The use of torture is a contentious issue that has been vigorously debated in political and ethical circles for centuries. Proponents of the use of torture claim that the ends of torture, namely the extraction of valuable information and the deterrence of crime, justify its means. Those who stand against torture question its efficacy and oppose it on moral and legal grounds.

**HISTORICAL BACKGROUND**

The historical context of torture is important to understanding its implications today. This section will examine the use of torture in Western civilization. For the purposes of this paper, torture shall be discussed in the context of its use by governments for investigative purposes. Torture as a criminal act by civilians against one another shall be omitted from analysis.

Torture's function as an interrogative instrument is well documented throughout the span of human history. The city-states of ancient Greece used torture as a means of obtaining information in settling legal disputes. By law, only slaves were subject to torture, as free citizens were thought to have a greater capacity for reason and therefore dishonesty under interrogation. Information attained from tortured slaves was believed to be the most reliable form of evidence available to Greek courts, because slaves were thought to have no motivation to lie under duress. The practice of torturing slaves in legal cases was inherited by the Roman Empire, who expanded its use to non-Romans residing in the Empire, and second-class citizens. Roman jurisprudence legitimized torture, as was documented in Book 48, Chapter 18 of the Digest, Roman legal philosophy's seminal text. “De Quaestionibus,” Latin for “On Torture,” was the title of the essay, which would later be used to justify torture throughout Europe's medieval period (J. Ross, 2005, pp. 3–5).

The only exception to the prohibition against torturing free citizens in ancient Greece and Rome was in cases of treason. This is exemplified by the late empire's extensive use of torture against Christians, who were seen as subversive to the Emperor and the Pantheon. With the emergence of codified law in Western Europe in the 11th century, scholars of law used “De Quaestionibus” as a basis for the legal use of torture in their kingdoms. As the Middle Ages progressed, torture was used to obtain confessions from alleged perpetrators, so long as the torture matched the severity of the crime. A self-incriminating confession by a victim of torture was regarded as the “queen of proofs.” The Middle Ages also heralded the Catholic Church's promotion of the widespread use of torture in the Inquisition against heretics and witches. Inquisitors believed that witches associated together in sects, and torture was used both to generate a confession from the accused witch and to obtain denunciations of other witches. Under the duress of torture, supposed witches would name anyone they could to make the Inquisitor stop the torment. In 200 years of witch-hunts, 200,000 to 1,000,000 people are thought to have been executed (J. Ross, 2005, pp. 6–12).

There is one notable exception to the use of judicial torture in the Middle Ages. In England, only the King's personal Star Court was authorized to use torture in its established function of prosecuting traitors. All other English courts were permitted to use circumstantial evidence in criminal cases, and didn't require two eyewitnesses or a confession to convict a
In 1764, a young Milanese marquis named Cesare Beccaria wrote a short treatise called On Crimes and Punishments criticizing the use of torture in criminal proceedings. This pamphlet pointed out inconsistencies in the use of torture, such as the fact that it would prove “robust ruffians” innocent and “weak innocents” guilty, as well as claiming that there is a connection between society’s treatment of its prisoners and crime rates (Beccaria, 1764). By 1800, Beccaria’s treatise had convinced most European governments to abolish judicial torture. In 1863 the U.S. President Lincoln signed General Order No. 100, also known as the Lieber Code, which banned all torture by the U.S. military (J. Ross, 2005, pp. 3–4, 12–14).

Although torture was still technically illegal in European judicial proceedings throughout the first half of the 20th century, it resurfaced in informal use on the battlefields of World War I. With the rise of authoritarian right- and left-wing governments in following decades, torture became an accepted instrument of state control. The horrors that were visited upon victims of Nazi torture chambers catalyzed a movement to ban torture once and for all. The 1949 Geneva Conventions sought to make torture illegal for state parties in all instances of warfare, both international and non-international (J. Ross, 2005, pp. 14–17). Common Article 3 (Convention [III] Relative to the Treatment of Prisoners of War, 1949), which appears in all four of the Conventions, states:

Persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

As of 2013, every country on earth has signed and ratified the four Geneva Conventions. The Conventions are further supplemented in international law by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which was signed by the U.S. on December 10, 1984. The UNCAT defines 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.

Although torture was illegal in every country after the Geneva Conventions and the UNCAT, it was used by governments on numerous occasions in the second half of the 20th century. The Khmer Rouge of Cambodia were infamous torturers and published a 42-page instruction manual for their bureaucratic torture centers (J. Ross, 2005, p. 15). The Israeli Security Service has admitted to using torture during the Palestinian uprising in the occupied territories from 1988 to 1992 (BBC, 2000). Egypt’s secret police force, the Mukhabarat, has routinely used torture. This was known by the U.S., and throughout the 1990s the CIA delivered terrorism suspects into Egyptian custody for interrogations that often made use of torture. In 1998, the CIA and the Albanian government captured five suspected terrorists and sent them to Egypt for interrogation. The captives’ brutal treatment at the hands of Egyptian torturers was cited by Ayman al-Zawahiri as one of Al-Qaeda’s reasons for the 1998 U.S. Embassy bombings in Nairobi and Dar es Salaam (Mayer, 2008, pp. 111-115).

The 9/11 terrorist attacks and the U.S.’s subsequent Global War on Terror (GWOT) have heralded a new chapter in the use of torture by national governments. The United States, in its campaign to secure the world against terrorism, has allegedly committed acts in the process that amount to torture. The use by U.S. agents of stress positions, sleep deprivation, “enhanced interrogation” methods, and other specific interrogative acts have been criticized as being in violation of the Geneva Conventions and the United Nations Convention Against Torture. Although it has been nearly 250 years since Cesare Beccaria published , and more than 60 years since the Geneva Conventions outlawed the use of torture by governments, it is clear that the debate surrounding the moral, pragmatic, and legal implications is as hotly contested as ever.

**MORAL BACKGROUND**

Moral considerations regarding the use of torture have been principal in the development of ethical systems for thousands of years. In 886, Pope Nicholas I questioned the use of torture to obtain confessions: “A confession must be spontaneous, not extracted by force. Will you not be ashamed if no proof emerges from the torture? Do you not recognize how iniquitous your procedure is?” (J. Ross, 2005, p. 7). The two primary modern secular ethics systems which deal with the moral status of torture are consequentialism and deontology.

**Consequentialist Ethics**

Consequentialism, the most well-known sub-system of which is utilitarianism, is the system of ethics which places normative value in relation to the consequences of an action. Jeremy Bentham, John Stuart Mill, and Henry Sidgwick developed the earliest forms of utilitarianism, which claimed that the correct moral act was that which produced the greatest happiness for the greatest number of people. Perhaps the most fundamental principle of consequentialism is its denial that the moral value of an act can be derived from anything but the act’s consequences (Sinott-Armstrong, 2012).

Under any system of ethics, the rightness of an act depends on the normative values the system assigns. What binds together all consequentialisms is the principle that an act’s rightness depends on whether its consequences promote the specific consequentialism’s value. For example, if one is considering an act of torture under the utilitarian lens, which places as its value the maximization of happiness, one must consider whether the consequences of the specific act of torture would produce an amount of total happiness that would outweigh the unhappiness inflicted on the victim. A classic thought experiment known as the “ticking time bomb scenario,” which was first introduced in Jean Lartéguy’s 1960 novel Les Centurions, is meant to illustrate the value of consequentialist reasoning about torture
The scenario is as follows: Imagine that you are in charge of a law enforcement agency that is investigating a terrorist plot to use a weapon of mass destruction in an unknown highly populated civilian area. You capture a terrorist associated with the plot whom you know has critical information about where the weapon is. You don’t have enough time to interrogate him using conventional strategies. Is it morally right to torture the captive to obtain the location of the weapon?

Consequentialists have argued that the ticking time bomb scenario illustrates the right that governments and law enforcement agencies have to make use of torture. Some, such as British political columnist Bruce Anderson, have even argued that in the protection of their citizens, governments have the duty to torture the relatives of a terrorism suspect to obtain information if the suspect herself will not talk (Anderson, 2010). But while consequentialism in itself has no implicit rejection of torture, it has no implicit acceptance either. This is in part the great weakness of consequentialism; the complexity of costs and benefits pursuant to the actions of institutions cannot easily be morally evaluated. It is mainly individual acts and their capacity to promote beneficial consequences that provide the relevant facts for this school of consequentialism.

A revised form of classic “act” consequentialism is called “rule” consequentialism. This variety, perhaps most visibly championed by well-known philosopher Peter Singer, takes as its starting point the observation that it is unrealistic to expect actors to perform sui generis cost-benefit analyses in every possible situation. Rule consequentialists hold that moral actions should be performed in accordance with a set of rules to be determined through consequentialist calculation. These rules are selected due to their ability to, in the majority of cases, uphold a normative value. Individuals are expected to act in accordance with these rules with the important caveat that any rule may be broken if a particular application of that rule is shown to uphold the system’s normative value less than a proposed alternative.

**Deontological Ethics**

Systems of deontological ethics are the antithesis of consequentialist systems. Deontological theories argue that an act’s moral status has nothing to do with its consequences, and everything to do with its conformity with moral laws or customs. The word ‘deontology’ is a combination of the Greek words deon, meaning duty, and logos, meaning reasoned speech. The philosopher who is usually credited with inventing deontological ethics is Immanuel Kant (Alexander & Moore, 2012). For Kant, the moral action has a good will in accordance with reason. Thus he developed the Categorical Imperative (CI), a method of calculating the morality of an action.

The Categorical Imperative is based on the principle that morality should follow rationality. Kant believed that rationality can be subject to human passions, and therefore an adherence to the CI is imperative to agency based in reason. In The Groundwork of the Metaphysics of Morals and The Critique of Pure Reason, Kant (1785) provides three formulations of the CI that can be used in making normative moral decisions. The First Formulation is as follows: “Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction.” This means that with each of your actions you should be able to universalize your decision into a law that all men should follow when faced with a similar moral question. The Second Formulation is: “Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.” The Second Formulation calls on each of us, in our moral decisions, to treat everyone as if they are not simply something to be manipulated to achieve a result, but also as if they are a desired result in and of themselves. This leads to the Third Formulation: “Therefore, every rational being must so act as if he were through his maxim always a legislating member in the universal Kingdom of Ends.” The Third Formulation is notoriously vague. It essentially means that in every action, one must act as if they are creating laws for something called the Kingdom of Ends. In this sense, every individual has the duty to act in ways that universalize moral maxims (First Formulation) that would enhance the lives of all those who, as ends in themselves (Third Formulation), live in the Kingdom of Ends.

Kant tells us that using the CI leads us to the position that a person should never lie. In telling a lie, under the First Formulation of the CI, one would be universalizing the maxim that one should always lie. In a world where everybody always lies, nobody would believe anything anybody else said. If you will that people believe what you say when they are talking to you, you would be willing a contradiction that people both believe what you say and don’t believe what you say. You would also be violating the Second and Third formulations of the CI, because in lying to somebody you are using them only as a means to an end, and you are also legislating a maxim in the Kingdom of Ends where everybody treats each other simply as means to ends.

It is important to recognize that Kant’s universalism was present (with Locke’s, Montesquieu’s, and others) at the founding of the U.S. Constitution. The U.S. Constitution, a product of the Enlightenment, was clearly crafted in the context of that movement’s emphasis on discovering the fundamental laws of humans and nature. The Constitution was drafted to uphold principles such as the freedom of speech and the freedom from unreasonable searches and seizures that “shall not be violated.” Kant looked favorably upon the effort of constitutional government to establish such rational, inviolable principles of governance in his *Groundwork on the Metaphysics of Morals* (1785).

**PRAGMATIC BACKGROUND**

Many discussions about the ethics of torture hinge on the assumption that torture can produce reliable and actionable information. Does experience prove that torture can produce the caliber of information needed to avert the dreaded ends in the ticking time bomb scenario? How effective has the use of torture been in the Global War on Terror?

**The Reliability of Information Gained from Torture**

Proponents of the use in torture in investigations often point to the assassination of Osama bin Laden as the paradigm case of quality intelligence obtained through the use of torture. Several days after U.S. Special Forces killed bin Laden in Abbottabad, Pakistan, former Bush Administration Attorney General Michael Mukasey (2011) claimed that the trail of information that led to the death of the terrorist leader “began with a disclosure from Khalid Sheikh Mohammed (KSM) …under the pressure of harsh interrogation techniques that included waterboarding.” However, this account was blatantly false. KSM hadn’t been asked about the man who eventually led the CIA to bin Laden, Abu Ahmed al-Kuwaiti, until several months after KSM’s torture had ended. In fact, under close scrutiny, in practically every instance the proponents of the use of torture point to as
having provided actionable intelligence, the opposite turns out to be the case. This includes not only in the case of the assassination of Osama bin Laden, but also the interrogation of Abu Zubayda as well as the Library Tower Plot, as is investigated in great detail in the Report of the Constitution Project’s Task Force on Detainee Treatment (Hutchinson et al., 2013, pp. 245–257).

The truth of the matter is that the majority of experts believe torture has never been a reliable means of producing information (Finn & Warrick, 2009; Irvine, 2005; Rose, 2008; Stein, 2009; The United States Army, 2005). One of the main problems with torturing detainees for information is that, under torture, people will say literally anything they can to get the torture to stop. The danger of false confessions under torture is very real. The Bush Administration promised its 2003 invasion of Iraq partially on the claim that there was a connection between Saddam Hussein and Al-Qaeda. This information was gained from a jihadist named Ibn al-Shaykh al-Libi, who invented the connection under intense CIA supervised torture in Egypt (The Constitution Project, pp. 260–262). In addition, torture can actually damage valuable information that victims still contain. One of the findings of Survival, Resistance, Evasion, and Escape (SERE), the U.S. military’s program to train captured personnel to resist torture, is that under the extreme physical and psychological duress of torture, victims are extremely likely to suffer memory loss or the creation of false memories (Hutchinson et al., 2013, pp. 259–260; Rodriguez & Harlow, 2012, pp. 126–127).

A discussion about the pragmatic effects of torture would be incomplete without mention of the effects that torture has on its perpetrators. Torture causes severe, lasting psychological effects on many of those who engage in its use. Firstly, the use of torture in a single situation can encourage its use in similar situations, eventually leading to the acceptance of torture as an interrogation tactic on a wide scale. Usually, those who engage in torture feel that they are doing so in accordance with the will of their societies. When the torture is exposed, or public opinion shifts against the use of torture, those who participated in its use often feel rejected and betrayed (Vendantum, 2004). Those who have perpetrated torture are also known to suffer from mental illnesses such as depression, anxiety, PTSD, drug abuse, and suicide ideation. The mental pain inflicted on those who have tortured affects even the most experienced interrogators (Blumenfield, 2007).

The use of torture can be contrasted with more traditional interrogative techniques that do not utilize the infliction of physical or mental suffering. These methods have been shown to be highly effective. Matthew Alexander (pseudonym), a top military interrogator who conducted nearly 300 interrogations and oversaw nearly 1,000 in Iraq, was appalled by the detainee abuse he saw there. He ordered his team not to participate in the “enhanced interrogation” methods that were prevalent at the time, and instead to focus using the methods listed in the Army Field Manual in creative and unique ways. Alexander’s team focused on building rapport and attempting to understand the culture of their detainees. They were met with great success. They found that most of their detainees were more than willing to talk. When treated with compassion, the detainees reportedly became amicable toward the U.S., which had been presented to them in a very demonized fashion. Once they realized that they didn’t have much at stake in sticking with Al-Qaeda, the detainees were happy to help the U.S. by giving information (M. Alexander, 2008).

THE EFFECT OF TORTURE IN THE GLOBAL WAR ON TERROR

As the United States and its allies turned to torture to combat terrorism in the 1990s and 2000s, the details and accounts of the torture made their way into the global public discourse. These accounts inevitably made spread to those with sympathies for the tortured and those with less than favorable attitudes toward the U.S. Two days before the 1998 U.S. embassy bombings, Egyptian jihadist leader Ayman al-Zawahiri published a letter in a London Arab-language newspaper about the abduction and torture by the U.S. and Egypt of six Albanian terrorist suspects. In the letter, Zawahiri stated, “We wish to inform the Americans...of preparations for a response which we hope they read with care, because we shall write it with the help of God in the language they understand” (Wright, 2006).

Many prominent experts on the use of torture by the U.S. in the GWOT claim that it actually harms U.S. security and national interests. In a 2009 memo to his staff, the Obama Administration’s top intelligence officer, the Director of National Intelligence Dennis Blair, wrote, “The bottom line is these techniques have hurt our image around the world. The damage they have done to our interests far outweighed whatever benefit they gave us and they are not essential to our national security” (Warrick, 2009). Matthew Alexander claimed in an op-ed in the Washington Post that U.S. torture actually causes people to join the jihadist movement. Alexander (2008) wrote,

I learned in Iraq that the number one reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantánamo.... It’s no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse. The number of U.S. soldiers who have died because of our torture policy will never be definitively known, but it is fair to say that it is close to the number of lives lost on September 11, 2001. How anyone can say that torture keeps Americans safe is beyond me—unless you don’t count American soldiers as Americans.

LEGAL BACKGROUND

Torture is unequivocally and categorically illegal under both domestic and international law. Very few people would argue that there can be any legal basis for torture. Therefore, most arguments about the legality of torture focus on the definition of torture, and whether specific interrogative acts can be said to constitute torture. This section will analyze the statutes that prohibit torture under U.S. and international law, and the definitions that can be used to analyze whether specific interrogative acts constitute torture.

Domestic Law

Torture is unconstitutional under the Fourth, Fifth, Eighth, and 14th Amendments to the U.S. Constitution, and illegal abroad under the Federal Anti-Torture Statute (FATS). The Bill of Rights makes torture illegal both in interrogative and punitive situations in its injunctions against unreasonable searches and seizures, deprival of due process, requirements to self-incriminate, and cruel or unusual punishments. The FATS (18 USC § 2340) states,

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. The statute defines torture in the following manner:

(1)"torture" means an act committed by a person acting under the color
of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Clearly the legal status of a potential act of torture turns on the definition of “severe physical or mental pain or suffering.”

In the wake of the terrorist attacks of 9/11, President Bush requested that the Office of Legal Council (OLC) provide an analysis of the Federal Anti-Torture Statue and what interrogative acts constituted torture under the law. Assistant Attorney General Jay S. Bybee responded with a series of three memos written by Deputy Assistant Attorney General John Yoo that would later become infamously known as the Torture Memos. In the first of the Torture Memos, Yoo sought to give a solid definition of the phrase “severe physical or mental pain or suffering” that is found in the FATS. Yoo (2002) made the case that, Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction, but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder.

Yoo based his analysis of the phrase “severe pain” on a U.S. law outlining emergency medical benefits for members of the government’s health insurance plan. The text of the relevant subsection of 42 USC § 1395w–22 is:

(B) Emergency medical condition based on prudent layperson

The term “emergency medical condition” means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
(ii) serious impairment to bodily functions, or
(iii) serious dysfunction of any bodily organ or part.

A simple analysis of the text of the law reveals prima facie that it in no way attempts to provide either necessary or sufficient conditions for someone to be regarded as being in “severe pain.” Exactly the manner Yoo and the Office of Legal Counsel managed to glean from this law that the feeling “which accompanies serious physical injury such as death or organ failure” is a necessary condition for it to be severe enough to implicate torture is beyond the limits of traditionally conceived legal rationality. How a law concerning emergency health care under the Medicare Choice Plan relates to a law prohibiting torture is further still. This section of the Medicare Choice Plan is clearly intended to provide criteria for identifying an “emergency medical condition” to be covered under Medicare, and simply lists “severe pain” as an indicator of an “emergency medical condition.” It is in no way intended to define “severe pain” even within the context of the Medicare Choice Plan, let alone within the rest of U.S. statutory law. Yoo is simply cherry-picking one of the few instances of the term “severe pain” within U.S. code, and using its surrounding definitional context to create a pseudo-formal translation of the term that fits his own twisted interpretation of legal interrogation. The importance of this new definition of torture is that it excludes the official “enhanced interrogation” techniques that the U.S. was using in the GWOT. These techniques included sexual humiliation, waterboarding, hypothermia, threatening with dogs, abdomen strikes, facial slaps, sleep deprivation, 20-plus hour interrogations, and wall-slamming (Ross & Esposito, 2005).

International Law

If domestic laws concerning the definition of torture are vague, then international laws as they apply to the U.S. are as well. The United Nations Convention against Torture established the Committee Against Torture whose purpose it is to investigate alleged acts of torture that have occurred within state parties to the convention. In passing the UNCAT, the U.S. Senate included several key reservations in its ratification. Section I-2 of the U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990) declares, “That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.” This stipulation exempts the U.S. from the jurisdiction of the Committee Against Torture and the International Court of Justice when it comes to arbitration surrounding the issue of torture.

Though the UNCAT and the Committee Against Torture may not be able to provide any further clarity regarding the question of what constitutes torture, the Geneva Conventions certainly can. In the midst of the most questionable U.S. behavior in the Global War on Terror, the Bush Administration made an attempt to circumvent Geneva Convention protections for individuals against torture. After a series of memos analyzing the status of Taliban and Al-Qaeda prisoners under the Conventions, the Bush Administration declared in early February of 2002 that the Conventions would only apply to members of the Taliban, and not to members of Al-Qaeda (Garamone, 2002). This is based on the rationale exemplified in John Yoo’s memo entitled Application of Treaties and Laws to al Qaeda and Taliban Detainees (2002) which states, “Al Qaeda is merely a violent political movement or organization and not a nation-state. As a result, it is ineligible to be a signatory to any treaty.” This analysis is furthered by the fact that members of Al-Qaeda are unlawful combatants who don’t display common uniforms or emblems that would designate them as an armed force and grant them protected status under the Conventions. However, these arguments are fully ignorant of Common Article 3 of the Geneva Conventions (1949) which clearly states that “persons taking no active part in the hostilities” must be protected from “violence to life and person,” “cruel treatment and torture,” or “outrages upon personal dignity, in particular humiliating and degrading treatment.”
There can be no mistake that Common Article 3 covers detained members of Al-Qaeda and other members of terrorist organizations, because as detainees of the U.S., they can no longer be taking “active part in the hostilities.” The purpose of Common Article 3 is to protect all persons other than POWs, who are covered in other sections of the Conventions. This includes unlawful combatants. The purpose of Common Article 3 is to act as a catch-all for persons who are removed from the hostilities in the course of a war (Pejic, 2011). Therefore, the victims of “enhanced interrogation” techniques used by the U.S. cannot be said to be exempt from the protection of the Geneva Conventions.

The domestic jurisdiction of the Geneva Conventions, and Common Article 3 in particular, is provided for by the 1996 War Crimes Act. The law (18 USC § 2441) states,

(a) Offense.— Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(c) Definition.— As used in this section the term “war crime” means any conduct:

(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character.

(d) Common Article 3 Violations

(A) Torture.— The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

(B) Cruel or inhuman treatment.— The act of a person who commits, or conspires or attempts to commit, an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions), including serious physical abuse, upon another within his custody or control.

It is absolutely clear that violations of the Geneva Conventions are punishable under the current U.S. system of justice. The War Crimes Act of 1996, in no uncertain terms, explicitly codifies the Conventions under U.S. law, and provides for punishments ranging from simple monetary fines to life imprisonment or death if a person is killed in the commission of a war crime.

**Moral Implications and Recommendations**

Even by consequentialist logic—that the benefits of torture outweigh its costs—torture lacks solvency. Torture damages U.S. interests and causes more terrorism than it prevents, as is demonstrated by the 1998 embassy bombings and the findings of Michael Alexander. Torture damages the U.S.’s reputation abroad and makes other nations hesitant to cooperate with it, hindering its ability to affect change and protect its interests. It is clear that this outcome-based approach to ethics is doing the U.S. no good, and is failing to achieve even its own moral standards.

The ticking time bomb scenario is the crown jewel of the consequentialist argument for torture, but as several terrorism experts in the U.S. have made clear, such a situation has never actually happened. In fact, as Malcolm Nance, the former chief of training for the Navy’s SERE program, told Rachel Maddow in an interview on MSNBC, in a ticking time bomb scenario torturing a detainee would actually be worse than using traditional interrogation methods (Nance, 2009). In such a scenario “all the prisoner has to do is not answer the question — or better yet, the prisoner will lie.”

Adoption of a rule consequentialist system which sets justice as its normative value and constructs an ethical rule against torture may seem to be a viable approach to the problem of government torture, but it ultimately fails in its application. This is because torture, which treats persons as means to ends rather than ends in themselves, should always be seen as injustice. True justice can never be achieved through injustice, and therefore a system of ethics which theoretically allows injustices in extreme circumstances can never fully achieve justice. The current U.S. approach to torture demonstrates this failure of rule consequentialism. The U.S. has laws against torture, but they are routinely broken by individuals who calculate that a particular circumstance warrants a break. This system has been extremely detrimental to the value of justice, and only a radical shift in ethics can bring about its complete restoration.

Adherence to a deontological system of ethics like Kant’s Categorical Imperative better upholds justice and the rule of law than a consequentialist system, particularly when it comes to issues like torture. Under deontological analysis, torture is wrong in all circumstances. This is because torture treats persons as means to ends, rather than as ends in themselves. The proliferation of a sort of consequentialist “ends justify the means” attitude throughout the Global War on Terror has led to countless instances in which an innocent person has been tortured by U.S. operatives. Take, for example, the case of Khalid el-Masri, a German citizen who was mistaken for a similarly named Al-Qaeda operative and was kidnapped by the CIA in Macedonia and flown to a U.S. black site in Afghanistan known as the “Salt Pit” where he was tortured and raped and then detained for four months (Case of el-Masri v. the Former Yugoslav Republic of Macedonia, 2012). In the words of Pope Nicholas I, “Do you not recognize how iniquitous your procedure is?” It is wholly counter to the value of justice to torture an innocent person.

Policymakers of the United States should adopt a deontological ethical framework, particularly in cases that deal with human rights issues such as torture. Essential rights and liberties are foundational to the American form of government, and the founders sought to create a system that would protect, in all circumstances, those rights. As evidenced in the Fourth, Fifth, Eighth, and 14th Amendments, the Constitution seeks to protect individuals from the abuses of torture. Torture is also illegal under federal and international law. A deontological ethics that forbids torture in all

**The evidence shows that torture simply is not able to produce the kind of information that its proponents claim it can. Those who advocate it can point to few examples in which it has uniquely provided reliable, actionable information.”**

**IMPLICATIONS AND RECOMMENDATIONS**

In the light of this information regarding the historical, moral, pragmatic, and legal significance of torture in the U.S., it will be helpful to evaluate the issues raised in this paper in the context of an overriding value. This value will be justice. My contention is that justice is best achieved through adherence to a deontological system of ethics and by upholding the rule of law.
The evidence shows that torture simply is not able to produce the kind of information that its proponents claim it can. Those who advocate it can point to few examples in which it has uniquely provided reliable, actionable information. The very nature of torture makes good and bad information indistinguishable, as even innocents will craft incredibly detailed and highly creative stories to make the torment stop. Torture psychologically damages its victims, often in ways that can distort information that was reliable to begin with.

If the goal of U.S. intelligence gathering is to produce reliable, actionable information with interrogations, the U.S. should stick to methods developed by intelligence and law-enforcement agencies that stay within the legal boundaries established by international and domestic law. Not only are they legal and ethical, but these methods have been highly effective, including, as Michael Alexander has demonstrated, in the current Global War on Terror. Sticking to legal methods of interrogation has an additional pragmatic advantage. In the U.S., evidence that is gathered in ways that stand in violation of the Constitution or federal law is inadmissible in courts. The use of legal interrogation methods empowers the U.S. to prosecute terrorism suspects. This is more preferable than the current state of affairs in which many suspected terrorists are being indefinitely detained in a sort of legal limbo where their release would be reasonably dangerous to the U.S., but their prosecution would fall through because the evidence surrounding their alleged crimes has been obtained illegally. Indefinite detention is counter to the value of justice, and therefore by upholding the rule of law and refusing to engage in illegal interrogation methods, the U.S. can promote the justice both domestically and internationally.

**LEGAL IMPLICATIONS AND RECOMMENDATIONS**

The primary legal implications of the information surrounding the United States’ use of “enhanced interrogation” techniques in the Global War on Terror are that such techniques amount to torture, and are therefore illegal under domestic and international law. The argument that “enhanced interrogation” doesn’t amount to torture is premised on a highly irrational misrepresentation of the definition of “severe mental or physical pain” that was crafted in a manner that fundamentally conflicts with foundational principles of American jurisprudence. The notion that menacing detainees with enormous military dogs or subjecting them to waterboarding, which is designed to elicit instinctual drowning reflexes, somehow doesn’t constitute a “threat that another person will imminently be subjected to death, severe physical pain or suffering”; if that is the case, it certainly demonstrates a fundamental contempt for basic human rights and dignity.

In order to restore the rule of law and promote the value of justice, the United States should publicly acknowledge that it has used torture in the Global War on Terror, and, in accordance with the Federal Anti-Torture Statute and the War Crimes Act of 1996, should commence criminal investigations of all those who have participated in or facilitated the use of torture in the era. In addition, pursuant to Article IV Clause 2 of the United States Constitution which recognizes treaties, alongside the Constitution and the laws of the United States, as being the “Supreme Law of the Land,” the United States should assent to the jurisdiction of the International Court of Justice and submit a report to the United Nations Committee Against Torture detailing its violations of the United Nations Convention Against Torture as well as Common Article 3 of the Geneva Conventions.

Prosecutions of perpetrators will bring information to light that will open a public dialogue about what torture is and its use in public policy, and set a precedent for the prosecutions of future acts of torture. The American people must understand that torture is both categorically immoral and illegal. Those who represent the American people in intelligence gathering must understand that under no circumstance are they entitled to torture another person, and that doing so will see them harshly punished.

**CONCLUSION**

The rule of law in the United States, being critical to justice, has been massively eroded by the widespread official sanction of illegal and immoral acts of torture in the Global War on Terror. To restore the rule of law, the people of the United States must make a commitment to the fundamental human rights and dignities enshrined in the U.S. Constitution, domestic, and international legal code. Enforcement of the Federal Anti-Torture Statute, the War Crimes Act of 1996, the United Nations Convention against Torture, and Common Article 3 of the Geneva Conventions will ensure that the crime of torture is eliminated as an instrument of U.S. intelligence policy. A commitment to categorically eliminate the use of torture will restore U.S. moral credibility, make the world a safer place for Americans, and repair some of the damage to the rule of law that the Global War on Terror has wrought. This will promote the value of justice and hopefully turn the page on a particularly painful chapter of history.

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