of serious violence, and hence is more likely to carry out the threat.

There is no logical or moral difference between this scenario and one where there is overwhelming evidence that a wrongdoer has kidnapped an innocent person and informs police that the victim will be killed by a co-offender if certain demands are not met.

In the hostage scenario, it is universally accepted that it is permissible to violate the right to life of the aggressor to save an innocent person. How can it be wrong to

violate an even less important right (the right to physical integrity) by torturing the aggressor in order to save a life in the second scenario?

There are three main [objections] to even the above limited approval of torture. The first is the slippery slope argument; if you start allowing torture in a limited context, the situations in which it will be used will increase.

This argument is not sound in the context of torture. First, the floodgates are already open — torture is used widely, despite the absolute legal prohibition against it. Amnesty International has recently reported that it had received, during 2003, reports of torture and ill-treatment from 132 countries, including the United States, Japan and France. It is, in fact, arguable that it is the existence of an unrealistic absolute ban that has driven torture beneath the radar of accountability, and that legalisation in very rare circumstances would in fact reduce instances of it.

The second main argument is that torture will dehumanise society. This is no more true in relation to torture than it is with self-defence, and in fact the contrary is true. A society that elects to favour the interests of wrongdoers over those of the innocent, when a choice must be made between the two, is in need of serious ethical rewiring.

A third [objection] is that we can never be totally sure that torturing a person will in fact result in us saving an innocent life. This, however, is the same situation as in all cases of self-defence. To revisit the hostage example, the hostage-taker's gun might in fact be empty, yet it is still permissible to shoot. As with any decision, we must decide on the best evidence at the time.

Torture in order to save an innocent person is the only situation where it is clearly justifiable. This means that the recent high-profile incidents of torture, apparently undertaken as punitive measures or in a bid to acquire information where there was no evidence of an immediate risk to the life of an innocent person, were reprehensible.

Will a real-life situation actually occur where the only option is between torturing a wrongdoer or saving an innocent person? Perhaps not. However, a minor alteration to the Douglas Wood situation illustrates that the issue is far from moot. If Western forces in Iraq arrested one of Mr. Wood's captors, it would be a perverse ethic that required us to respect the physical integrity of the captor, and not torture him to ascertain Mr. Wood's whereabouts, in preference to taking all possible steps to save Mr. Wood.

Even if a real-life situation where torture is justifiable does not eventuate, the above argument in favour of torture in limited circumstances needs to be made because it will encourage the community to think more carefully about moral judgements we collectively hold that are the cause of an enormous amount of suffering in the world.

First, no right or interest is absolute. Secondly, rights must always yield to consequences, which are the ultimate criteria upon which the soundness of a decision is gauged. Lost lives hurt a lot more than bent principles.

Thirdly, we must take responsibility not only for the things that we do, but also for the things that we can — but fail to — prevent. The retort that we are not responsible for the lives lost through a decision not to torture a wrongdoer because we did not create the situation is code for moral indifference.

Equally vacuous is the claim that we in the affluent West have no responsibility for more than 13,000 people dying daily due to starvation. Hopefully, the debate on torture will prompt us to correct some of these fundamental failings.

"Inhuman Behavior" was written by Major General KERMIT D. JOHNSON, a retired chaplain in the U.S. Army. Johnson is a graduate of the U.S. Military Academy, the Princeton Theological Seminary, the U.S. Command and General Staff College, and the U.S. Army War College. As an infantry officer, he commanded a heavy mortar company in the Korean War. As a chaplain, he served in the United States, Germany, and Vietnam, completing his service as Chief of Chaplains from 1979 to 1982.

"Inhuman Behavior" was published in 2006 in *the Christian Century*, a national magazine concerned with "faithful living, critical thinking."

Inhuman Behavior: A Chaplain's View of Torture

Kermit D. Johnson

The historian Arnold Toynbee called war "an act of religious worship." Appropriately, when most people enter the cathedral of violence, their voices become hushed. This silence, this reluctance to speak, is based in part on not wishing to trivialize or jeopardize the lives of those who have been put in harm's way. We want to support the men and women in our armed forces, whether we are crusaders, just warriors or pacifists.

Furthermore, those who interrupt this service of worship become a source of public embarrassment, if not shame. The undercurrent seems to be that dissent or critique in the midst of war is inherently unpatriotic because it violates a sacred wartime precept: support our troops.

If war causes us to suppress our deepest religious, ethical and moral convictions, then we have indeed caved in to a "higher religion" called war.

From the standpoint of Christian faith, how do we respond? I would say that if war causes us to suppress our deepest religious, ethical and moral convictions, then we have indeed caved in to a "higher religion" called war.

Since this obeisance to war is packaged in the guise of patriotism, it is well to admit to the beauty of patriotism, the beauty of unselfishness and love of country, land, community, family, friends and,

yes, our system of government. But this fabulous beauty makes us appreciate all the more what Reinhold Niebuhr called the "ethical paradox in patriotism." The paradox is that patriotism can transmute individual unselfishness into national egoism. When this happens, when the critical attitude of the individual is

squelched, this permits the nation, as Niebuhr observed, to use "power without moral constraint."

I believe this has been the case, particularly since 9/11, in the treatment of prisoners under U.S. custody.

We must react when our nation breaks the moral constraints and historic values contained in treaties, laws and our Constitution, as well as violating the consciences of individuals who engage in so-called "authorized" inhuman treatment. Out of an unsentimental patriotism we must say no to torture and all inhuman forms of interrogation and incarceration. It is precisely by speaking out that we can support our troops and at the same time affirm the universal values which emanate from religious faith.

A clear-cut repudiation of torture or abuse is also essential to the safety of the troops. If the life and rule of Jesus and his incarnation is to be normative in the church, then we must stand for real people, not abstractions: for soldiers, their families, congregations to which they belong, and the chaplains and pastors who minister to their needs from near and far. By "real people" we also mean that tiny percentage of the armed forces who are guards and interrogators and the commanders responsible for what individuals and units do or fail to do in treating prisoners.

Too often the topic of torture is reduced to a Hollywood drama, a theoretical scenario about a ticking time bomb and the supposed need to torture someone so the bomb can be discovered and defused in the nick of time. Real torture is what takes place in the daily interchange between guards, interrogators and prisoners, and in the everyday, unglamorous, intricate job of collecting intelligence.

U.S. troops in Iraq are fighting an insurgency. It is a battle for the "hearts and minds" of the people. Mao Zedong referred to guerrillas or insurgents as the fish and the supporting population as the water. This is an asymmetrical battle. As a weaker force, the insurgents cannot operate without the support of the people. So the classic formula for combating an insurgency is to drain the swamp — cut the insurgents off from their life support. Both sides are trying to win the "hearts and minds" of the people.

Imagine, then, the consequences when people learn that U.S. forces have tortured and abused captives. A strengthened and sustained insurgency means danger and death for U.S. forces. Never mind that the other side routinely tortures. It is we who lay claim to a higher morality.

Nor should we take comfort that we do not chop off heads or field suicide bombers. What we must face squarely is this: whenever we torture or mistreat prisoners, we are capitulating morally to the enemy — in fact, adopting the terrorist ethic that the end justifies the means. And let us not deceive ourselves: torture is a form of terrorism. Never mind the never-ending debate about the distinctions between "cruel, inhuman and degrading treatment" and "torture." The object of all such physical and mental torment is singularly clear: to terrify prisoners so they will yield information. Whenever this happens to prisoners in U.S. control, we are handing terrorists and insurgents a priceless ideological gift, known in wartime as aid and comfort to the enemy.

As for individual guards or interrogators, whenever they are encouraged or ordered to use torture, two war crimes are committed: one against the torturer and the other against the prisoner. The torturer and the tortured are both victims, unless the torturer is a sadist or a loose cannon who needs to be court-martialed. This violation of conscience is sure to breed self-hatred, shame and mental torment for a lifetime to come.

Finally, the most obvious reason for repudiating torture and inhuman treatment is that our nation needs to claim the full protection of the Geneva Conventions on behalf of our troops when they are captured, in this or any war.

The congressional votes for and the presidential capitulation to the amendment offered by Senator John McCain prohibiting torture and inhuman treatment have to be seen as positive (despite the president's statement in signing it, in which he claimed an exception to the rule when acting as commander in chief). But reasons for concern remain.

- The most passionate defenders of the Geneva Conventions, the judge advocate generals, the military lawyers, were completely cut off from providing input on the torture issue.
- The government has denigrated international treaties that the U.S. has signed and that constitute U.S. law regarding torture and inhuman treatment.
- The definition of torture has been reinterpreted by the Justice Department as follows: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."
- There is no indication that the outsourcing or "rendition" of brutal treatment will cease. Is it not odd that some of the countries the U.S. State Department faults for torture are the very countries we utilize in outsourcing interrogations? What credence can we put in their assurances that they will not torture?
- In Senate testimony, Senator Jack Reed (D., R.I.) asked the military this question: "If you were shown a video of a United States Marine or an American citizen [under the] control of a foreign power, in a cell block, naked with a bag over their head, squatting with their arms uplifted for 45 minutes, would you describe that as a good interrogation technique or a violation of the Geneva Convention?" The chairman of the Joint Chiefs of Staff, Marine General Peter Pace, answered: "I would describe it as a violation." The next question might be: Why have these and other violations of the Geneva Conventions been certified as legal when employed by the U.S.?
- The public has been dragged through a labyrinth of denials, retractions, redefinitions and tortured arguments, all designed to justify and rationalize lowered moral standards in the treatment of prisoners, not to strengthen and defend high ethical standards.

In a letter to Senator McCain, Captain Ian Fishback, a West Point graduate in the 82nd Airborne Division, said, "Some argue that since our actions are not as horrifying as al-Qaeda's we should not be concerned. When did al-Qaeda become any type of standard by which we measure the morality of the United States? I strongly urge you to do justice to your men and women in uniform. Give them clear standards of conduct that reflect the ideals they risk their lives for." Torture is not one of those ideals.

How Mae Analyzed the Debate between Bagaric/Clarke and Johnson

As Mae reread each essay, she highlighted the text and made notes in the margin where she found the key features of the argument and several motivating factors. At the same time, she entered the paragraph numbers and brief summaries of what she found into her Annotations Chart (see pp. 239–40).

Analyzing both essays took a few hours of intense close reading, but when she was done, Mae felt she understood both essays very well and had many ideas about which points of disagreement and agreement she could discuss in her essay. In fact, Mae felt confident that she had found more material than she could use in an essay her instructor limited to one thousand words.

Mae found it easy to identify the issue and position in each essay. After some careful analysis, she also located the main reasons and supporting evidence for each argument, as well as all counterarguments and possible objections the authors acknowledged, along with how they responded to them (either by conceding or refuting them).

The trickiest part for Mae was identifying the authors' motivating factors. Her instructor had forewarned the class that this would likely be the case, because the motivating factors were likely not to be explicitly stated. After rereading key passages a few times, Mae felt satisfied that she had found the major motivating factors for both essays in paragraphs she had already annotated.

An example of Mae's annotations of one portion of the Bagaric and Clarke essay and her completed Annotations Chart are shown in this section.

Position (thesis)

Ideology: self-defense is inviolable right

Hostage-taking scenario (pars. 4–6)

Torture is permissible where the evidence suggests that this is the only means, due to the immediacy of the situation, to save the life of an innocent person. The reason that torture in such a case is defensible and necessary is because the justification manifests from the closest thing we have to an inviolable right: the right to self-defence, which of course extends to the defence of another. Given the choice between inflicting a relatively small level of harm on a wrongdoer and saving an innocent person, it is verging on moral indecency to prefer the interests of the wrongdoer.

The analogy with self-defence is sharpened by considering the hostage-taking scenario, where a wrongdoer takes a hostage and

3 Torture sometimes OK — analogy to self-defence (par. 3)

Moral value: human life

4 Priority: saving innocent life outweighs harming wrongdoer

points a gun to the hostage's head, threatening to kill the hostage unless a certain (unreasonable) demand is met. In such a case it is not only permissible, but desirable for police to shoot (and kill) the wrongdoer if they get a "clear shot." This is especially true if it's known that the wrongdoer has a history of serious violence, and hence is more likely to carry out the threat.

"Logically" and "morally," terrorist like wrongdoer

5 There is no logical or moral difference between this scenario and one where there is overwhelming evidence that a wrongdoer has kidnapped an innocent person and informs police that the victim will be killed by a co-offender if certain demands are not met.

Logic: If right to kill to save life, then right to torture

6 In the hostage scenario, it is universally accepted that it is permissible to violate the right to life of the aggressor to save an innocent person. How can it be wrong to violate an even less important right (the right to physical integrity) by torturing the aggressor in order to save a life in the second scenario?

Ideology: right to life more imp. than right to physical integrity

Melissa Mae's Annotations Chart

		Essay 1: Bagaric/Clarke	Essay 2: Johnson
Features of the Argument	ISSUE	1 (war on terrorism)	1-5 (post 9/11 wartime ethics/ politics)
	POSITION (THESIS)	3 ("Torture permissible . . . only means . . . to save the life of an innocent person.")	6 ("We must react when our nation breaks the moral constraints and historic values . . . say no to torture . . .")
	ARGUMENT (Main supporting reasons and evidence)	Torture sometimes OK 3 (analogy: self-defense) 4-6 (analogy: hostage-taking scenario → b/c If it's right to kill to save innocent life, then it's right to torture) 13 (b/c it's necessary in real life — Wood example) 14 (b/c "no right or interest is absolute")	Torture never OK 6-7 (b/c it endangers our troops & against "universal values" & "religious faith") 9-10 (b/c it's counterproductive, loses "hearts & minds") 11 (b/c we become terrorists) 12 (b/c torturers also "victims") 13 (b/c our troops need Geneva Conventions protection) 14 (b/c it's against the law)

(continued)

(continued)

		Essay 1: Bagaric/Clarke	Essay 2: Johnson
Motivating Factors	COUNTERARGUMENT (Refutation or concession?)	1-2 (Refutes "absolute" prohibition against torture argument) 7-10 (Refutes slippery slope, dehumanizes society, & info untrustworthy arguments.) 11 (Concedes cases torture is wrong → therefore qualifies thesis: not when punitive, only in immediate risk.)	1-6 (Refutes dissent is "unpatriotic" argument b/c it's morally necessary & saves troops) 8 (Refutes ticking time bomb scenario b/c it's "Hollywood drama," not realistic) 15 (Refutes U.S. behavior "not as horrifying as al-Qaeda's" b/c we have our own moral standards)
	VALUES (Moral, ethical, religious)	2-3 (save innocent life) 13-16 (need "to think more carefully about moral judgments")	1-4 (Niebuhr's "ethical paradox in patriotism" → "power w/o moral constraint") 6 ("affirm universal values which emanate from religious faith") 11 ("terrorist ethic that the end justifies the means")
	IDEOLOGY AND IDEALS (Cultural, legal, political)	3 (right to self defense) 6 ("universally accepted . . . to violate the right to life of the aggressor to save an innocent person") 14 ("Lost lives hurt a lot more than bent principles.")	11 (U.S. torturing — "ideological gift" to terrorists) 1-6 (morality absolute: end doesn't justify the means?) 15 ("Torture is not one of those ideals.")
	FEARS AND CONCERNS	1 (post 9/11 fear of terrorism)	14 ("reasons for concern")
	PRIORITIES AND AGENDAS	3 (save innocent life)	6-7 (save troops lives) 10-11 (preserve U.S. ideals & morals)
	BINARY THINKING	12 ("only option [is] between torturing a wrongdoer or saving an innocent person? Perhaps not. However . . .")	1-6 (morality, Religious principles, Law v. Pragmatism; Ends v. Means)

How Mae Used the Annotations Chart to Plan and Draft Her Essay

Mae relied on the Annotations Chart as a guide to planning her essay (see pp. 195–97). It seemed logical to her to start her essay where she started the chart: by identifying the *issue* and the *positions* on the issue presented by each essay.

In her first paragraph, she provides some context for the issue, noting that the disclosure in 2004 of detainee abuse at Abu Ghraib first led many Americans

to become concerned about torture and that the debate over “enhanced interrogation techniques” such as waterboarding and sleep deprivation continues today. Like Mae, you may turn up relevant details in your background research about the issue — facts, history, current news — that you can use to present it to readers.

In her second paragraph, Mae introduces the two opposing position essays by title and date of publication, gives some background on the writers, and briefly states the positions they take in their essays. She concludes the paragraph by suggesting that common ground exists between what seem at first glance to be starkly opposing perspectives.

In her third and fourth paragraphs, Mae continues to make good use of her chart in presenting key aspects of the authors' main arguments. To represent their arguments fairly and accurately and to identify the language she would paraphrase, she first consulted her chart and then looked again at her highlighted and annotated essays. You can see from the chart that she made use of information from several paragraphs in both readings. Her patience in charting the topics ensured that she would not overlook any important material that would help her compare and contrast these writers' essays.

As you read the rest of Mae's essay, note that she does not cover every element in her chart but selected those that enable her to represent fairly what she considers to be the most interesting and important points of agreement and disagreement between the two writers.

Thinking Critically About What You Have Learned

Now that you have read and discussed several common ground essays and written one of your own, take some time to think critically and write about what you have learned. To think critically means to use all of your new genre knowledge — acquired from the information in this chapter, your own writing, the writing of other students, and class discussions — to reflect deeply on your work for this assignment. It also requires that you consider the social implications of your new knowledge.

Critical thinking is sustained by analysis — a thoughtful, patient survey of all of the materials you have read and produced during your work in this chapter. The benefit is proven and important: You will remember longer what you have learned, ensuring that you will be able to put it to good use well beyond this writing course.

Reflecting on Your Writing

Your instructor may ask you to turn in with your essay and process materials a brief metacognitive essay or letter reflecting on what you have learned in writing your essay finding common ground. Choose among the following invention activities those that seem most productive for you.

- Explain how your purpose and audience — what you wanted your readers to understand about why people disagree and where they might find common ground — influenced *one* of your decisions as a writer, such as how you framed the issue, how you introduced the authors, which points of disagreement and agreement you chose to discuss, or the motivating factors you emphasized.
- Discuss what you learned about yourself as a writer in the process of writing this particular essay. For example, what part of the process did you find most challenging. Did you try something new, like annotating the essays and making a chart of your annotations or listing the points of disagreement and agreement?
- If you were to give advice to a friend who was about to write an essay finding common ground, what would you say?
- Which of the readings in this chapter influenced your essay? Explain the influence, citing specific examples from your essay and the reading.
- If you got good advice from a critical reader, explain exactly how the person helped you — perhaps by suggesting a motivating factor, a shared concern or value that your analysis was hinting at but not addressing directly or by noting passages where comparative transitions or clearer labeling was needed to help readers keep track of the similarities or differences between the arguments.

Considering the Social Dimensions: Being Fair and Impartial

Essays that attempt to understand the basis for disagreement and find common ground on controversial topics are unquestionably helpful for writers and readers alike. They help us to understand complicated arguments and discover ways to move forward amicably and constructively. They are especially important in a democracy because they enable us to perform our role as citizens conscientiously, informing ourselves about important issues.

Traditionally, journalists and academics have served as authors of analytical essays that seek to help us understand differences and find common ground on controversial social, cultural, and political issues. For example, the Committee of Concerned Journalists identifies the news media as “the common carriers of public discussion” and asserts that it bears a responsibility “to fairly represent the varied viewpoints and interests in society, and to place them in context rather than highlight only the

conflicting fringes of debate.” Most importantly, they make clear that “[a]ccuracy and truthfulness require that as framers of the public discussion we not neglect the points of common ground where problem solving occurs” (“A Statement of Shared Purpose,” www.concernedjournalists.org/node/380).

Journalists and academic analysts, however, recognize that maintaining accuracy and trustworthiness can be quite challenging on highly contentious issues. They wrestle with the requirement that analysis be impartial. They often make a distinction between impartiality — which can be defined as not partial or biased, but fair and just — and objectivity — which assumes that it is possible to examine a controversy scientifically, without being influenced by personal feelings, experiences, values, or prior knowledge. Most analysts, however, acknowledge that while objectivity may not be possible, writers can strive to be fair in the way they represent different viewpoints, even-handed and balanced in giving each side its voice, and unbiased in avoiding judgmental language.

1. **Consider how challenging it was to make your analysis fair and impartial.** As you were analyzing the argument essays and writing your finding common ground essay, in what ways, if any, did you have difficulty maintaining your impartiality? How did you try to make sure you were being fair? What strategies did you use in your writing to come across to readers as a trustworthy analyst?
2. **Write a page or so about the goal of trying to be fair and impartial as an analyst.** Based on your own experience as a writer of a finding common ground essay (as well as other writing you may have done in the past), what have you learned about the goal of trying to be fair and impartial? Is it an achievable goal? Is it a worthwhile goal? Why or why not?

Add to your discussion any ideas you have from your experience as a consumer of analytical writing and talk. How critical are you as a reader or listener? How important do you think it is for you as a citizen and student to feel confident that the analysis you are consuming comes across as fair, unbiased, impartial, even objective? Be sure to distinguish between op-ed style commentary intended to express opinions and judgments and journalism or academic style analysis intended to be fair and impartial.

Appendix: Two Debates

Following are two clusters of essays taking positions on two different issues: torture and same-sex marriage. These essays are also available electronically on the companion Web site for this book, bedfordstmartins.com/theguide, which also includes several other debates for you or your instructor to choose from.

Debate 1: Torture

“Thinking about Torture” by Ross Douthat (pp. 245–48)

**“Committing War Crimes for the ‘Right Reasons’”
by Glenn Greenwald (pp. 248–51)**

“An End to Torture” by Maryann Cusimano Love (pp. 251–55)

See also:

“A Case for Torture” by Mirko Bagaric and Julie Clarke (pp. 233–34)

“Inhuman Behavior” by Kermit D. Johnson (pp. 235–38)

Understanding the Torture Debate

The United States ratified the United Nations Convention against Torture (1987), which asserts that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency may be invoked as a justification for torture.” People differ on what constitutes torture, but the U.N. defined torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Since the terrorist attacks of September 11, 2001, and the subsequent revelations of abuse of prisoners by the U.S. military and others at the Abu Ghraib and Guantanamo Bay prisons and elsewhere, however, torture has again become a subject of intense debate in the United States. For example, writers have debated whether torture is effective in obtaining the truth, affects the torturers, threatens the international standing of the United States, or undermines justice. Other contested issues include what qualifies as torture, whether the United States must observe international laws forbidding torture, or whether the United States should set an example by not torturing. The five essays in this chapter take different approaches to the issue, but they all make arguments that are worth examining.



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Thinking about Torture

ROSS DOUTHAT

1 I haven't written anything substantial, ever, about America's treatment of detainees in the War on Terror. There are good reasons for this, and bad ones. Or maybe there's only one reason, and it's probably a bad one — a desire to avoid taking on a fraught and desperately important subject without feeling extremely confident about my own views on the subject.

2 I keep waiting, I think, for somebody else to write a piece about the subject that eloquently captures my own inarticulate mix of anger, uncertainty and guilt about the Bush Administration's interrogation policy, so that I can just point to their argument and say go read *that*. But so far as I know, nobody has. There's been straightforward outrage, obviously, from many quarters, and then there's been a lot of evasion — especially on the Right, where occasional defenses of torture in extreme scenarios have coexisted with a remarkable silence about the broad writ the Bush Administration seems to have extended to physically-abusive interrogation, and the human costs thereof. But to my knowledge, nobody's written something that captures the sheer *muddiness* that surrounds my own thinking (such as it is) on the issue.

3 That muddiness may reflect moral and/or intellectual confusion on my part, since the grounds for straightforward outrage are pretty obvious. There's a great deal of political tendentiousness woven into Jane Mayer's *The Dark Side*, for instance, but it's very difficult to come away from her reportage unpersuaded that this Administration's counterterrorism policies exposed significant numbers of people — many guilty, but some innocent — to forms of detention and interrogation that we would almost certainly describe as torture if they were carried out by a lawless or dictatorial regime. For a less vivid but also somewhat less partisan analysis that reaches the same conclusion, you can read the executive summary of the just-released Levin-McCain report. (And of course both Mayer's book and the Arms

Services Committee report are just the latest in a line of similar findings, by reporters and government investigations alike.)

Now it's true that a great deal of what seems to have been done to detainees arguably falls into the category of what Mark Bowden, in his post-9/11 *Atlantic* essay on "The Dark Art of Interrogation," called "torture lite": It's been mostly "stress positions," extreme temperatures, and "smacky-face," not thumbscrews and branding irons. But it's also clear now, in a way that it wasn't when these things were still theoretical to most Americans, that the torture/torture lite distinction gets pretty blurry pretty quickly in practice. It's clear from the deaths suffered in American custody. It's clear from the testimony that Mayer puts together in her book. And it's clear from the outraged response, among conservatives and liberals alike, to the photographs from Abu Ghraib, which were almost all of practices closer to "torture-lite" than outright torture but which met, justly I think, with near-universal condemnation nonetheless. (And while it still may be true that in some sense, the horrors of Abu Ghraib involved individual bad apples running amok, they clearly weren't running all that *far* amok, since an awful lot of the things they photographed themselves doing — maybe not the human pyramids, but the dogs, the hoods, the nudity and so forth — showed up on lists of interrogation techniques approved by the Secretary of Defense himself.)

So as far as the bigger picture goes, then, it seems indisputable that in the name of national security, and with the backing of seemingly dubious interpretations of the laws, this Administration pursued policies that delivered many detainees to physical and mental abuse, and not a few to death. These were wartime measures, yes, but war is not a moral blank check: If you believe that Abu Ghraib constituted a failure of *jus in bello*, then you have to condemn the decisions that led to Abu Ghraib, which means that you have to condemn the President and his Cabinet. . . .

Given this reality, whence my uncertainty about how to think about the issue? Basically, it stems from the following thought: That while the Bush Administration's policies clearly failed a just-war test, they didn't fail it in quite so *new* a way as some of their critics suppose . . . and moreover, had I been in their shoes I might have failed the test as well. . . .

For instance: The use of the atomic bomb. I think it's very, very difficult to justify Harry Truman's decision to bomb Hiroshima and Nagasaki in any kind of plausible just-war framework, and if that's the case then the nuclear destruction of two Japanese cities — and indeed, the tactics employed in our bombing campaigns against Germany and Japan more broadly — represents a "war crime" that makes Abu Ghraib look like a trip to Pleasure Island. (And this obviously has implications for the justice of our entire Cold War nuclear posture as well.) But in so thinking, I also have to agree with Richard Frank's argument that "it is hard to imagine anyone who could have been president at the time (a spectrum that includes FDR, Henry Wallace, William O. Douglas, Harry Truman, and Thomas Dewey) failing to authorize use of the atomic bombs" — in so small part because I find it hard to imagine *myself* being in Truman's shoes and deciding the matter differently, my beliefs about just-war principle notwithstanding.

8 The same difficulty obtains where certain forms of torture are concerned. If I find it hard to condemn Harry Truman for incinerating tens of thousands of Japanese civilians, even though I think his decision probably violated the moral framework that should govern the conduct of war, I *certainly* find it hard to condemn the waterboarding of, say, a Khalid Sheikh Muhammed in the aftermath of an event like 9/11, and with more such attacks presumably in the planning stages. I disagree with Charles Krauthammer, who has called torture in such extreme circumstances a "moral duty"; rather, I would describe it as a kind of immorality that we cannot expect those charged with the public's safety to always and everywhere refrain from. (Perhaps this means, as some have suggested, that we should ban torture, but issue retroactive pardons to an interrogator who crosses the line when confronted with extreme circumstances and high-value targets. But I suspect that this "maybe you'll get retroactive immunity, wink wink" approach probably places too great a burden on the individual interrogator, and that ultimately some kind of mechanism is required whereby the use of extreme measures in extreme circumstances is brought within the law.)

9 Yet of course the waterboarding of al Qaeda's high command, despite the controversy it's generated, is not in fact the biggest moral problem posed by the Bush Administration's approach to torture and interrogation. The biggest problem is the sheer scope of the physical abuse that was endorsed from on high — the way it was routinized, extended to an ever-larger pool of detainees, and delegated ever-further down the chain of command. Here I'm more comfortable saying straightforwardly that *this should never have been allowed* — that it should be considered impermissible as well as immoral, and that it should involve disgrace for those responsible, the Cheneys and Rumsfelds as well as the people who actually implemented the techniques that the Vice President's office promoted and the Secretary of Defense signed off on.

10 But here, too, I have uncertainty, mixed together with guilt, about how strongly to condemn those involved — because in a sense I know that what they were doing was what I wanted to them to do. . . .

11 Some of the most passionate torture opponents have stated that they never, ever imagined that the Bush Administration would even consider authorizing the sort of interrogation techniques described above, to say nothing of more extreme measures like waterboarding. I was not so innocent, or perhaps I should I say I was more so: If you had listed, in the aftermath of 9/11, most of the things that have been done to prisoners by representatives of the U.S. government, I would have said that *of course* I expected the Bush Administration to authorize "stress positions," or "slapping, shoving and shaking," or the use of heat and cold to elicit information. After all, there was a war on! I just had no idea — until the pictures came out of Abu Ghraib, and really until I started reading detailed accounts of how detainees were being treated — what these methods could mean in practice, and especially as practiced on a global scale. A term like "stress positions" sounds like one thing when it's sitting, bloodless, on a page; it sounds like something else when somebody dies from it.

Now obviously what I've said with regard to the financial crisis is also true in this arena: With great power comes the responsibility to exercise better judgment than, say, my twenty-three year old, pro-torture-lite self. But with great power comes a lot of pressures as well, starting with great fear: The fear that through *inaction* you'll be responsible for the deaths of thousands or even millions of the Americans whose lives you were personally charged to protect. This fear ran wild the post-9/11 Bush Administration, with often-appalling consequences, but it wasn't an irrational fear — not then, and now. It doesn't excuse what was done by our government, and in our name, in prisons and detention cells around the world. But anyone who felt the way I felt after 9/11 has to reckon with the fact that what was done in our name was, in some sense, done for us — not with our knowledge, exactly, but arguably with our blessing. I didn't get what I wanted from this administration, but I think you could say with some justification that I got what I asked for. And that awareness undergirds — to return to where I began this rambling post — the mix of anger, uncertainty and guilt that I bring to the current debate over what the Bush Administration has done and failed to do, and how its members should be judged.

12



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Committing War Crimes for the "Right Reasons"

GLENN GREENWALD



The Atlantic's Ross Douthat has a post today — "Thinking about Torture" — which, he acknowledges quite remarkably, is the first time he has "written anything substantial, ever, about America's treatment of detainees in the War on Terror." He's abstained until today due to what he calls "a desire to avoid taking on a fraught and desperately important (sic) subject without feeling extremely confident about my own views on the subject."

1

2 I don't want to purport to summarize what he's written. It's a somewhat meandering and at times even internally inconsistent statement. Douthat himself characterizes it as "rambling" — befitting someone who appears to think that his own lack of moral certainty and borderline-disorientation on this subject may somehow be a more intellectually respectable posture than those who simplistically express "straightforward outrage." In the midst of what is largely an intellectually honest attempt to describe the causes for his ambiguity, he actually does express some "straightforward outrage" of his own. About the widespread abuse, he writes: "it should be considered impermissible as well as immoral" and "should involve disgrace for those responsible, the Cheneys and Rumsfelds as well as the people who actually implemented the techniques that the Vice President's office promoted and the Secretary of Defense signed off on."

3 Nonetheless, Douthat repeatedly explains that he is burdened by "uncertainty, mixed together with guilt, about how strongly to condemn those involved," and one of the central reasons for that uncertainty — one that is commonly expressed — is contained in this passage:

But with great power comes a lot of pressures as well, starting with great fear: The fear that through inaction you'll be responsible for the deaths of thousands or even millions of the Americans whose lives you were personally charged to protect. This fear ran wild the post-9/11 Bush Administration, with often-appalling consequences, but it wasn't an irrational fear — not then, and now. It doesn't excuse what was done by our government, and in our name, in prisons and detention cells around the world. But anyone who felt the way I felt after 9/11 has to reckon with the fact that what was done in our name was, in some sense, done for us — not with our knowledge, exactly, but arguably with our blessing. I didn't get what I wanted from this administration, but I think you could say with some justification that I got what I asked for. And that awareness undergirds — to return to where I began this rambling post — the mix of anger, uncertainty and guilt that I bring to the current debate over what the Bush Administration has done and failed to do, and how its members should be judged.

4 This is the Jack Goldsmith argument: while what Bush officials did may have been misguided and wrong, they did it out of a true fear of Islamic enemies, with the intent to protect us, perhaps even consistent with the citizenry's wishes. And while Douthat presents this view as some sort of candid and conflicted complexity, it isn't really anything more than standard American exceptionalism — more accurately: blinding American narcissism — masquerading as a difficult moral struggle.

5 The moral ambiguity Douthat thinks he finds is applicable to virtually every war crime. It's the extremely rare political leader who ends up engaging in tyrannical acts, or commits war crimes or other atrocities, simply for the fun of it, or for purely frivolous reasons. Every tyrant can point to real and legitimate threats that they feared.

Ask supporters of Fidel Castro why he imprisoned dissidents and created a police state and they'll tell you — accurately — that he was the head of a small, defenseless island situated 90 miles to the South of a huge, militaristic superpower that repeatedly tried to overthrow his government and replace it with something it preferred. Ask Hugo Chavez why he rails against the U.S. and has shut down opposition media stations and he'll point out — truthfully — that the U.S. participated to some extent in a coup attempt to overthrow his democratically elected government and that internal factions inside Venezuela have done the same.

Iranian mullahs really do face internal, foreign-funded revolutionary groups that are violent and which seek to overthrow them. Serbian leaders — including those ultimately convicted of war crimes — had legitimate grievances about the treatment of Serbs outside of Serbia proper and threats posed to Serbian sovereignty. The complaints of Islamic terrorists regarding U.S. hegemony and exploitation in the Middle East are grounded in factual truth, as are those of Gazan terrorists who point to the four-decades-old Israeli occupation. Georgia really did and does face external threats from Russia, and Russia really did have an interest in protecting Russians and South Ossetians under assault from civilian-attacking Georgian artillery. The threat of Israeli invasion which Hezbollah cites is real. Some Muslims really have been persecuted by Hindus.

But none of those facts justify tyranny, terrorism or war crimes. There are virtually always "good reasons" that can be and are cited to justify war crimes and acts of aggression. It's often the case that nationalistic impulses — or genuine fears — lead the country's citizens to support or at least acquiesce to those crimes. War crimes and other atrocities are typically undertaken in defense against some real (if exaggerated) threat, or to target actual enemies, or to redress real grievances.

But we don't accept that justifying reasoning when offered by others. In fact, those who seek merely to explain — let alone justify — the tyranny, extremism and/or violence of Castro, or Chavez, or Hamas, or Slobodan Milosevic or Islamic extremists are immediately condemned for seeking to defend the indefensible, or invoking "root causes" to justify the unjustifiable, or offering mitigating rationale for pure evil.

Yet here we have American leaders who now, more openly than ever, are literally admitting to what has long been known — that they violated the laws of war and international treaties which, in the past, we've led the way in advocating and enforcing. And what do we hear even from the most well-intentioned commentators such as Douthat? Yes, it was wrong. True, they shouldn't have done it. But they did it for good reasons: they believed they had to do it to protect us, to guard against truly bad people, to discharge their heavy responsibility to protect the country, because we were at war.

All of the same can be said for virtually every tyrant we righteously condemn and every war criminal we've pursued and prosecuted. The laws of war aren't applicable only in times of peace, to be waived away in times of war or crisis. To the contrary, they exist precisely because the factors Douthat cites to explain and

mitigate what our leaders did always exist, especially when countries perceive themselves at war. To cite those factors to explain away war crimes — or to render them morally ambiguous — is to deny the very validity of the concept itself.

12 The pressures and allegedly selfless motivations being cited on behalf of Bush officials who ordered torture and other crimes — even if accurate — aren't unique to American leaders. They are extremely common. They don't mitigate war crimes. They are what typically motivate war crimes, and they're the reason such crimes are banned by international agreement in the first place — to deter leaders, through the force of law, from succumbing to those exact temptations. What determines whether a political leader is good or evil isn't their nationality. It's their conduct. And leaders who violate the laws of war and commit war crimes, by definition, aren't good, even if they are American.



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An End to Torture

Maryann Cusimano Love

1 **S**ixty years ago, Eleanor Roosevelt and the U.S. government worked doggedly to create the Universal Declaration of Human Rights. Mrs. Roosevelt knew many successes in her long years of public service, yet she regarded the writing and passage of the Universal Declaration of Human Rights as her greatest accomplishment. She envisioned it as an international Magna Carta and Bill of Rights for people everywhere. She worked so hard (and drove others hard as well) that one delegate charged that the length of the drafting committee meetings violated his own human rights.

2 Like all other human organizations, the United States has a less than pure record on human rights. The same U.S. founding documents that set some souls soaring with language of universal rights also enslaved other human beings and defined them as property, while also excluding the female majority of the population

Protecting human rights and prohibiting torture is practical and advances U.S. interests, especially security interests. By contrast, using torture undermines security.

entirely. We the people have spent the last 232 years working to live up to the best and undo the worst of those founding documents. Protecting human rights and prohibiting torture is practical and advances U.S. interests, especially security interests. By contrast, using torture undermines security.

Whatever one thinks of Barack Obama, Sarah Palin or Hillary Clinton, the 2008 presidential election campaign was a historic move to open up our political life and

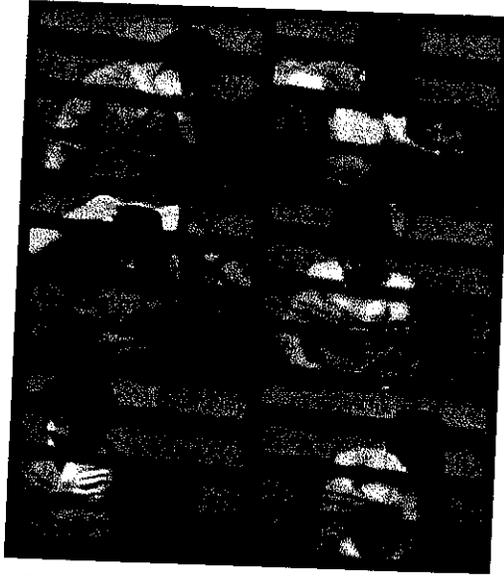
leadership to all. Eleanor Roosevelt was no starry-eyed idealist. As a woman, an advocate for the poor and the wife of a man with a disability, she knew that U.S. rhetoric on human rights often did not match reality. Lest she forget it, the Soviet and other Communist delegates to the United Nations continually reminded her. As she recounted it, they would point out some failure of human rights in the United States and ask, "Is that what you consider democracy, Mrs. Roosevelt?" And I am sorry to say that quite often I have to say, "No, that isn't what I consider democracy. That's a failure of democracy, but there is one thing in my country: we can know about our failures and those of us who care can work to improve our democracy!" Mrs. Roosevelt placed her faith in the transparency of our society and in the ready supply of everyday prophets who would challenge and overcome injustices.

What Would Eleanor Do?

What would Mrs. Roosevelt make of the current U.S. debate over the use of torture in the war on terrorism? Article 5 of the Universal Declaration of Human Rights prohibits torture, unequivocally stating, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." So serious was this basic human right that the drafters placed it at the very beginning of the document, right after the articles stating that all human beings are free and equal and enjoy "the right to life, liberty and security of person." Articles 6 to 11 guaranteed a person's legal rights, including freedom from arbitrary arrest or detention, a right to an impartial trial and a presumption of innocence; these were the "easy" articles from the U.S. perspective. The harder rights for the United States, with its laissez-faire, capitalist economic system, were the social and economic rights tucked in at the end of the document, particularly Articles 23 and 25, which guarantee the right to a job, adequate compensation and an adequate standard of living, "including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Throughout the cold war, the United States repeatedly criticized violations by Soviet and Communist countries of the legal and political rights enumerated in the declaration. These countries returned fire by noting their "iron rice bowl," a state-supported social safety net that they charged was lacking in the

United States and other capitalist states.

5 The current torture debate has turned this history on its head. After the terrorist attacks of Sept. 11, 2001, the Bush administration retreated from the traditional U.S. stance against torture and argued instead for an American exception. Lawyers like John Yoo argued that a "new kind of war" against an enemy that has no regard for human rights excused the United States of its responsibilities as outlined in the Universal Declaration of Human Rights and in the Geneva Conventions. While never admitting to practicing torture, the Bush administration allowed and undertook what it characterized as "aggressive



■ Omar Khadr, a Canadian citizen who was 16 years old at the time, appears in multiple video screen grabs during a February 2003 interview in the Guantánamo Bay prison. His attorney and some human rights groups allege that Khadr was tortured.

interrogation techniques," including waterboarding, sexual humiliation, attacks by dogs, sleep deprivation and so on. While some of the practices were later decried, particularly those atrocities captured on photos at the Abu Ghraib prison in Iraq, many others were doggedly defended (particularly by Vice President Dick Cheney) as necessary and helpful in the war on terror.

6 Not all members of the government defense and security communities were so convinced. Then-Secretary of State Colin Powell and State Department lawyers, as well as military JAG lawyers, fought the administration's interpretations. They believed such interrogation techniques were illegal and counterproductive, undermining military morale and discipline, exposing U.S. troops and citizens to the risk of same or similar treatment, and undermining the standing of the United States around the world. So concerned were C.I.A. employees that they purchased insurance policies and urged Congressional action to protect them from lawsuits and legal liability should the political winds change and the actions they were being ordered to undertake be declared illegal.

7 Congress and the public largely acquiesced. Polls showed that pluralities of Americans (and among them, Catholics) believed torture to be permissible. Congressional action to rein in the administration was tepid. In order to avoid a presidential veto, Congress watered down more vigorous anti-torture legislation, never declared waterboarding and other administration-approved methods to be torture, and granted legal protections to government agents who used these aggressive techniques.

President Obama's administration will have to take up the torture debate. Most of the debate centered on whether particular "aggressive interrogation techniques" constituted torture, and whether particular actions taken by agents of the U.S. government (Defense Intelligence Agency, Central Intelligence Agency, military interrogators and government contractors) were legal, including foreign renditions to countries suspected of torture. Religious leaders like the U.S. Conference of Catholic Bishops and the National Religious Campaign Against Torture addressed the morality of torture by emphasizing the fundamental dignity of all human life, as expressed in the Universal Declaration, over the utilitarian view (that the ends of protecting the United States from acts of terror justified the means of violating the rights of suspected terrorists). Torture is a particularly problematic form of violence because it is inflicted by the very state that is supposed to be the protector and guarantor of human rights.

Points Missing in the Public Debate

First, torture is ineffective. Philosophers and television shows erroneously propagate the scenario of the "bomb in a baby carriage": government agents apprehend a terrorist who knows when and where the next attack will take place; agents must stop the imminent attack; so they use torture to extract information quickly from the attacker. This model is wrong in almost all respects. Such "exquisite" intelligence as is depicted in prime time never exists in the real world. Instead, government agents never know exactly whom they have caught and what such persons know. Torture does not work because individuals respond in different ways to pain. Aggressive interrogation techniques can yield false information made up to satisfy interrogators and stop the pain. Instead of actionable intelligence that could stop the next attack, such false information wastes scarce government resources on wild goose chases. Even when government agents catch real terrorists, the application of coercive techniques may play into their apocalyptic visions of martyrdom, rather than "loosening lips."

Second, torture is immoral, even in a utilitarian calculus. Others besides suspected terrorists are harmed by torture. Arriving at the conclusion that "the end" of saving innocents from terrorist attack justifies the means of torture grossly underestimates the costs of torture to society, to our nation's military and legal institutions and to our role in the world. Those we ask to do the torturing are also harmed, sometimes irreparably. Our legal and political systems are harmed, as professionalism in the military and in law enforcement suffers. For this reason, military lawyers are among the strongest critics of torture. As Shannon E. French, formerly of the U.S. Naval Academy, notes in her book *The Code of the Warrior*, military professionals need ethical codes to work effectively and to differentiate themselves from barbarians and murderers. The United States has the strongest military on earth, and others come from far and wide to study and emulate U.S. military professionalism and codes of conduct. The ethical frameworks of the Universal Declaration of Human Rights, the military code of conduct and the Geneva Conventions protect not only innocent civilians but military personnel

themselves. Violating those norms puts Americans at risk for similar treatment. According to his killers, contractor Nicholas Berg was beheaded in retaliation for torture at Abu Ghraib.

11 *Third, torture is impractical.* Protecting human rights and prohibiting torture is practical and advances U.S. interests, especially U.S. security interests. By contrast, using torture undermines U.S. security. The National Religious Campaign Against Torture acknowledges this in its call for the new president to issue an executive order banning torture (www.nrcat.org). The war against terror is primarily a battle of ideas. Al Qaeda fights for the idea of the bankruptcy of modern and secular Islamic states allied with the West, while the United States fights for the idea that the tactic of terrorism, of intentionally killing civilians, is impermissible. The United States cannot effectively fight for a global norm while ignoring normative constraints. The United States cannot champion human rights abroad while ignoring them at Guantánamo. The United States certainly cannot do this with the world watching.

12 Military force is not the source of American power in the world today. The strength and attractiveness of U.S. ideals are at the basis of U.S. "soft power," and torture undermines those. The debate is not between realists keen on protecting U.S. citizens and idealists who place human rights ahead of security concerns. As Eleanor Roosevelt knew 60 years ago, and a new administration must rediscover now, advancing human rights also advances U.S. interests and security.

Debate 2: Same-Sex Marriage

"Interracial Marriage: Slippery Slope?" by La Shawn Barber (pp. 256–57)

"The Loving Decision" by Anna Quindlen (pp. 258–60)

"The Future of Marriage," Editorial from *National Review* (pp. 260–61)

"The Right's Contempt for Gay Lives" by Andrew Sullivan (pp. 261–63)

Understanding the Debate over Same-Sex Marriage

Same-sex marriage — the right of gay couples to marry and enjoy all the legal rights and protections of married couples — has been the source of heated debate in the United States for decades. Much of the current conversation about same-sex marriage has centered around recent activity at the ballot box, in state legislatures, and in the courts. Ballot measures in November 2008 in California, Florida, and Arizona explicitly defined marriage as between one man and one woman or otherwise attempted to forestall measures designed to allow same-sex marriage. In early