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The Use of State-Sponsored Torture for National Security: A Debate on the Permissibility of Torture in the Name of Public Safety

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The Use of State-Sponsored Torture for National Security

A Debate on the Permissibility of Torture in the Name of Public Safety

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Abstract

Can the United States government's use of state-sponsored torture ever be justified for national security purposes?

This question is a taboo subject that frequently elicits passionate responses from individuals who argue both for and against its use in upholding national security. This vigorous debate challenges moral, ethical, legal, and even pragmatic ideals in seeking to determine if state use of torture can ever be a part of America's national security strategy. These considerations, and others, have inspired this research project and the specific research question which seeks to determine whether the United States government's use of state-sponsored torture for national security purposes can ever be justified.

This study intends to analyze existing literature on the relevant arguments, ideologies, and statistics that both proponents and opponents of torture employ to analyze their positions. In doing so, the study achieves the conclusion that state-sponsored torture should be absolutely prohibited under all circumstances for moral, ethical, legal, and pragmatic reasons as it represents a flagrant and systematic degradation of the freedoms and values that this country is based on.



Table of Contents

Introduction	3
Defining Torture	4
History of Torture in the United States	7
Public Opinion on Practice of Torture	14
The Nature of the Torture Dilemma	21
Key Arguments in Practice	22
Arguments in Support of State-Sponsored Torture	23
The Ticking Time Bomb Scenario	23
Torture from a Utilitarian Standpoint	29
A Philosophical Argument for Torture: The Role of Government	34
Benefits of Institutionalizing Torture	42
Arguments in Opposition to Torture	46
Moral Argument in Opposition to Torture	47
Deontological Argument in Opposition to Torture	51
Legal Arguments Against Torture	55
Torture is Ineffective as an Information-Seeking Method	68
Analysis of Arguments	74
Conclusion	78
Bibliography	80



Introduction

The use of torture for national security purposes has sparked great debate among philosophers, academics, human rights activists, and members of the legal community. Many have argued that the practice is immoral and should not be considered at all while others have asserted that it can be justified and maybe even required under certain circumstances. This debate has further intensified in the aftermath of 9/11 and other recent terror attacks as the pain and shock experienced by millions of Americans as a result of these tragedies have led to both anger and strong retaliatory reactions. Considering the ferocity of this discussion and the multitude of arguments that have been presented by actors on both sides of the debate, it has become apparent that a full-scale research project that analyzes each of these assertions is necessary in determining whether torture can ever be justifiable. In making this determination, the following research question followed naturally:

Is it ever justifiable for the United States government to use state-sponsored torture for national security purposes?

In doing justice to this research, it is necessary to approach this question from multiple angles. While this research is primarily focused on the philosophical and moral considerations and implications of torture, it does take an interdisciplinary approach, employing arguments that address legal and pragmatic bases, in order to be properly thorough, holistic, and applicable to real-world situations. Failing to consider arguments from any of these areas would be a disservice to the topic and would not be comprehensive. In seeking to properly answer this research question, this paper is presented in multiple sections. Beyond this introduction is a section presenting a clear definition of torture, followed by a brief historical account of torture in the United States, a discussion of current public opinion on the practice, arguments both for and

against, and finally an analysis and conclusion of all the arguments presented. The goal of this research is not necessarily to persuade of my own opinions, but instead to discuss, examine, and synthesize existing literature and make an educated and well-researched determination whether state-sponsored torture can ever be justified in the United States.



Defining Torture

While the preceding section of this work has gone to great lengths to briefly explain why the torture question is important, no time has yet been taken to narrow down and determine a clear definition for torture that can be applied throughout this research. As with nearly any controversial topic, much debate, discourse, and controversy exist when seeking to identify a proper definition for torture and how to identify where torture begins and ends and if any distinction exists between it and softer terms or euphemisms such as enhanced interrogation. In a general sense, torture is often understood to be the infliction of pain and suffering on someone in an effort to coerce him or her into doing or saying something that he or she would otherwise refuse to do or say. While this definition may seem quite clear on the surface level, debate begins to develop when one starts to consider the finer details.

A critical agreement in international law, Article I of the United Nations Convention Against Torture (UNCAT) describes torture as “any act by which severe pain or suffering... is intentionally inflicted on a person for such purposes as obtaining from him..., information or a confession, punishing him for an act he... has committed or intimidating or coercing him...

when such pain or suffering is inflicted... with the consent or acquiescence of a public official.”¹ According to this definition, three conditions must be met for an action to constitute torture: the intentional infliction of severe mental or physical suffering, undertaken by a public official, who is directly or indirectly involved for a specific purpose.²

While torture’s opponents sometimes attempt to argue that the United States government has no (or a weak) legal obligation to follow the direction or doctrines of the United Nations, it is at the very least inarguably bound by the language of Federal law.³ Having said this, the description of torture appears largely the same under U.S. law. Section 18 U.S. Code § 2340 outlines the official definition of torture under Federal law. This law outlines torture as any “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.”⁴ The law also includes an explanation of what acts constitute “severe physical or mental pain or suffering” including: the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality, the threat of imminent death, or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the

¹ "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," OHCHR, Accessed November 15, 2018, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

² Ibid.

³ More in depth analysis of legislation and international law regarding torture such as the Geneva Conventions, the United Nations Convention Against Torture, excerpts from the U.S. Code, and Supreme Court rulings are discussed in detail in a dedicated legal analysis section beginning on P.56.

⁴ "18 U.S. Code § 2340 – Definitions," Legal Information Institute, Accessed January 12, 2019, <https://www.law.cornell.edu/uscode/text/18/2340>.

administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.⁵

While these definitions are largely in concurrence, the execution of interrogation methods has historically straddled the gray area in between, where actors argue that certain actions either did or did not represent torture. Even though these arguments exist, it is clear that some actions administered under the direction of the government have crossed into the realm of torture even if recent administrations deny it. For example, waterboarding and sensory deprivation meet the torture qualifications listed above for both the United Nations and the U.S. Code, especially depending on how they are administered. Still, U.S. officials in the past have claimed otherwise publicly, or at the very least, have attempted to present their tactics as less harmful or severe than the reality. For example, former Secretary of State Condoleezza Rice said in 2009 "[w]e never tortured anyone;" she maintained the abuse was "not torture," but was "legal", and "right."⁶ When asked whether waterboarding was a demonstration of torture, Rice responded "I just said — the United States was told, we were told, nothing [was done] that violates our obligations under the Convention Against Torture. And so, by definition, if it was authorized by the president, it did not violate our obligations under the Conventions Against Torture."⁷ Rice's comments reflect just one example of the common trend of Federal officials refusing to publicly admit the nation's use of torture as defined under its own laws.

⁵ "18 U.S. Code § 2340 – Definitions," Legal Information Institute, Accessed January 12, 2019, <https://www.law.cornell.edu/uscode/text/18/2340>.

⁶ Annie Lowrey, "Condi Rice Defends Enhanced Interrogation as 'legal' and 'right'," Foreign Policy, April 30, 2009, Accessed November 21, 2018, <https://foreignpolicy.com/2009/04/30/condi-rice-defends-enhanced-interrogation-as-legal-and-right/>.

⁷ Ibid.

While Rice largely comments on the physical actions taking place, Mark Davis, a columnist for *Townhall.com*, argues that the question of torture actually lies in intentions. Davis asserts that “as long as our intentions remain noble, our behaviors clearly defined, and the practices closely supervised” then torture is not taking place because the intention is not to induce suffering, but to retrieve critical information.⁸ Davis’ argument may be viewed to some as a slippery slope that could be used to justify much worse activities, but it is likely simply an excuse that seeks to justify torture by pretending to label it as something it is not. This phenomenon further reinstates the importance of the research at hand. It is not a question of whether or not the nation has carried out torture or even what torture is, those are essentially given facts. The question is whether it should be legally justifiable and permissible going forward.



History of Torture in the United States

When asked about the use of state-sponsored terror tactics, many Americans might talk of the “enhanced interrogation” practices employed by George W. Bush’s administration in the aftermath of the *9/11* attacks. If you were to ask of other examples of torture by the American government, you might be likely to receive a somewhat general or muddled answer along the lines of “I’m sure it exists, but I don’t know of any specific examples.” Many may also believe that torture was instituted on a large scale for the first time during the War on Terror, which began after *9/11* and continues through this day. However, this belief is far from the reality –

⁸ Mark Davis, “The Haspel Obstacle: Enhanced Interrogations Are Not ‘Torture,’” *Townhall*. May 11, 2018, Accessed November 24, 2018, <https://townhall.com/columnists/markdavis/2018/05/11/the-haspel-obstacle-enhanced-interrogations-are-not-torture-n2479426>.

government mandated torture, in varying forms, has been a cornerstone of American defense strategy since the beginning of this nation. In fact, the government has publicly disclosed acts of torture on dozens of occasions against various groups for a multitude of reasons that all were intended to “advance the nation’s interests,” whatever those interests may have been at any given point in time.

To offer a better understanding and framework for arguments both in favor of and against the use of torture, I will first discuss a very brief history of some notable uses of torture in America’s past. The following section, while intentionally not exhaustive as this is not intended to be a historical work, will feature a discussion and analysis of the past use of government sponsored torture in the United States. This section is included in an effort to give historical context that can help answer the question of whether such practices can ever be justifiable and permissible.

Government sponsored torture has been present in American society to some degree since before America was even a country of its own. In spite of the freedoms and protections they offered by creating and ratifying the Constitution, even the Founding Fathers supported forms of torture in different ways. In support of this notion, Brett Wilkins, an editor-at-large for *US News* wrote in “A Brief History of American Torture” that “the same Founding Fathers who constitutionally proscribed ‘cruel and unusual punishment’ endorsed and committed the most heinous crimes against both Native Americans and black slaves.”⁹ For example, President Thomas Jefferson advocated in a letter written in 1780 to George Rogers Clark for the forcible

⁹ Wilkins, Brett. "A Brief History of American Torture." CounterPunch.org. May 07, 2018. Accessed November 13, 2018. <https://www.counterpunch.org/2018/05/08/a-brief-history-of-american-torture/>.

removal or “extermination” of Virginia’s native peoples in the event of land disputes.¹⁰ Another dark example of torture in American history is the enslavement of millions of African Americans from the time of the Jamestown Colony through the late 19th century. While extermination and slavery are not torture in themselves, the government’s support of these practices created an avenue by which torture could be conducted freely without repercussions. The government systematically allowed for the control and ownership of individuals and did not outlaw or in many cases even discourage the torture and abuse of natives and slaves.¹¹ In fact, the Senate failed nearly two hundred times to pass a bill that outlaws lynching despite support from multiple presidents and the House of Representatives, finally passing such a bill in February of this year, long after the decline of the torturous practice.¹²

State-sponsored torture by the Federal government continued and, in many ways, proliferated in the 20th century. In 1903, President Theodore Roosevelt authorized the waterboarding of Filipino detainees as part of American military efforts related to the Filipino-American War.¹³ The United States’ use of torture further grew following the end of World War II due to rising fears of communism and the impending rise of the Soviet Union. Beginning in the 1960s, the Central Intelligence Agency (CIA) and the military began producing torture manuals that explained specific torture practices to be used against enemies.¹⁴ CIA torture

¹⁰ Jefferson, Thomas. "From Thomas Jefferson to George Rogers Clark, 1 January 17[80]." National Archives and Records Administration. Accessed November 12, 2018. <https://founders.archives.gov/documents/Jefferson/01-03-02-0289>.

¹¹ "Slavery in the US," Lumen, accessed April 01, 2019, <https://courses.lumenlearning.com/boundless-ushistory/chapter/slavery-in-the-u-s/>.

¹² Eli Watkins and Ted Barrett, "Senate Passes Anti-lynching Bill in Renewed Effort to Make It a Federal Hate Crime," CNN, February 14, 2019, Accessed March 13, 2019. <https://www.cnn.com/2019/02/14/politics/senate-anti-lynching-harris-booker/index.html>.

¹³ Brett Wilkins, "A Brief History of American Torture," CounterPunch.org, May 07, 2018, Accessed November 13, 2018, <https://www.counterpunch.org/2018/05/08/a-brief-history-of-american-torture/>.

¹⁴ Ibid.

practices again expanded into the heart of the Cold War as demonstrated in the now declassified Project MK-Ultra in which the agency conducted hundreds of clandestine experiments, sometimes on unwilling American citizens – to evaluate the potential use of LSD and various other drugs for mind control, information gathering, and psychological torture from 1953 to 1975.¹⁵ The CIA’s Vietnam War era torture project – the Phoenix Program, which was “designed to destroy the ‘civilian infrastructure,’” resulted in the killing of 20,587 Vietcong suspects.¹⁶ In light of these ever-growing torture practices into the middle and late 20th century, perhaps no exhibition of torture has been more publicized, ridiculed, and in some cases praised, than the acts of the George W. Bush administration in fighting terror in the Middle East in the early to mid-2000s.

The attacks of September 11, 2001 devastated the hearts of Americans, exposed the nation’s vulnerabilities to new emerging threats, and most importantly served as the catalyst for what would eventually become an extended and grueling “War on Terror” that extends through this day. With so much uncertainty regarding the forces responsible for the attacks and the potential for additional threats to materialize in the hours and days following led the Bush administration to commence a historic campaign to retrieve information from individuals conspiring to commit acts of terrorism. This defense campaign, while interpreted by many as acts of torture, was publicly and privately referred to as “enhanced interrogation.”¹⁷ In the early stages of this program, the administration worked diligently to prevent the perception of

¹⁵ "MK-Ultra," History.com, June 16, 2017, Accessed November 14, 2019, <https://www.history.com/topics/us-government/history-of-mk-ultra>.

¹⁶ Barbara Myers, "The Secret Origins of the CIA's Torture Program and the Forgotten Man Who Tried to Expose It," The Nation, June 29, 2015, accessed March 27, 2019, <https://www.thenation.com/article/secret-origins-cias-torture-program-and-forgotten-man-who-tried-expose-it/>.

¹⁷ "CIA Tactics: What Is 'enhanced Interrogation'?" BBC News, December 10, 2014, Accessed October 26, 2018, <https://www.bbc.com/news/world-us-canada-11723189>.

equivocation between enhanced interrogation and torture, with it choosing to keep many of its more controversial activities hidden from the public. Despite the administration's push to conceal and downplay the controversial actions of several government organizations, most notably the Central Intelligence Agency (CIA), it became increasingly clear as time passed that little distinction existed between enhanced interrogation and torture.¹⁸

In contrast to the reality of what was taking place, the Federal government held the official position that no government agencies were facilitating anything that was expressly illegal or immoral. In addition to simply arguing that torture was not taking place, and perhaps ironically so, President Bush condemned Saddam Hussein's torture of Iraqi prisoners at his 2004 State of the Union Address, saying "If this isn't evil, then evil has no meaning."¹⁹ At the same time, no senior administration officials expressly refuted the specific allegations of abusive interrogations presented by the media. Furthermore, no officials unequivocally stated that U.S. policy outlaws the "enhanced interrogation" techniques described in media accounts.²⁰

In the wake of growing controversy surrounding allegations of the administration's use of torture, Bush would later publicly apologize saying "the war on terrorism is about values" and he pledged that as it fights, the United States will always stand for "the non-negotiable demands of human dignity."²¹ In spite of his comments, the enhanced interrogation acts continued; in a shock

¹⁸ "Getting Away with Torture | The Bush Administration and Mistreatment of Detainees," Human Rights Watch, August 31, 2017, Accessed October 29, 2018, <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#>.

¹⁹ "The Legal Prohibition Against Torture," Human Rights Watch, July 14, 2009, Accessed October 29, 2018, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

²⁰ "Getting Away with Torture | The Bush Administration and Mistreatment of Detainees," Human Rights Watch, August 31, 2017, Accessed October 29, 2018, <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#>.

²¹ Ibid.

to people around the world, photographs of Iraqi prisoners at Abu Ghraib prison in Baghdad, “hooded, naked, attached to wires, attacked by dogs, forced to simulate sex acts and assume humiliating and painful positions” all administered by smiling U.S. military personnel were circulated worldwide.²² Despite President Bush’s apology, his viewpoint on state-sponsored torture is probably best represented by his answer to whether or not he should approve an interrogation technique known as waterboarding on September 11 mastermind Khalid Sheikh Mohammed. Bush replied quickly and sharply, “Damn right.”²³

The inauguration of President Barack Obama in January 2009 brought great change to the Federal government’s use of torture. After his inauguration, he took steps to ban torture and close overseas Black sites.²⁴ However, despite his campaign promises, he chose to largely sweep Bush-era torture practices “under the rug” in his failure to prosecute CIA torturers.²⁵ More specifically, shortly after taking office his attorney general at the time said the new administration “would not prosecute anyone who acted in good faith and within the scope of the legal guidance” given to the CIA by Bush administration officials.²⁶ At any rate, Obama’s administration did take measures to roll back torture and increase transparency about previous torture undertaken by the Federal government. For example, the administration not only banned waterboarding and closed CIA black site torture facilities; it also released many documents that

²² "Getting Away with Torture | The Bush Administration and Mistreatment of Detainees," Human Rights Watch, August 31, 2017, Accessed October 29, 2018, <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees#>.

²³ Ibid.

²⁴ Andrew Breiner, "How Obama Blew His Chance to Stop U.S. Torture," Roll Call, January 26, 2017, accessed April 03, 2019, <https://www.rollcall.com/politics/how-obama-blew-his-chance-to-stop-u-s-torture>.

²⁵ Raf Sanchez, "Why Won't Barack Obama Prosecute CIA Torturers?" The Telegraph, December 12, 2014, accessed November 2, 2018, <https://www.telegraph.co.uk/news/worldnews/barackobama/11291476/Why-wont-Barack-Obama-prosecute-CIA-torturers.html>.

²⁶ Jennifer Epstein, "After the Outrage, What's Next?" POLITICO, December 10, 2014, Accessed November 13, 2018, <https://www.politico.com/story/2014/12/cia-torture-report-next-step-113449>.

corroborated the existence of torture during the Bush years. Obama administration officials also authorized the release of the KUBARK manuals from 1983 which were detailed guides that instructed torturers how to properly carryout "Threats and Fear, Pain, and Debility" as well as recommendations on prisoner interrogation including the use of threats of violence and deprivation.²⁷

The 2016 election of Donald Trump as the 45th President is also likely to dramatically change the nation's use and acceptance of torture as used for national security purposes. Since the early days of his campaign, President Trump has been an outspoken supporter of practices such as waterboarding and has expressed support for other, more intense methods of extracting information if necessary. When asked in a CNN campaign interview if he would "allow US Interrogators to waterboard terrorist prisoners in order to extract information, Trump answered with a simple, enthusiastic, and resounding "Absolutely!"²⁸ Later on in the same interview, Trump continued his support for waterboarding saying "of course it's bad, but it's like...it's not chopping off heads folks, that I can tell you."²⁹ He furthered his support of waterboarding saying "I would approve it immediately but make it also much worse. They ask me the question: 'What do you think of waterboarding?' Absolutely fine...but we should go much stronger than waterboarding."³⁰ President Trump's public positions on torture and other advanced forms of

²⁷ Gopal Ratnam, "CIA Ignored Its Own Lessons in Turning to Torture After 9/11," *Foreign Policy*, December 11, 2014, accessed April 03, 2019, <https://foreignpolicy.com/2014/12/10/cia-ignored-its-own-lessons-in-turning-to-torture-after-911/>.

²⁸ CNN, "Donald Trump: Torture Works," YouTube video, posted by CNN, 17 February 2016, <https://www.youtube.com/watch?v=Kpj3pp10wD8>.

²⁹ *Ibid.*

³⁰ *Ibid.*

interrogation suggest that the practice may become more widespread and standardized during his presidency.

Not only have Trump's comments reinforced his belief in torture, his actions and choices have done so as well. For example, he appointed Gina Haspel, who previously managed a CIA black site during the Bush era where at least one detainee, Abd al-Rahim al-Nashiri, was tortured, as CIA director.³¹ While it is not necessarily the case that Haspel's appointment will lead to an increase in the use of torture, given her history and background, it is certainly plausible to view such an outcome as a possibility, if not outright likely. Additionally, while many of the President's comments and actions suggest his support for torture, perhaps the greatest indication is his belief on the effectiveness of torture in which he said "and don't tell me it doesn't work, torture works. Okay, folks?"³² While evidence suggests that the Trump administration is more than likely to reinstitute or increase the presence of torture in America's national security and defense strategy, the question of this research project – whether or not torture is ever justifiable and permissible in the first place – is still in need of proper investigation.



Public Opinion on Practice of Torture

Torture has played a long-standing and dramatic role in America's history. Said succinctly and eloquently by Brett Wilkins in his article titled "A Brief History of American

³¹ Adam Serwer, "Obama's Legacy of Impunity for Torture," *The Atlantic*, March 16, 2018, Accessed November 14, 2019, <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/>.

³² CNN, "Donald Trump: Torture Works," YouTube video, posted by CNN, 17 February 2016, <https://www.youtube.com/watch?v=Kpj3pp10wD8>.

Torture,” “in a nation built on a foundation of genocide and slavery, horrific violence, including widespread torture, was a critical tool for securing and maintaining white dominance in the same way that great global violence has been crucial to perpetuating America’s superpower status in modern times.”³³ Despite this long record of torture in the name of American exceptionalism, most Americans probably do not take much time to consider the idea of torture, other than maybe determining that it is either acceptable or impermissible. Wilkins argues that “when most Americans do think of their own country’s torture, if they think of it at all, they usually imagine it to be a regrettable departure [from] the civilized norm misguidedly perpetrated amid the terror and fury ignited by the deadliest attack on US soil in generations.”³⁴ This statement, of course, is in reference to the September 11th attacks that shocked and outraged the entire nation. What Wilkins means to suggest is that on one hand, when tasked with answering the torture question, most Americans’ responses only address torture that is conducted in retaliation such as with the 9/11 case. On the other hand, he suggests that most Americans believe it to be an unfortunate, yet acceptable necessity that is carried out in the name of national security, even if it is an inherently immoral and abhorrent practice.

As shown through various data in the following paragraphs, American public opinion on torture is actually quite mixed, with many studies and surveys showing near identical opposition and support. While the moral and philosophical questions that this research seeks to answer cannot and should not be answered by prevailing attitudes and beliefs, this stark distinction in the beliefs of the American public provides an even greater motivation for answering the research question at hand in the first place. Even if the answer to this question is easy for some, there is

³³ Brett Wilkins, "A Brief History of American Torture," CounterPunch.org, May 07, 2018, Accessed November 13, 2018, <https://www.counterpunch.org/2018/05/08/a-brief-history-of-american-torture/>.

³⁴ Ibid.

significant disagreement among the public nationwide, which leaves us wondering the causes of such a wide range of views. For this reason, public opinion data is included in this research – that is, for framing and context in explaining why this research question of state-sponsored torture’s justifiability is worthy of study at all.

Actual public opinion data paints a very similar picture for Americans’ perceptions on torture in comparison to what Wilkins puts forward. A poll conducted in Fall of 2016 by Pew Research Center found that Americans are almost evenly divided on the use of torture in the nation’s anti-terror efforts (See Figure 1 on Page 20). More specifically, when the 4,265 respondents were asked of their opinions on torture, 48% said that there are some circumstances in which the use of torture is acceptable in the government’s anti-terror efforts while 49% said there are no circumstances under which torture should ever occur.³⁵ Despite the near even split, the study did find notable differences among different demographics and political groups. For example, men were somewhat more likely to say that some circumstances existed with 53% saying yes, in comparison to 44% of women.³⁶ Additionally, Republicans were far more likely than Democrats to say that there are some circumstances in which US torture is acceptable; 71% of Republicans and Republican-leaning independents in comparison to just 31% of Democrats and Democrat-leaning independents.³⁷

A series of similar polls also done by Pew from July of 2004 through August of 2011 found similar, but slowly shifting results (See Figure 2 on Page 20). The 2004 poll found 53% of

³⁵ Alec Tyson, "Americans Divided over Use of Torture," Pew Research Center, January 26, 2017, Accessed January 9, 2019, <http://www.pewresearch.org/fact-tank/2017/01/26/americans-divided-in-views-of-use-of-torture-in-u-s-anti-terror-efforts/>.

³⁶ Ibid.

³⁷ Ibid.

Americans to be in opposition, and 43% to be in favor.³⁸ The 2011 poll indicated a slight, but notable increase in support with a narrow 53% majority in support and 42% saying torture could rarely or never be justified.³⁹ The 2016 poll marks a notable shift with the respondents being split almost evenly between yes and no in comparison to significantly greater opposition to torture in the 2004 poll. Still, the results of Pew's several polls over the last fifteen years suggest that public support for torture is holding steady, if not slightly growing.⁴⁰

An additional poll, titled "People on War," conducted by the International Committee of the Red Cross (ICRC) between June and September of 2016 found that nearly half of Americans find torture to be acceptable.⁴¹ The poll, which surveyed more than 17,000 people from sixteen different countries, found that 46% of Americans believe it is acceptable to torture enemy combatants, while 30% are opposed to the practice and another 24% unsure or unwilling to answer.⁴² While the poll suggests that a plurality of Americans likely support torture, at least under certain conditions, what is perhaps more telling is the change in poll responses over time.

In 1999 when the ICRC last conducted its "People on War" poll – 65% of Americans said the US could not torture captured enemies.⁴³ Furthermore, the poll found that 54% of Americans considered torture "wrong", which is a smaller proportion than in any other population polled except for those of Israel and Palestine (See Figure 3 on Page 21 for data comparing all sixteen

³⁸ Bruce Drake, "Americans Have Mixed Views on Use of Torture in Fighting Terrorism," Pew Research Center, December 09, 2014, Accessed January 9, 2019, <http://www.pewresearch.org/fact-tank/2014/12/09/americans-views-on-use-of-torture-in-fighting-terrorism-have-been-mixed/>.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ "People on War 2016," International Committee of the Red Cross, March 28, 2017, Accessed December 29, 2018, <https://www.icrc.org/en/document/people-on-war>.

⁴² Ibid.

⁴³ Ibid.

countries).⁴⁴ When asked separately if a captured enemy combatant could be tortured to obtain important military information, just 30% of American respondents said no, fewer than that of all of the other countries' respondents with the exception of Nigeria and Israel who were very close behind (See Figure 4 on Page 21 for data comparing all sixteen countries).⁴⁵ When respondents who answered yes to the preceding question were asked the same question again after being told that torture is illegal and banned by the United Nations Convention on Torture, the vast majority, 59%, did not change their positions (See Figure 5 on Page 22 for graphical data).⁴⁶ The findings of the ICRC's poll are significant in that they suggest that American support for state-sponsored torture against enemies is growing and is already significantly higher than in other nations.

While the research done by both Pew and the ICRC might seem to indicate that Americans are becoming more amenable to the idea of government-sponsored torture against the nation's enemies, that is not necessarily the case. There is not yet enough available evidence to conclude that this change in public opinion is long-term. It is certainly plausible that the increase in acceptance of torture is directly related to the War on Terror and the recency of 9/11 in the memory of many or even the escalated political rhetoric on the topic during the 2016 presidential campaign season. On the other hand, there could also be other factors that influenced the results in both polls such as the sample set used, polling method, and other situational factors that may be difficult to discern upon first glance. Regardless, the purpose of this research is not to study public opinion. Even though analyzing appropriate research relating to public opinion of torture is relevant to this project, the question remains whether or not torture is ever justifiable.

⁴⁴ "People on War 2016," International Committee of the Red Cross, March 28, 2017, Accessed December 29, 2018, <https://www.icrc.org/en/document/people-on-war>.

⁴⁵ Ibid.

⁴⁶ Ibid.



Figure 1⁴⁷

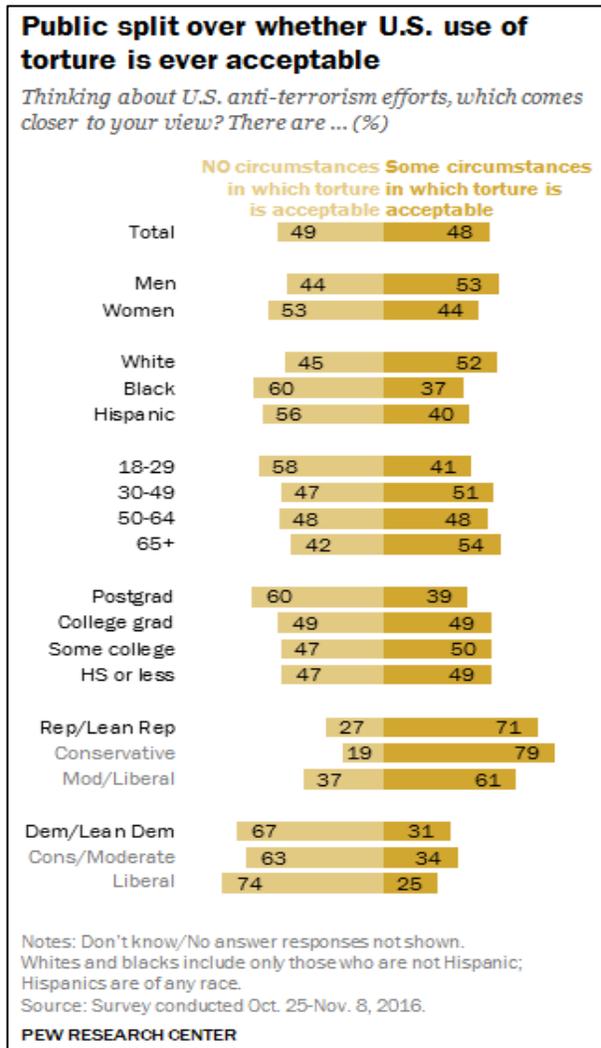
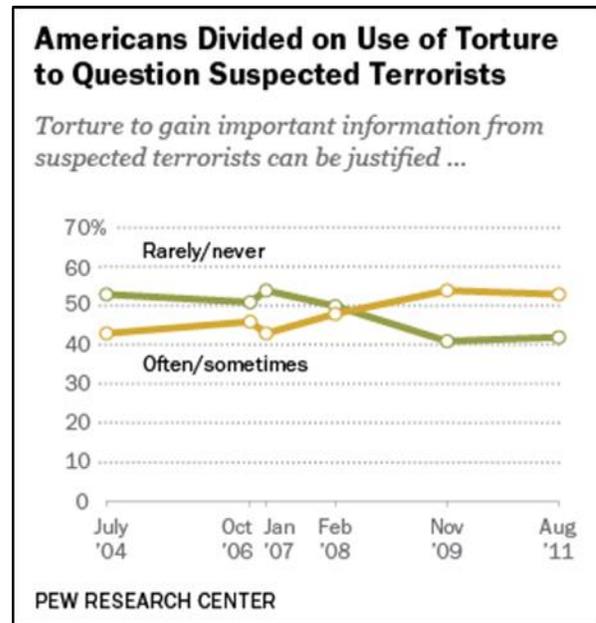


Figure 2⁴⁸



⁴⁷ Alec Tyson, "Americans Divided over Use of Torture," Pew Research Center, January 26, 2017, Accessed January 9, 2019, <http://www.pewresearch.org/fact-tank/2017/01/26/americans-divided-in-views-of-use-of-torture-in-u-s-anti-terror-efforts/>.

⁴⁸ Bruce Drake, "Americans Have Mixed Views on Use of Torture in Fighting Terrorism," Pew Research Center, December 09, 2014, Accessed January 9, 2019, <http://www.pewresearch.org/fact-tank/2014/12/09/americans-views-on-use-of-torture-in-fighting-terrorism-have-been-mixed/>.

Figure 3⁴⁹

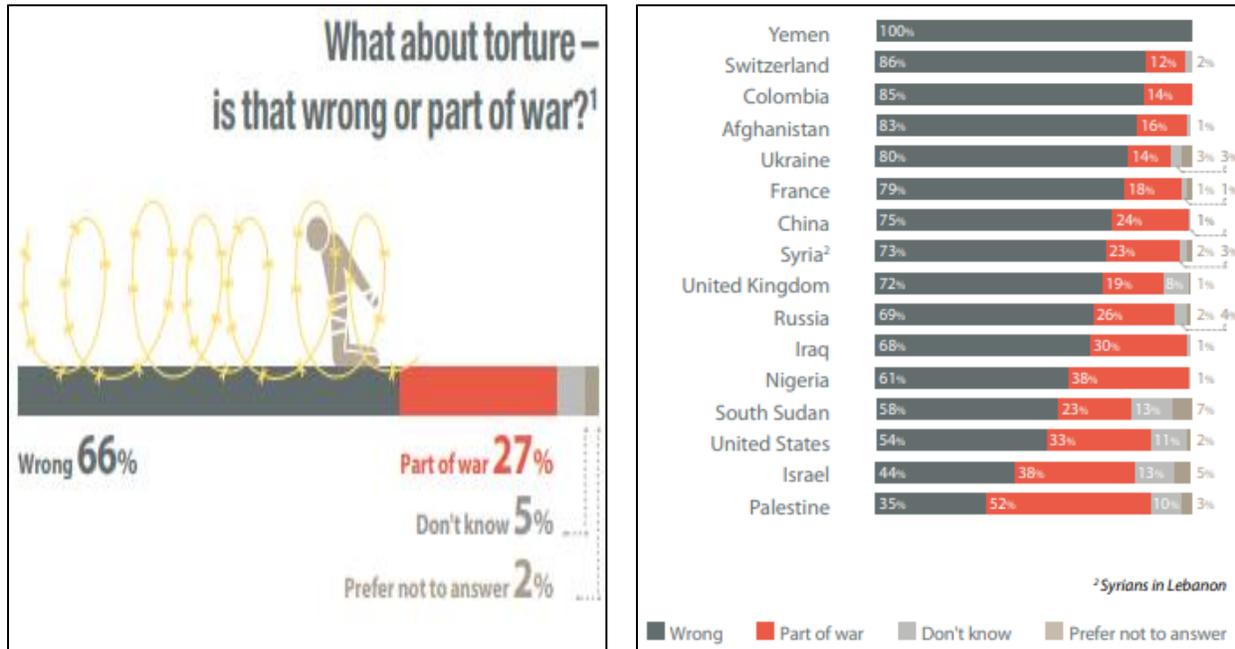
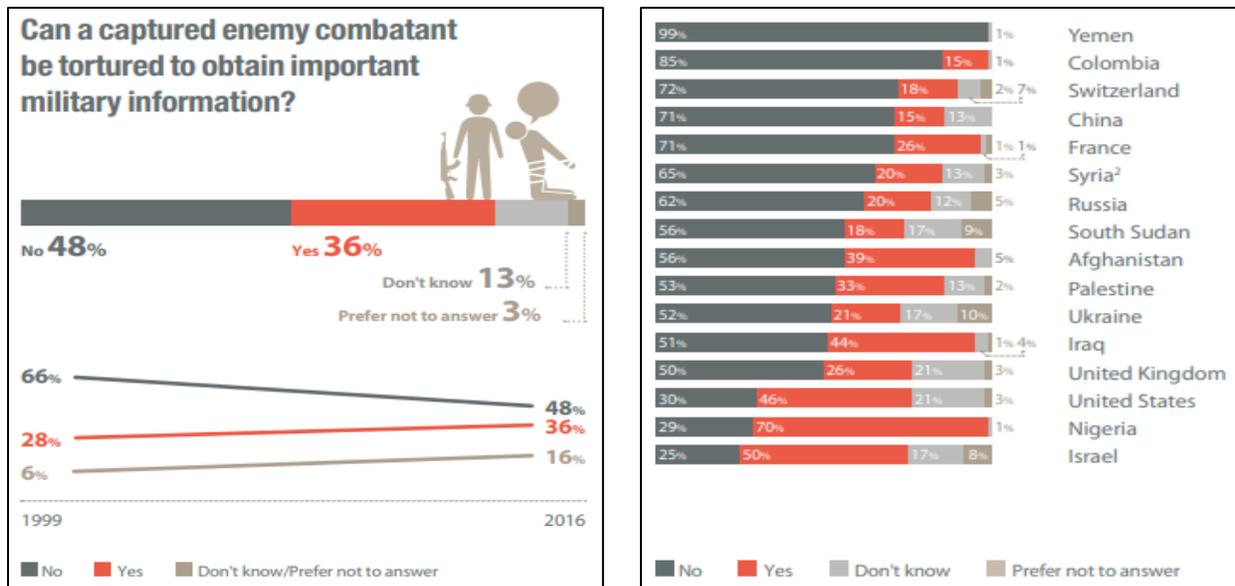
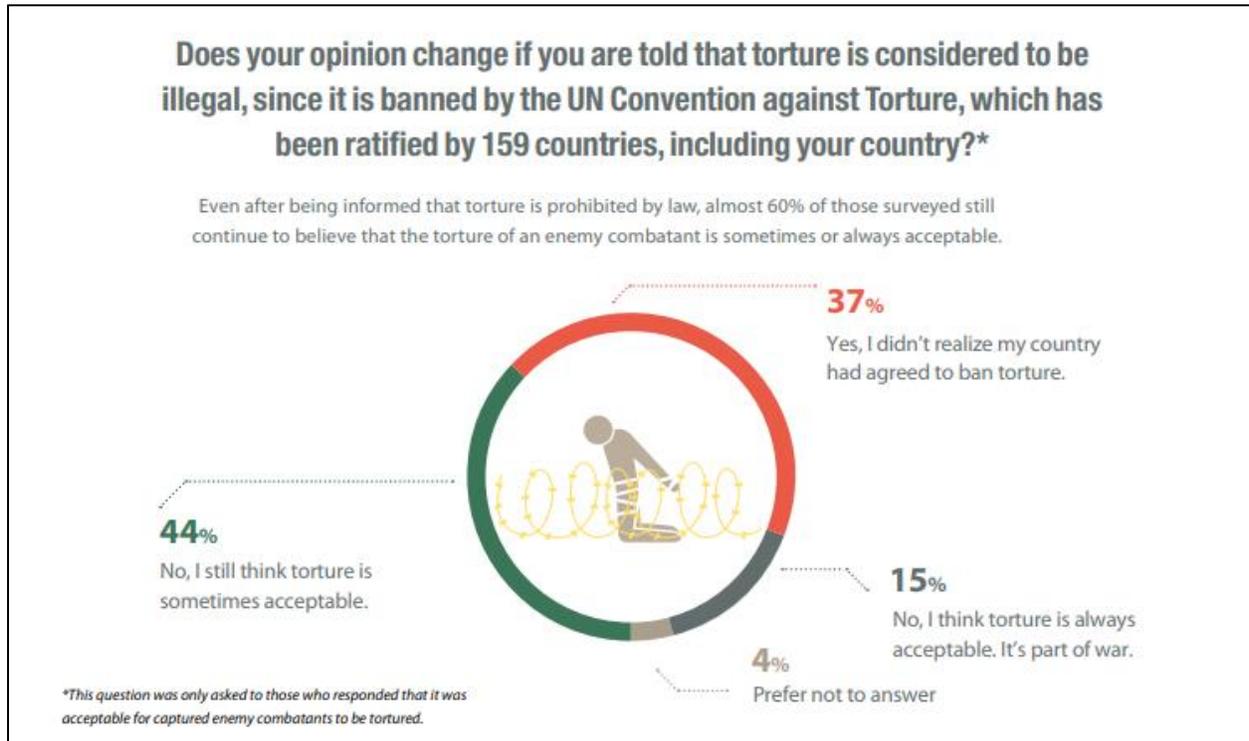


Figure 4⁵⁰



⁴⁹ "People on War 2016," International Committee of the Red Cross, March 28, 2017, Accessed December 29, 2018, <https://www.icrc.org/en/document/people-on-war>.

⁵⁰ Ibid.

Figure 5⁵¹

The Nature of the Torture Dilemma

A final point of discussion to set the stage before presenting and analyzing arguments from both sides is an explanation of the dilemma that is causing controversy over this issue in the first place. A considerable oversimplification of the core arguments of each side is that we must choose between either national security or human rights when it comes to properly defending against our enemies. The practice of torture is controversial because proponents view it as a regrettable, yet necessary evil to protect ourselves and our national interests while opponents

⁵¹ "People on War 2016," International Committee of the Red Cross, March 28, 2017, Accessed December 29, 2018, <https://www.icrc.org/en/document/people-on-war>.

view it as an inherent injustice and compromise of fundamental human rights. However, perhaps security and human rights are not necessarily mutually exclusive, as some actors on either side might lead one to believe. At any rate, I will now look to the core arguments of both sides in an effort to come to a conclusion on whether state-sponsored torture by the U.S. government can ever be justified under any circumstances.



Key Arguments in Practice

As mentioned in the preceding section, proponents of government directed torture largely base their arguments on the importance of national security and the protection of the citizenry of a state as a means of justification for the practice. In keeping with this theme, the discussion explaining arguments in support of torture that follows will include a four-part analysis consisting of an explanation of the ticking time bomb scenario, an application of the ethical theory of utilitarianism, a philosophical argument rooted in the role of government and its primary functions, and the derived benefit of institutionalizing torture as a lawful practice. That analysis will be followed by a similarly structured four-part analysis of arguments presented by opponents of torture, who believe that torture is inherently immoral and represents a direct violation of the human rights that all citizens are entitled to. That discussion will include a moral argument concerning the violation of fundamental human rights, an analysis based on the ethical theory deontology, a legal argument employing the U.S. Bill of Rights and other relevant Federal laws, and finally a pragmatic argument relating to the efficacy of torture as an information-seeking method.



Arguments in Support of State-Sponsored Torture

Proponents of the use of state-sponsored torture often argue that national security and assurance of the public safety are direct responsibilities of the state that should be prioritized over all else. They claim that torture, while certainly not the preferred method of gathering critical information, is ethically justifiable as a means of protecting the security and interests of the citizens of the United States when no other suitable method is available. They typically posit that torture by no means should be the go-to method of obtaining information, but when specific circumstances arise and all other alternatives are ineffective, then it can be justified. They might also agree that torture is an immoral practice, but still hold that it is justifiable if innocent lives are at risk and no other option can be exercised to ensure public safety. It is difficult to believe that the many Americans who support torture do so because they find torture to be a moral, humane, and honorable practice. Instead, it is more likely that they view torture as an “unfortunate necessity” or “necessary evil” that must be regretfully undertaken to promote the general welfare of the innocent citizens of the state.



The Ticking Time Bomb Scenario

Proponents of torture seek to justify their belief through a wide variety of arguments. While many of these explanations tend to be rooted in ethical theories and works of philosophy, proponents also seek to find support for state-sponsored torture through both pragmatic arguments and application of real-world situations. Essentially all arguments that they employ center around some form of a cost-benefit analysis in which the extent of the harm done by the acts of torture is compared to the extent of the benefits received by whatever information is

gained from the interrogation methods. The first major argument that follows the idea of a cost-benefit analysis is one of the most thoroughly discussed and debated concepts in the history of the torture question: the ticking time bomb scenario. This concept of the ticking time bomb scenario stems from an ethical thought experiment first pioneered by utilitarian Jeremy Bentham in his 1804 essay *Means of Extraction for Extraordinary Reasons*.

In his essay, Bentham asks the reader to consider an occasion in which reasonable suspicion exists that a suspect has information that, if attained, could reduce the suffering or forthcoming suffering of countless innocent civilians.⁵² Bentham further pushes the reader to imagine that “at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if inflicted by the hand of justice, would universally be spoken of under the name of torture.”⁵³ He then asks the reader a heavy and open-ended question: “should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced” in order to save or relieve the suffering of the hundreds of innocents?⁵⁴

Brought into simpler terms, Bentham asks the reader to consider whether the immoral act of torture on one criminal can be justified if committing it leads to the reduction in the equal suffering or torture of the many, especially when those individuals have committed no such crime. Even though Bentham is directly asking if torture of suspects is permissible when it can prevent the harm of others, what he is indirectly asking us to do is choose the solution that yields

⁵² Jeremy Davies, "Interdisciplinary Studies in the Long Nineteenth Century," 19, December 01, 2012, accessed December 05, 2018, <https://19.bbk.ac.uk/articles/10.16995/ntn.643/>.

⁵³ Ibid.

⁵⁴ Ibid.

the greatest benefit to the many or the greatest utility – an ideal which will be further discussed in sections to come. He is not asking the reader if the suspect should be tortured for simply committing a crime or harboring information; he instead suggests that torture should be implemented if doing so will end or prevent the suffering of the civilians – a decision that certainly produces greater benefits for more people than the harm done to the one criminal.

Bentham’s concept of the ticking time bomb scenario is nothing more than the foundation for the age-old “trolley problem” in ethics. This thought experiment, developed by Phillipa Foot in 1967, and further investigated by many, including Judith Jarvis Thomson, concerned a very similar moral dilemma that removed the presence of a criminal. While this example has enjoyed numerous versions and variations over the years, the original iteration created by Foot follows. The reader is told to imagine that he or she is the driver of a trolley. As the trolley turns around a bend, five workmen come into view who are unable to leave the tracks before your trolley runs over them. You step on the brakes, but unfortunately, they do not work and the train continues toward the workmen. You spot a spur of track leading off to the right. If you decide to change tracks, the five workmen will be saved. However, there is one workman on this spur of track who is equally unable to vacate the tracks in time. He will certainly be killed if you decide to switch tracks. Given this background, Foot wages the question: “Is it morally permissible for you to turn the trolley?”⁵⁵

In her journal article “The Trolley Problem,” Judith Jarvis Thomson recalls her experience posing this hypothetical question to many individuals with each one responding that

⁵⁵ Judith Jarvis Thomson, “The Trolley Problem,” *The Yale Law Journal* 94, no. 6 (1985): 1395-415, doi:10.2307/796133.

switching to the other track was either morally *permissible* or morally *required*.⁵⁶ While not all agreed that it was morally required, none found that it would be morally wrong to do so.⁵⁷

Thomson then instructs the reader to consider a follow-up hypothetical situation. Imagine that you are an excellent surgeon, in fact so excellent that every time you perform a transplant, the organs always take and the patients always live. At the moment you have five different patients in need of life-saving organ transplants, but no organ donors are available. Time is almost up for these patients when it is brought to your attention that a healthy young man with the correct blood type has come to the hospital for an annual check-up. You conclude that all you have to do is sacrifice this one healthy patient to save the five dying patients. Realizing this, you ask the patient if he would be willing to die and donate his organs, but he declines. With these considerations in mind, Thomson asks the reader: “Would it be morally permissible for you to operate anyway?”⁵⁸ Thomson continues, saying that everyone to whom she asked this question answered “No, it would not be morally permissible.”⁵⁹

Thomson then wonders, why is it that one hypothetical is moral and the other is not if both decisions result in the death of one individual and the saving of five who would otherwise die? In other words, each results in a net effect of saving four lives. She argues that the distinction lies in the difference between “killing and letting die.”⁶⁰ Thomson asserts that Foot would come to a similar conclusion – that turning the trolley is morally permissible, but conducting the surgery is not. In the trolley example, the options are to kill one or kill five –

⁵⁶ Judith Jarvis Thomson, "The Trolley Problem," *The Yale Law Journal* 94, no. 6 (1985): 1395-415, doi:10.2307/796133.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

obviously the best choice is to kill only one. On the other hand, with the surgery example, the options are to kill one or let five die. Foot and Thomson suggest that causing injury is far worse morally than failing to provide aid, arguing that “the former is worse than the latter [in] that the negative duty to refrain from causing injury is stricter than the positive duty to provide aid.”⁶¹ The ticking time bomb scenario and the Trolley Problem discussed in detail by Bentham, Foot, and Thomson both serve as good starting points for discussion on theoretical cases concerning the use of torture, but analysis of real-life twenty-first century applications will probably serve us better in answering the overall research question at stake.

Alan Dershowitz, a well-known criminal defense lawyer and Felix Frankfurter Professor of Law, Emeritus at Harvard University School of Law, brought the ticking time bomb scenario back to life in a series of works he completed following the 9/11 terror attacks and the onset of the War on Terror in the early 2000s. In his iteration of the scenario, which he offers in a 2001 *Los Angeles Times* article titled “Is There a Torturous Road to Justice,” he asks the reader to consider a realistic situation – that law enforcement has captured a suspected terrorist who is believed to have vital information regarding an imminent “large-scale threat.” This individual additionally refuses to disclose any information of the threat which is about to endanger thousands or more innocent citizens.⁶² Dershowitz then asks, “would torturing one guilty terrorist to prevent the deaths of a thousand innocent civilians shock the conscience of all decent people?”⁶³ He assures the reader that doing so certainly would not. In order to prove that it would not, he tells the reader to think of a situation in which a young child has been kidnapped and

⁶¹ Judith Jarvis Thomson, “The Trolley Problem,” *The Yale Law Journal* 94, no. 6 (1985): 1395-415, doi:10.2307/796133.

⁶² Alan M. Dershowitz, “Is There a Torturous Road to Justice?” *Los Angeles Times*, November 08, 2001, Accessed December 12, 2018, <https://www.latimes.com/archives/la-xpm-2001-nov-08-me-1494-story.html>.

⁶³ *Ibid.*

buried in a box with two hours of oxygen. The kidnapper has been apprehended, but refuses to disclose any information about the child's location. Should torture of the suspect be considered?

Dershowitz argues that it is clear that law enforcement would torture the criminal in an attempt to save the innocent child.⁶⁴ In reaching this conclusion, he pivots, asserting that given past history, evidence suggests that when given limited permission to carryout torture, law enforcement personnel will expand its use.⁶⁵ He continues, saying that he has “no doubt that if an actual ticking bomb situation were to arise, our law enforcement authorities would torture.”⁶⁶ He makes the claim that it is clear that authorities will look to torture if and when the ticking time bomb scenario arises, just as it did on the morning of September 11, 2001. The bigger question, he argues, is “whether such torture should take place outside of our legal system or within it.” He believes that if we are to have torture, then it ought to be authorized by law for the many inherent benefits that doing so would bring – benefits that will be analyzed later on in this investigation of the ethics and legality of torture.⁶⁷

When considering either the trolley problem or the ticking time bomb scenario, one might argue that choosing to do nothing is the most morally correct option as doing nothing removes personal fault from the succeeding results. This, however, is not the case – opting to do nothing is selecting an option in and of itself. In fact, one could reasonably argue that doing nothing directly yields personal fault as “we do have a Samaritan responsibility to protect others to the best of our ability when possible.”⁶⁸ When considering just the ticking time bomb dilemma, it

⁶⁴ Alan M. Dershowitz, "Is There a Torturous Road to Justice?" Los Angeles Times, November 08, 2001, Accessed December 12, 2018, <https://www.latimes.com/archives/la-xpm-2001-nov-08-me-1494-story.html>.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security,” (POL 318: Applied Political Ethics, Rollins College, 2017).

becomes even more difficult to accept no action as a solution. In this situation, we have strong reason to believe that a suspect in our custody is harboring vital information that could save countless lives. Regardless if this individual is the perpetrator of the threat at hand, “the refusal to relay such valuable information results in some degree of guiltiness.”⁶⁹

In contrast, the numerous potential victims of the act of terror are assumed to be innocent, at least for the context of this situation. Considering this, it is generally understood that the role of law enforcement is to promote the public safety and remove dangerous offenders from the public arena. It is their duty to fulfill that task, even if that means resorting to torture if necessary. Ultimately, the suspect’s confirmed, or at the very least, highly likely guiltiness, “signifies that he or she has forfeited his or her rights to some degree and no longer deserves the entirety of protections that the innocent citizens are entitled to by the state.”⁷⁰ Torture cannot be justified when directed toward an innocent civilian, but when applied toward a law-breaking criminal for the sake of protecting the innocent, then it is justifiable if no more effective and morally superior options are present.



Torture from a Utilitarian Standpoint

The ticking time bomb scenario, as introduced and championed by its proponents, provides a strong case for state-sponsored torture when presented in terms of protecting the innocent rather than simply punishing the accused. It seeks to determine the morality and justifiability of torture based on a cost-benefit analysis of the suffering induced by the torture on

⁶⁹ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security,” (POL 318: Applied Political Ethics, Rollins College, 2017).

⁷⁰ Ibid.

the suspect in comparison to the suffering prevented for the innocent. The argument holds that the prevention in suffering of the many more than off-sets the suffering imposed on the few. This argument, on a deeper level, is nothing more than an extrapolation of the philosophy of utilitarianism which also considers the importance of a cost-benefit analysis when gauging the morality of a decision.

Being that the nature of this research topic concerns whether a certain political phenomenon, in this case the use of torture by the state, is ever justifiable, it follows that any reasonable and properly thorough analysis should include arguments based in political philosophy. In this application, utilitarianism is the philosophy of moral decision-making that most strongly supports, and in some cases even mandates, the use of torture by the government. The utilitarian ethical theory is most generally understood to be “the view that the morally right action is the action that produces the most good.”⁷¹ One important point to note before delving into the specifics of the theory, is that it is a form of consequentialism, meaning that the morally correct option is entirely dependent on the results or consequences produced.⁷² In contrast with egoism, from a strictly utilitarian standpoint, one is required to maximize good consequences for all, not just oneself.⁷³ Utilitarianism is also unique in that it is distinguished by impartiality – all individuals’ happiness are viewed equally.⁷⁴

The concept of “good” is defined differently depending on specific subtypes of utilitarianism and the specific philosopher studying the theory. For the classic utilitarians, Jeremy Bentham and John Stuart Mill, good was synonymous with pleasure. In other words, the morally

⁷¹ Julia Driver. "The History of Utilitarianism," Stanford Encyclopedia of Philosophy, September 22, 2014, Accessed November 24, 2018, <https://plato.stanford.edu/entries/utilitarianism-history/>.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

correct option is that which yields the maximum pleasure for the maximum number of people. They defined the opposite of pleasure as pain. Bentham, in *An Introduction to the Principles of Morals and Legislation*, famously declared that people seek pleasure and the avoidance of pain, since they “...govern us in all we do, in all we say, in all we think...”^{75,76} In addition to admitting this natural tendency, he also put forward the principle of utility as the standard for the actions of both individuals and the government. Decisions and their resulting actions can be morally approved when they promote happiness and pleasure, but not when they cause unhappiness and pain.⁷⁷ Bentham further stressed that lawmakers must be sensitive to changing social factors to determine what decisions maximize utility at any given time. This is the case because a law that is good at one point in time may be bad in another – the consequences and effects of laws and decisions change over time.⁷⁸

John Stuart Mill, a follower of Bentham, admired and followed much of his work even though he disagreed with some of his beliefs, namely on the nature of happiness. While Bentham believed that there were no qualitative differences between different “pleasures,” Mill held that Bentham was too egalitarian in his hedonistic approach, instead asserting that simple-minded, sensual pleasures were less valuable than “more sophisticated and complex pleasures.” He posited that “intellectual pleasures are of a higher, better, sort than the ones that are merely sensual, and that we share with animals.”⁷⁹ He made additional distinctions between pleasures

⁷⁵ Julia Driver, "The History of Utilitarianism," Stanford Encyclopedia of Philosophy, September 22, 2014, Accessed November 24, 2018, <https://plato.stanford.edu/entries/utilitarianism-history/>.

⁷⁶ Jeremy Bentham and Laurence J. Lafleur, 1948, *An Introduction to the Principles of Morals and Legislation* (New York: Hafner Pub. Co).

⁷⁷ Julia Driver, "The History of Utilitarianism," Stanford Encyclopedia of Philosophy, September 22, 2014, Accessed November 24, 2018, <https://plato.stanford.edu/entries/utilitarianism-history/>.

⁷⁸ Ibid.

⁷⁹ Ibid.

relating to “intensity, duration, certainty or uncertainty, propinquity or remoteness and more.”⁸⁰ Despite this key difference, Mill did agree with Bentham in that people desire happiness – the utilitarian end – and that general happiness is “a good to the aggregate of all persons.”⁸¹ Both Bentham and Mill supported utilitarianism as a tool to inform law and social policy in a manner that produced the greatest good for the entirety of, or at least most of a state’s citizenry, a virtuous moral cause.⁸²

Applying Mill’s view of happiness, it quickly becomes clear how a utilitarian case for government directed torture can be formulated. The suffering that the innocent ticking time bomb scenario victims would face would be both low-level sensual and high-level intellectual and abstract. Of course, the actual suffering that would occur relating to bodily harm or death would be a decrease in utility alone, but the loss of ability of the victims to live fulfilling, loving, and self-actualizing lives is arguably a much greater degree of suffering than the actual death itself. On the other hand, the suffering of the tortured suspect would be merely sensual in that he or she would be subjected to sensory deprivation and other physical (though short-term) harm. While this is still a decrease in utility for the individual objected to it, the overall decrease is significantly less than that for the innocent.

In “Terrorism, Ticking Time Bombs, and Torture,” author Fritz Allhoff explains that even though utilitarianism can be used to justify torture, it does not provide ethical justification for the implementation of torture in all situations.⁸³ Allhoff asserts that under the doctrine of

⁸⁰ Julia Driver, "The History of Utilitarianism," Stanford Encyclopedia of Philosophy, September 22, 2014, Accessed November 24, 2018, <https://plato.stanford.edu/entries/utilitarianism-history/>.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Fritz Allhoff, *Terrorism, Ticking Time-bombs, and Torture: A Philosophical Analysis* (Chicago: University of Chicago Press, 2012).

utilitarianism, torture would have to “be the least harmful remedy applied to resolve the situation, otherwise utility would not be maximized.”^{84,85} Any “insufferable” exhibition of torture would be unacceptable and morally intolerable if an alternative method of interrogation would elicit the same information and desired result.⁸⁶ In fact, he admitted that while utilitarianism can be used to justify torture, he thinks “that torture is rarely justified, at least in part because it is rarely necessary to prevent a serious and imminent threat , but also because it would rarely be the best way to prevent such a threat.”⁸⁷ Despite the rarity of justified situations, Allhoff still argues that “there can be cases where torture is the lesser evil” based on the concept of utility, but “such a commitment...hardly amounts to an endorsement of terrorism simply because of the relative paucity of those cases.”⁸⁸ Allhoff’s argument is not for wide-reaching justification and implementation of torture, but just for its moral acceptance in a very small percentage of cases that cannot be resolved using other methods.

The utilitarian argument seeks to justify state-sponsored torture through strict consequentialism. It employs a cost-benefit analysis of the suffering induced by the torture in comparison to the suffering prevented by the torture. In this case, utilitarianism justifies any situation in which torture’s use maximizes utility for the maximum number of individuals while simultaneously minimizing suffering and unhappiness as well. Granted, few of these situations exist as all other morally superior options that yield the same result would need to be considered

⁸⁴ Fritz Allhoff, *Terrorism, Ticking Time-bombs, and Torture: A Philosophical Analysis* (Chicago: University of Chicago Press, 2012).

⁸⁵ Fisher, Matthew. “Ethics of the Use of State-Sponsored Torture for National Security” (POL 318: Applied Political Ethics, Rollins College, 2017).

⁸⁶ Fritz Allhoff, *Terrorism, Ticking Time-bombs, and Torture: A Philosophical Analysis* (Chicago: University of Chicago Press, 2012).

⁸⁷ Ibid.

⁸⁸ Ibid, Allhoff uses the word terrorism in place of torture. It is assumed that this word choices reflects a personal belief that state-sponsored torture can be equivocated with a form of state-sponsored terrorism, regardless of intent in its use.

and attempted first. Additionally, the ticking time bomb scenario is also admittedly uncommon, yet still plausible and possible. Further, opponents of this argument are likely to assert that it is too hypothetical in nature and that there is no way to account for uncertainty in expected outcomes. While this consideration does bring about a fair level of concern, proponents would counter that uncertainty is far preferable to certain harm. If torture is not considered and an enemy combatant does not disclose the life-saving information, then we can be certain that the innocent civilians will die. Overall, while utilitarianism may not be a “catch-all” moral theory in that the means, regardless of how immoral they are, are justified by the ends, it does serve as a strong argument in favor of government directed torture.



A Philosophical Argument for Torture: The Role of Government

The primary purpose of government is a concept that has been studied extensively and debated even more diligently by many political philosophers throughout the years. Perhaps the greatest contributions to this discussion on the role of the state have come from many of the great social contractarians including Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, among others. These social contractarians, throughout their various works, sought to explain reasons why individuals relinquished their individual freedoms and consented to a social contract to form the governments that oversee them. The most powerful and respected of these explanations is that people consent to the social contract and give up some of their personal freedoms for the protections and safety that the state can offer them in return, through the creation of a civil society. This idea stems from John Locke’s *Second Treatise on Civil Government*, a

philosophical work that had a profound influence on the Founding Fathers and the development of the American political system.⁸⁹

In the *Second Treatise*, John Locke begins his discussion on the nature and purpose of civil government by defining political power as the:

“right to make laws—with the death penalty and consequently all lesser penalties—for regulating and preserving property, and to employ the force of the community in enforcing such laws and defending the commonwealth from external attack; all this being only for the public good.”⁹⁰

Following his definition of political power, Locke proceeds to discuss the *State of Nature* or the state in which men are *naturally in* to explain political power and derive it from its proper source.⁹¹ He describes a state in which all men are perfectly free to determine their own actions and determine and dispose of their own possessions without the permission of others, essentially “subject only to the limits set by the law of nature.”⁹² He also describes this state as one of equality in which no man has power over another. However, he does note that this liberty does not equate to a license to abuse others where no constraints on one’s behavior exist. Locke continues, explaining that man is entitled to his own self-preservation and can do harm to another person if his motive is anything other than the justified punishment of an offender:

“Everyone is obliged to preserve himself and not opt out of life willfully, so for the same reason everyone ought, when his own survival isn’t at stake, to do as much as he can to preserve the rest of mankind; and except when it’s a matter of punishing an offender, no one may take away or damage anything that contributes to the preservation of someone else’s life, liberty, health, limb, or goods.”⁹³

⁸⁹ John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

He concludes his discussion on the state of nature by stating that all men remain in this state until a special agreement or consent between them to develop a political society is constructed.⁹⁴

After discussing the state of nature, Locke then discusses that state of war which he describes as a “state of enmity and destruction.”⁹⁵ While other social contractarians equated the states of nature and war, such as Thomas Hobbes, who famously referred to the life of a man in the state of nature as “solitary, poor, nasty, brutish, and short,” Locke suggested that the two states were actually quite distant from each other.⁹⁶ Locke asserted that:

“A state of nature, properly understood, involves men living together according to reason, with no-one on earth who stands above them all and has authority to judge between them. Whereas in a state of war a man uses or declares his intention to use force against another man, with no-one on earth to whom the other can appeal for relief.”⁹⁷

When referencing the state of war, he is referring more to conflicts on the individual level rather than between nations. He argues that in the state of war, in the absence of a common authority to act as an arbitrator to resolve disputes, men are forced to implement their own means to protect their liberties and property.

In concluding his discussion on the states of nature and war, Locke claims that with the lack of “authority to decide between contenders, and the only appeal [being] heaven, every little difference is apt to end up in war.”⁹⁸ This, he reasons, is a great motivation by which men choose to put themselves into a society and leave the state of nature.⁹⁹ Even if consenting into a civil society yields the reduction in some freedoms such as the ability to fully do as one pleases,

⁹⁴John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

⁹⁵ *Ibid.*

⁹⁶ Thomas Hobbes, *Leviathan* (Oxford: Clarendon Press, 2012).

⁹⁷ John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

Locke posits that men are willing to make such a sacrifice if the consequence is the state's protection of their property, liberties, and welfare.¹⁰⁰ He furthers his pursuit of answering the question of why men choose to become part of a society. Answering his own question, he says:

“Though in the state of nature he has an unrestricted right to his possessions, he is far from assured that he will be able to get the *use* of them, because they are constantly exposed to invasion by others. All men are kings as much as he is, every man is his equal, and most men are not strict observers of fairness and justice; so his hold on the property he has in this state is very unsafe, very insecure. This makes him willing to leave a state in which he is very free, but which is full of fears and continual dangers; and not unreasonably he looks for others with whom he can enter into a society for the mutual preservation of their *lives, liberties* and *estates*, which I call by the general name ‘*property*’.”¹⁰¹

In giving up the “equality, liberty, and executive power” that they had in the state of nature, men have the intention of better preserving their own persons, liberty, and property.¹⁰² Locke puts forward the idea that the sole purpose of the state is that of preserving and protecting the people that it serves. He argues that the very purpose for which men enter into society is “to be safe and at peace in their use of their property” and that the avenue by which “this is to be achieved is the laws established in that society.”¹⁰³ A simple summation of Locke's arguments is that people in a state of nature recognize the need for an executive power to protect their liberties and property, so they consent to forming a civil society to which they will all be bound. They acknowledge that this government's sole purpose is for the people's mutual benefit. That is, to serve them, their safety, and needs and it can be rightfully overthrown, dissolved, and replaced if at any point it ceases to fulfill these functions. Along these lines, Locke would be very likely to support torture (at least on foreign combatants) since he explains that the state is not entitled to uphold the rights of non-citizens. Locke's arguments are important in the debate on torture

¹⁰⁰ John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

¹⁰¹ *Ibid.*, 40.

¹⁰² *Ibid.*, 41.

¹⁰³ *Ibid.*, 43.

because his philosophy serves as the basis for much of the Founding Father's thinking as they drafted America's political system. His ideas on the role of government, which were formulated into America's system of government, directly impact the permissibility and justifiability of torture. However, before directly linking Locke's philosophy with the debate on torture, let's first analyze the intermediary variable which is Locke's impact on America's government.

As mentioned above, the work of many great political thinkers influenced the development and construction of the United States' system of government. Of these philosophers, few had greater impact on American political thought than John Locke. The ideas that he presents in the *Second Treatise on Civil Government* serve as critical foundational elements of the Declaration of Independence, the Constitution, and many state and local level documents. In fact, Donald L. Doernberg, a professor at the Elisabeth Haub School of Law at Pace University points out in "*We the People*": *John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action* that the very first words of the preamble to the Constitution "suggest one element unique to the American Revolution: its outcome was a government created by the people."¹⁰⁴ Doernberg suggests that these beginning words of America's birth of sovereignty echo the concepts put forth by both Locke and another famous social contractarian, Jean Jacques Rousseau.¹⁰⁵ He argues that this idea of popular sovereignty in that states derive "their just powers from the consent of the governed," appearing most directly in

¹⁰⁴ Donald L. Doernberg, "We the People. John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action," *California Law Review*, January 1985, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2069&context=californialawreview>.

¹⁰⁵ Ibid.

the Declaration of Independence, predates the Constitution and can be ultimately credited to Locke and Rousseau.¹⁰⁶

Doernberg further writes in *We the People* that it would be difficult to overstate Locke's influence on "the American Revolution and the people who created the government that followed it."¹⁰⁷ While continually stressing his influence on the Framers, he does make a point to mention that they did not always accept his theories fully without question.¹⁰⁸ In some forms, he argues, American political philosophy went beyond Locke, especially when it came to the removal of government officials and alterations to the government without the need for political revolution.¹⁰⁹ Most notably, the Founding Fathers entirely rejected "Locke's concept of absolute legislative supremacy over the executive and the courts, instead developing the 'three coequal branches,'" which created a marked distinction between the American and English systems of government.¹¹⁰ At any rate, Doernberg holds to his arguments and echoes the following quote from *Constitutional Democracy: A Nineteenth-Century Faith*: generally speaking "the framers established their government in frank Lockean style upon the consent of the governed."¹¹¹

Evidence of Locke's influence on American government exists far beyond just the Declaration of Independence and the Federal Constitution. The Pennsylvania State Constitution of 1776 even more directly suggests a basis in Locke's philosophy than the Declaration of Independence. It states that "every member of society hath a right to be protected in the

¹⁰⁶ Donald L. Doernberg, "We the People. John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action," *California Law Review*, January 1985, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2069&context=californialawreview>.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

enjoyment of life, liberty and property.”¹¹² In simpler terms, the government’s most essential function is to ensure the protection of the lives and rights of the citizens it serves.¹¹³ Steven Heyman, author behind an essay titled *The First Duty of Government: Protection, Liberty and The Fourteenth Amendment*, argues that this declaration, which was later present or implied in other state constitutions, is an expression of a foundational principle in American political thought at the time that the framers were drafting the Constitution.¹¹⁴ This “Right to Protection” principle that Heyman refers to, a concept rooted deeply in English constitutional law, “is the foundation for what the American system of government was developed on – the preservation of life, liberty, and the pursuit of happiness,” which is how it is defined and presented in the Declaration of Independence.¹¹⁵ It is reasonable to argue at this point that a clear connection and influence exists between the philosophy of John Locke and the American system of government as it was created by the Founding Fathers. Now, let us take a closer look at how Locke’s work and, by extension, the foundations of American government support the case for allowing state-sponsored torture.

According to Locke, the number one purpose and duty of a government is to protect and maintain the life, liberty, and property of its people.¹¹⁶ If we simplify this argument, we can say that Locke’s philosophy holds that the government’s primary role is to uphold the *best interests* of all its people. Since not everyone’s interests can be maximized at once, we must default to the

¹¹² Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment* (Duke Law, 1991).

¹¹³ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security” (POL 318: Applied Political Ethics, Rollins College, 2017).

¹¹⁴ Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment* (Duke Law, 1991).

¹¹⁵ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security” (POL 318: Applied Political Ethics, Rollins College, 2017).

¹¹⁶ John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

principle of utility for the government to make its decisions. With this line of thinking, we can logically come to the conclusion that the government's primary role to maximize the utility of its citizens to the best of its ability, otherwise there would be no point in ever leaving the state of nature. When applying this argument directly to the debate on the permissibility of torture the question that must be asked follows: when it comes to the use of state-sponsored torture, what outcome most directly supports the government's number one priority of ensuring the life, liberty, and property of the masses? Asking this question makes the answer become clear. The government should consider torture as an option if no other potential solution would properly protect the rights and freedoms of its people.

Critics of this argument would likely attack this reasoning, arguing that such logic would permit heinous mistreatment and suffering for minority groups if such actions yielded an increase in utility or increases in protections for the masses. However, one must remember that the principle of utility, holds that slight increases in utility for the many do not necessarily justify great increases in suffering for the few. Pleasures and pains remain relative to one another and great suffering for some cannot be overlooked by the government. However, in the case of torture, the suffering of one supposed suspect can be justified since the greatest liberty – the right to life – is what is at stake for the many. All in all, if according to Locke, the number one purpose of government is to ensure the life, liberty, and property of its people, then it certainly follows naturally that that government would seek out any means reasonable to do so. Otherwise, it would run the risk of no longer serving its people and would be liable to be rightfully overthrown by the people in which it is intended to serve.



Benefits of Institutionalizing Torture

A final argument I will discuss that proponents of state-sponsored torture often look to is an analysis of the many benefits that can arise from institutionalizing and regulating torture as a practice. There are many examples in American history where outlawing actions or practices has led to even more unfavorable consequences than intended. Perhaps the most relevant example that comes to mind is the Prohibition Era. Illegalizing the production and consumption of alcohol led to the creation of illegal and unregulated productions, large scale smuggling operations, many cases of tax evasion, and speakeasies that were hotbeds for gangster activity and other high-profile crimes.¹¹⁷ The repeal of Prohibition through the 21st Amendment in 1933 largely brought an end to this period of gangsterism and allowed for the complete regulation of the alcohol industry in the United States. As a result, repealing Prohibition led to a marked decline in organized crime and underground bootlegging operations.¹¹⁸ In other words, legalization of alcohol allowed for its production and consumption to be regulated which improved both the safety and interests of the public. Many proponents argue that this same logic applies to the debate on state-sponsored torture.

In the same way that legalization and regulation allowed for greater transparency, safety, and standardization of the production and consumption of alcohol, proponents argue that the same results would materialize for the legalization and regulation of state-sponsored torture. Alan Dershowitz of Harvard Law is likely one of the strongest advocates of this idea. In an article written for *Reuters* titled, “The Case for Torture Warrants,” he argues that the case for

¹¹⁷ Mark Thornton, “Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure,” *Cato Institute*, 17 July 1991. <https://object.cato.org/pubs/pas/pa157.pdf>

¹¹⁸ *Ibid.*

standardized torture practices through warrants is strong and clear.¹¹⁹ Dershowitz begins this article considering a “rational discussion” on the question of torture. He notes that such discussions are emotionally difficult, especially considering that moral absolutists would not even consider such a discussion to be rational in the first place, as the very idea of a “‘rational’ discussion of torture is an oxymoron.”¹²⁰ He acknowledges the arguments of these moral absolutists, most notably that torture “strips any democracy employing it of the moral standing to object to human rights violations by other nations or groups; and it unleashes the ‘law of unintended consequences.’”¹²¹ He even admits that these arguments are typically empirical in nature and some may even be true as matters of fact. However, he argues that the moral permissibility is not the realistic concern at hand.

Dershowitz argues that when confronted with the “genuine choice of evils” between allowing many citizens to die at the hands of a terrorist or employing some form of torture against the suspected terrorist to prevent such deaths, that every democracy, indisputably, “will opt for the use of torture.”¹²² He further argues that, this too, is an empirical claim.¹²³ He points out that both Presidents Obama and Clinton would have used torture even though they did not openly support it like President Bush. In reference to President Obama, he points out that despite his administration’s announcement that it would never torture terrorism suspects, “it has also

¹¹⁹ Alan Dershowitz, "The Case for Torture Warrants," Reuters, September 07, 2011, Accessed December 26, 2018, <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

resisted any judicial review of its counterterrorism measures.”¹²⁴ Dershowitz further argued this point, saying:

“Trust us, but don’t ask us to justify that trust! Such an approach might be acceptable if men were angels, but no administration is run by angels. That is why visibility and accountability are essential to democratic governance.”¹²⁵

In reference to President Clinton, Dershowitz asserts that he implicitly acknowledged that he would use torture in an extreme case in an interview with *National Public Radio*:

“If they really believe the time comes when the only way they can get a reliable piece of information is to beat it out of someone or put a drug in their body to talk it out of em, then they can present it to the Foreign Intelligence Court, or some other court, just under the same circumstances we do with wiretaps. Post facto . . . But I think if you go around passing laws that legitimize a violation of the Geneva Convention and institutionalize what happened at Abu Ghraib or Guantánamo, we’re gonna be in real trouble.”¹²⁶

While Dershowitz does say that he does not know exactly what President Obama (and to a lesser extent) what President Clinton would say regarding the use of torture in a ticking-time bomb scenario, he does believe he knows exactly what each administration would do.¹²⁷ He holds to his argument that both Clinton and Obama, and the leader of any democracy would implement torture because “no President would want to be responsible for the deaths of thousands of innocent citizens if he or she could have prevented these deaths by authorizing the use of nonlethal torture against a guilty terrorist.”¹²⁸ Coming to this conclusion, he then asks the reader to consider the following question assuming he is correct in his assertion:

¹²⁴ Alan Dershowitz, "The Case for Torture Warrants," Reuters, September 07, 2011, Accessed December 26, 2018, <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

“If the use of torture is imminent, is it worse to close our eyes and tolerate it by low-level law enforcement officials without accountability, or instead bring it to the surface by requiring a warrant for it as a precondition to its infliction?”¹²⁹

In asking this question, Dershowitz is essentially asking the reader to move beyond the question of morality concerning torture and instead determine whether torture should be pursued openly, under established legal procedures or in secret, violating existing law.¹³⁰ He argues that undertaking torture under the scope of law at least allows for transparency and regulation since he believes it will be used as a counterterrorism method regardless of its legality.¹³¹

In explaining his reasoning, Dershowitz offers three important, yet conflicting values that are present in a democracy: safety and security of a nation’s citizens, the preservation of civil liberties and human rights, and open accountability and visibility.¹³² He states that in order to uphold the safety and security of a nation’s citizens, the state would be required to use torture. However, at the same time, to preserve the citizens’ civil liberties and human rights, the state is also required to reject torture “as an illegitimate part of our legal system.”¹³³ In explaining how the third value, open accountability and visibility plays into this triangular conflict, Dershowitz introduces two distinguished civil libertarians with whom he has debated the torture question: Floyd Abrams and Harvey Silverglate. Both have argued that they would support nonlethal torture if it meant saving thousands, but also that they would not want to see torture recognized officially by our legal system. Abrams’ approach, that “in a democracy sometimes it is necessary to do things off the books and below the radar screen,” illustrates this conflict with the value of

¹²⁹ Alan Dershowitz, "The Case for Torture Warrants," Reuters, September 07, 2011, Accessed December 26, 2018, <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

open accountability and visibility.¹³⁴ Dershowitz asserts that given the circumstances, it is essentially impossible to serve all three of these values simultaneously, so a moral dilemma of which to choose develops. He ultimately argues that ignoring the safety and security of citizens is not an option and that “a formal, visible, accountable, and centralized system” of torture using the requirement of a warrant is preferable if torture is to be used regardless.



Arguments in Opposition to Torture

Unlike supporters of torture who find conditional support for its use under very specific circumstances, opponents to state-sponsored torture often take an absolutist position that such a practice can never be justifiable under any circumstances, in any place, by any person, or for any reason. They typically argue that torture is an abhorrent, barbaric practice that serves no purpose in a civilized society. Among their many grievances, they often assert that it is fundamentally immoral, unethical, illegal, and simply ineffective. Even in difficult situations like the ticking time bomb scenario, they maintain that torture is a violation of human rights and undermines the values of democracy and the rights that it is meant to maintain. Additionally, opponents fully reject the idea of choosing the “lessor of two evils” in regard to the threat of compromising either the safety and security of citizens or the civil liberties of a supposed criminal. They argue that electing to choose one “evil” over another is ultimately still unacceptable as the ends cannot justify the means if the means are inherently immoral.

¹³⁴ Alan Dershowitz, "The Case for Torture Warrants," Reuters, September 07, 2011, Accessed December 26, 2018, <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>

Despite these criticisms, proponents of torture still maintain that the state has an absolute responsibility to protect its citizenry from harm. They argue that the government must uphold individual safety and national security even if that requires resorting to less than favorable measures such as torture. Even still, opponents continue to reject these arguments on moral, ethical, legal, and effectual bases. In describing the reasoning that opponents of torture use to not only persuade of their own viewpoints, but also to counter the logic of proponents I will discuss and explain the following arguments: a moral argument on the fundamental violation of human rights, an ethical argument based in deontology, a legal argument containing analysis of relevant legislation, and a pragmatic argument on the ineffectiveness of torture as an information-seeking method.



Moral Argument in Opposition to Torture

Stated simply, opponents of torture find all of its forms, including actions classified under euphemisms such as “enhanced interrogation,” to be immoral and unacceptable regardless of circumstances. They argue that torture represents a complete and systematic degradation of civil liberties and violates the fundamental human rights that citizens are entitled to. Along the same line of thinking used to teach a child the difference between right and wrong, even if a suspected criminal is in custody, torture is never the answer as “two wrongs do not make a right.” Regardless of the context of the situation or factors in play, “the duty of the government is still to protect all of its citizens, meaning that the government has no justification for engaging in

torture.”¹³⁵ Any subsequent use of torture ultimately results in not just the devaluation or total dismantlement of the citizenry’s rights and liberties, but also significant damage to the health and efficacy of the democracy to which the citizens belong.

While torture represents a reduction in civil liberties, some scholars such as Suzy Killmister, author of “Dignity, Torture, and Human Rights,” argue that its effects can be much wider in scope. She argues torture not only causes short-term physical suffering, but also psychological damage, most notably a violation of the victim’s dignity.¹³⁶ She asserts that dignity is not an inherent feature of individuals, but “rather a status that is conferred—whether by the individual herself or her community.”^{137, 138} Killmister makes the argument that torture as a practice is immoral because it strips the individual of his or her sense of self-worth and autonomy, both of which are ideals that a democracy *should* protect:

“...dignity does not assume the role of grounding human rights, but is instead given the more restricted task of identifying a core wrong involved in particular human rights violations. Most paradigmatically, dignity is put forward as the value that is threatened by practices such as torture... Part of what is wrong with torture, it is argued, is that it violates the victim’s dignity, where this is often taken to be intimately connected to the humiliation and degradation that torture inflicts. Torture is not the only human right for which this claim is made, though it is perhaps the most common. What is particular about such rights is that to fail to uphold them is purported to strip the victim of her dignity, as opposed to simply failing to respect her dignity.”¹³⁹

While the physical suffering that results from torture lends obvious support for arguments that it is a violation of human rights, Killmister makes a convincing argument that the emotional and

¹³⁵ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security” (POL 318: Applied Political Ethics, Rollins College, 2017).

¹³⁶ Suzy Killmister, “Dignity, Torture, and Human Rights,” *Ethical Theory & Moral Practice* 19, no. 5 (November 2016): 1087–1101, doi:10.1007/s10677-016-9725-6.

¹³⁷ Ibid.

¹³⁸ Ibid. Killmister’s note in “Dignity, Torture, and Human Rights” that the idea that dignity might be a conferred status, rather than an inherent feature echoes work done by both Colin Bird (2014) and Jeremy Waldron (2012).

¹³⁹ Ibid.

psychological impacts are just as immoral and important. She explains that while the physical effects are short-lived, the impacts on one's dignity and mental health are long-lasting.¹⁴⁰

Some opponents of torture suggest that part of the reason that torture has gained a degree of support is a climate of fear in response to the *9/11 attacks* and other panic in recent years about the threat of terrorism. However, Amber Edmondson, author behind "The Moral Justification Against Torture" reminds her readers that "it is important not to allow our usual moral objections to be silenced by panic."¹⁴¹ In her paper, she works to deconstruct the "climate of fear" phenomena which she believes is, in part, causing increased support for torture.¹⁴² David Luban, a prominent figure on the topics of justice and ethics, similarly describes this fear climate in an article in the *Virginia Law Review* titled "Liberalism, Torture, and the Ticking Time Bomb," which he says results in a sort of "panic moral justification" for torture.¹⁴³ He makes the argument that the ticking time bomb scenario and the unrealistic sense of urgency and panic that it creates is nothing more than an example of sleight-of-hand reductionism that is:

"built on a set of assumptions that amounts to intellectual fraud [and meant to] construct a liberal ideology of torture, by which liberals reassure themselves that essential interrogational torture is detached from its illiberal roots... constructing a torture culture."¹⁴⁴

In other words, Luban argues that the ticking time bomb and the accompanying acceptance of torture as just develops a false sense of morality that is induced by panic and urgency without respect to moral codes and democratic values.¹⁴⁵

¹⁴⁰ Suzy Killmister, "Dignity, Torture, and Human Rights," *Ethical Theory & Moral Practice* 19, no. 5 (November 2016): 1087–1101, doi:10.1007/s10677-016-9725-6.

¹⁴¹ Amber Edmondson, "The Moral Justification Against Torture," *The University of Manchester*, accessed January 4, 2019, [http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol1_7\(Edmondson\).pdf](http://hummedia.manchester.ac.uk/schools/law/main/research/MSLR_Vol1_7(Edmondson).pdf).

¹⁴² Ibid.

¹⁴³ David Luban, "Liberalism, Torture, and the Ticking Bomb," *Intervention, Terrorism, and Torture*, 2005, doi:10.1007/978-1-4020-4678-0_15.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

Aside from the moral violation that torture presents in current time, a final consideration to be discussed in the argument against torture on moral grounds is the long-term outlook of the practice. Susan Opatow of the John Jay College of Criminal Justice at City University of New York writes in an article titled “Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope” that “violations of human rights do not neatly disappear from public conscience over time. Instead, they remain as indelible stains.”¹⁴⁶ In explaining this concept, she considers the internment of Japanese Americans during the Second World War. The “culture of security” that justified the internment of thousands of Americans is now widely understood to “have been wrong, short-sighted, and an affront to deeply held American values of liberty and justice.”¹⁴⁷ She claims that torture undertaken in Guantánamo and other places in the recent past has similarly undermined human rights and was justified by nothing more than a culture of security. This, she asserts, “suggests that violating human rights and sidestepping international and national laws and professional ethics will be remembered as wrong in the harsher light of time.”¹⁴⁸ Ultimately, opponents of torture argue that the violation of human rights is clear, widely denounced, and blatantly immoral. They claim that its use directly results in the reduction of civil liberties and systematic degradation of fundamental human rights and an erosion of the values and effectiveness of democracy.



¹⁴⁶ Susan Opatow, "Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope," *Peace and Conflict: Journal of Peace Psychology* 13, no. 4 (11, 2007): 457-461, <https://search-proquest-com.ezproxy.rollins.edu:9443/docview/916160537?accountid=13584>.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

Deontological Argument in Opposition to Torture

An extension of this aforementioned moral reasoning for opposing torture is an ethical argument based on deontology or deontological ethics. Deontology is an ethical theory that directly conflicts with the utilitarian argument that supporters of torture often employ. Unlike the consequential nature of utilitarianism in which the morality of a decision is determined by the end results, deontology holds that “some choices cannot be justified by their effects—that no matter how morally good their consequences, some choices are morally forbidden.”¹⁴⁹ According to deontologists, the “rightness or wrongness” of a choice is determined by conformity to moral norms. They argue that individuals have a duty to do what is morally right even if another option may potentially produce superior results. Regardless of circumstances, an act cannot be carried out if it is not morally right, “no matter the Good that it might produce.”¹⁵⁰ Deontology directly contrasts with utilitarianism as it is concerned with the morality of the “means” while utilitarianism is focused on the maximization of utility, or the “ends,” without regard to the process of achieving said results.

The method by which deontology seeks to develop moral norms for behavior and decision-making is through universalization. In other words, an action cannot be morally acceptable if it could not be applied to all circumstances or the entire population. Essentially, if it is unjust to torture some than it should be unjust to torture any and all. In “Is Torture ever Morally Acceptable? If so, Under what Circumstances? If not, why not?” author Katie Smith applies to the torture debate this idea of universal rules which was first developed by the father

¹⁴⁹ Larry Alexander and Michael Moore, "Deontological Ethics," Stanford Encyclopedia of Philosophy, October 17, 2016, accessed November 27, 2018, <https://plato.stanford.edu/entries/ethics-deontological/>.

¹⁵⁰ Ibid.

of deontology, Immanuel Kant.¹⁵¹ In considering this concept, she outlines two primary universal rules of Kant's *categorical imperative* by which questions of morality are to be addressed:

“‘Act as though the maxim of your action were by your will to become a universal law of nature,’ and ‘Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.’”¹⁵²

Under the first rule, we certainly would not find torture to be acceptable because universalizing torture would leave us potentially vulnerable to having torture used against ourselves.¹⁵³

Furthermore, under the second rule, Smith explains that “torture is wrong because torturing a person for information is to use them as a means only” without regard to the morality of the actions being taken.¹⁵⁴ Ultimately, Smith argues that Kant's deontological logic lends us the conclusion that torture can never be morally justified despite the horrendous consequences that might come about as a result of our inaction.¹⁵⁵

In a discussion and application of Kant's deontology to the torture question, Joe Moloney, author of “A Moral Investigation of Torture in the Post 9.11 World,” echoes Smith's arguments that deontology prohibits torture.¹⁵⁶ However, before ultimately coming to the same conclusion as Smith, he first attempts to use deontology to morally justify torture by challenging the notion of what makes an action “moral.” He makes the claim, that under Kant's deontology:

¹⁵¹ Katie Smith, "Is Torture Ever Morally Acceptable? If So, Under What Circumstances? If Not, Why Not?" E-International Relations Students, December 22, 2007, , accessed December 06, 2018, <https://www.e-ir.info/2007/12/22/is-torture-ever-morally-acceptable-if-so-under-what-circumstances-if-not-why-not/>.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Joe Moloney, "A Moral Investigation of Torture in the Post 9.11 World," Virtual Commons - Bridgewater State University, 2010, accessed January 16, 2019, https://vc.bridgew.edu/undergrad_rev/vol6/iss1/24/.

“one could argue that it is the moral (and civic) duty of the law enforcement official to do anything in their power to ensure that the homeland and its citizens are safe and secure from acts of terror.”¹⁵⁷

Moloney also argues that one could reasonably argue that torture is moral under Kant’s categorical imperative. More specifically, he says that:

“if an individual was withholding information regarding terrorism and the United States needed that information to secure the safety of the homeland then some may argue that interrogators ought to extract that information in any way possible, even via torture. Under the universal formulation of the categorical imperative, this act could be deemed moral because it can be made into a universal moral law.”¹⁵⁸

After presenting the above-mentioned arguments that deontology could be used to morally justify torture, Moloney then makes a plea to invalidate these arguments in order to argue his personal interpretation that Kant’s deontology actually expressly prohibits torture.¹⁵⁹ He states that the initial argument, which is based on the practical imperative, fails to fully apply Kantian ethics to the issue of torture. He asserts that even if torture could be universalized, it still violates the practical imperative because:

“In order for the interrogators to accomplish their goal of extracting information from the suspect, they must treat the suspect as a means. That is to say, the suspected terrorist is treated as a means to achieving the end of obtaining the information... the act of torture remains immoral because it violates the practical imperative since it treats the suspect as a means to an end. It is simply not possible for torture to be conducted without using the suspect as a means. Under Kant’s practical imperative, using any individual as a means to an end is immoral.”¹⁶⁰

In a similar fashion, Moloney also rejects the second argument of deontology justifying torture. He notes that this argument fails to appease the idea of universal formulation because it does not fulfill both requirements: it does not hold any logical contradictions and “one must be able to

¹⁵⁷ Joe Moloney, "A Moral Investigation of Torture in the Post 9.11 World," Virtual Commons - Bridgewater State University, 2010, accessed January 16, 2019, https://vc.bridgew.edu/undergrad_rev/vol6/iss1/24/.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

rationally will that act into a moral law.”¹⁶¹ While he admits that there are no issues with logical contradictions, he says that “the act of torture is immoral under the universal formulation because one would not rationally will the act into a moral law.”¹⁶² Moloney concludes his arguments by saying that “the act of torture is believed by some to be moral; however, under Kant’s deontology, it is not.”¹⁶³

The claims made by both Smith and Moloney directly apply the deontological philosophy of Immanuel Kant to the present-day torture debate. They explain how deontology clearly and expressly prohibits torture as an immoral practice that should never be considered an option. They also dutifully compare the theory to its antithesis, consequentialism, and explain why it is an inferior philosophy for analyzing the torture debate. They argue that consequentialism, or utilitarianism more specifically, allows for the blatant disregard for the morality of the process by which desired results are achieved. Further, it allows for a slippery slope in which nearly any atrocity could be deemed morally permissible as long as some greater utility is also a consequence. Additionally, Smith makes the argument that the consequentialist notion of the ticking time bomb is unrealistic to begin with and “highly questionable as torture may force answers but there is no guarantee that they will be truthful.”¹⁶⁴ Ultimately, Smith, Moloney, and other subscribers of deontological ethics claim that it is simply impermissible for the state to consider torture as a method for extracting information because it is inherently immoral and cannot be universalized.

¹⁶¹ Joe Moloney, "A Moral Investigation of Torture in the Post 9.11 World," Virtual Commons - Bridgewater State University, 2010, accessed January 16, 2019, https://vc.bridgew.edu/undergrad_rev/vol6/iss1/24/.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Katie Smith, "Is Torture Ever Morally Acceptable? If So, Under What Circumstances? If Not, Why Not?" E-International Relations Students, December 22, 2007, accessed December 06, 2018, <https://www.e-ir.info/2007/12/22/is-torture-ever-morally-acceptable-if-so-under-what-circumstances-if-not-why-not/>.



Legal Arguments Against Torture

The two arguments in opposition to torture that I have already presented form a strong basis for prohibiting its use by the government for any purpose. However, potential critics or proponents of state-sponsored may rightfully claim that these two arguments, both moral and ethical, are limited by their theoretical nature and are entirely subjective and open to interpretation.¹⁶⁵ If these two arguments are not concrete enough or do not do enough to convince critics that state-sponsored torture can never be justified and implemented, then perhaps a legal analysis based on United States Federal law can. Stated rather simply, any use of torture by government officials is Federally illegal anywhere in the United States and anywhere abroad. While no specific mention of the concept of torture itself exists in the United States Constitution, its practice has been outlawed on numerous occasions at the Federal level. The most important legal documents that prohibit the use of torture are the Constitution (though indirectly), the Geneva Conventions, the United Nations Convention Against Torture, Title 18 of the U.S. Code, and a collection of Supreme Court cases that have been heard since *9/11*. In analyzing these different documents, I will present and examine the legal arguments against torture that opponents say inhibit the government from justifiably and lawfully using the practice as a means of extracting information from suspected terrorists.

The United States Constitution plays a powerful role in analysis of the question of the legality of government-directed torture. Considering that the Constitution is a rather general

¹⁶⁵ Matthew Fisher, "Ethics of the Use of State-Sponsored Torture for National Security," (POL 318: Applied Political Ethics, Rollins College, 2017).

document, it does not make any specific mentions to the practice of torture, but several of its tenets do outlaw groups of broader injustices to which torture is a part of. The practice does directly conflict with several concepts presented in the Bill of Rights. An article titled “The Legal Prohibition Against Torture” published in *Human Rights Watch* discusses several of these provisions which directly outlaw torture. More specifically, the article explains that:

“The U.S. courts have located constitutional protections against interrogations under torture in the Fourth Amendment's right to be free of unreasonable search or seizure (which encompasses the right not be abused by the police), the Fifth Amendment's right against self-incrimination (which encompasses the right to remain silent during interrogations), the Fifth and the Fourteenth Amendments' guarantees of due process (ensuring fundamental fairness in criminal justice system), and the Eighth Amendment's right to be free of cruel or unusual punishment.”¹⁶⁶

While each of these amendments to the Constitution outlaws torture in one way or another, the Fourth and Eighth Amendments likely provide the best constitutional arguments for the prohibition of torture. The Fourth Amendment clearly outlines that it is unconstitutional to subject individuals to unreasonable search and seizure including their “persons, houses, papers, and effects” without a warrant.¹⁶⁷ In the case of torture, it is not constitutional to hold a suspected terrorist without a warrant that is substantiated by acceptable evidence.¹⁶⁸ The Eighth Amendment also distinctly prohibits torture as it certainly falls under the category of “cruel and unusual punishments,” especially if authorities are not even certain that a suspect is guilty.¹⁶⁹ While arguing that torture is illegal from a Constitutional basis requires a small degree of inferences and assumptions, albeit generally understood and agreed upon inferences and assumptions, the legality of other documents is significantly clearer and direct. Critics of this

¹⁶⁶ “The Legal Prohibition Against Torture,” *Human Rights Watch*, 11 March 2003, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

¹⁶⁷ U.S. Constitution, amend. 4.

¹⁶⁸ U.S. Constitution, amend. 8.

¹⁶⁹ *Ibid.*

reasoning have claimed that the Bill of Rights is only applicable to U.S. citizens. This criticism has been met with refutations from the Supreme Court and arguments that international law outlaws torture inflicted on all individuals: “The prohibition against torture is universal and covers all countries both regarding U.S. citizens and persons of other nationalities.”¹⁷⁰

The Geneva Conventions, first drafted in 1864 and expanded following the conclusion of the Second World War, are a set of international protocols that provide an “agreed-upon framework of legal protections to safeguard soldiers, civilians... military personnel shipwrecked at sea...[and] prisoners of war and civilians under enemy control.”¹⁷¹ Lionel Beehner, author of an article titled “The United States and the Geneva Conventions,” published by the *Council on Foreign Relations*, explains that the Conventions have been ratified by nearly every country, a total of 194, including the United States.^{172, 173} Beehner writes that states that violate the Conventions are liable to be held accountable for charges of war crimes under *Common Article Three*, which “bars torture, cruel, inhumane, and degrading treatment, as well as outrages against the human dignity of prisoners of war, or POWs.”¹⁷⁴ It also specifically prohibits “violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”¹⁷⁵ The

¹⁷⁰ “The Legal Prohibition Against Torture,” Human Rights Watch, 11 March 2003, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

¹⁷¹ Lionel Beehner, “The United States and the Geneva Conventions,” *Council on Foreign Relations*, September 20, 2006, accessed December 14, 2018, <https://www.cfr.org/backgrounder/united-states-and-geneva-conventions>.

¹⁷² *Ibid.*

¹⁷³ Tracey Begley, “Is It Time to Ratify Additional Protocol I?” INTERCROSS, July 06, 2015, accessed March 27, 2019, <http://intercrossblog.icrc.org/blog/d9r104eqvjzqgma49vlapmk6a9l67i>.

While it is worth noting that the U.S. did not ratify Additional Protocols I and II of the Geneva Conventions in 1977, these are largely outside the scope of this research as those additions were concerned with protections for civilians while the torture question is primarily concerned with enemy combatants, which the original conventions addressed.

¹⁷⁴ *Ibid.*

¹⁷⁵ “The Legal Prohibition Against Torture,” Human Rights Watch, 11 March 2003, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

Geneva Conventions also expressly outlaw any use of force to extract information, which is the exact and only reason why the government would consider its use in the first place, at least according to the arguments put forward by proponents. Article 31 of the Fourth Geneva Conventions states this prohibition clearly: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties."¹⁷⁶

Proponents of torture have occasionally attempted to argue that the United States government is not bound by the Geneva Conventions as international law is unenforceable and cannot supersede the Constitution. While it is true that the United States is a sovereign country that is only *necessarily* bound by its own laws, the Constitution does discuss the role of treaties and their place in the legal structure of the United States. The Constitution gives the President and the Senate the power to ratify treaties that become Federal law. Article II, Section II reads that the president "shall have Power, by and with the Advice and Consent of the Senate, to make treaties..."¹⁷⁷ In other words, if the United States signs onto a treaty, as it did with the Geneva Conventions on August 12th of 1949, it signs its provisions into its own law and, by default, becomes bound to follow said provisions.¹⁷⁸ The only opportunities available to prevent the U.S. government's legal obligations to the Geneva Conventions would be to either pull out of the agreement altogether or if reservations would have been included prior to signing. In response to the question of whether the United States has the ability to reinterpret portions of the Geneva Convention, Lionel Beehner answered:

¹⁷⁶ "The Legal Prohibition Against Torture," Human Rights Watch, 11 March 2003, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

¹⁷⁷ U.S. Constitution, Article II, Section II.

¹⁷⁸ "Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949," International Committee of the Red Cross, accessed February 10, 2019, <https://ihl-databases.icrc.org/ihl/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument>.

“Signatories to treaties can attach reservations or include provisos at the time they sign or ratify international treaties. For example, the United States included a few reservations to the Geneva Conventions and their additional protocols on issues like the death penalty. However, it is uncommon for signatory states to revise their obligations many years after joining a treaty (of course, some states can choose to just opt out of treaties).”¹⁷⁹

What Beehner explains is that the chance to include any reservations against the Conventions’ torture policy has come and gone and now that the United States has ratified it, the only way to appropriately remove its legal obligations to them would be to fully withdraw from the treaty, which would potentially be a remarkably unpopular political move.¹⁸⁰

In a 2014 essay concerning the application and limits of treaties, Senator Ted Cruz makes an argument that further solidifies the argument presented by torture’s opponents – that signing an international treaty transforms international law into domestic law.¹⁸¹ He begins by reflecting on statements made by Supreme Court Justice Sonia Sotomayor during her Senate Judiciary Committee confirmation hearing. He recalls that she stated that “American law does not permit the use of foreign law or international law to interpret the Constitution,” while also noting that she correctly recognized that many United States laws rely directly upon international law sources.¹⁸² He continues, referring to Article II, Section II’s treaty-making enumeration, saying that “Treaties are probably the most prevalent mechanism by which domestic law adopts international law.”¹⁸³ Ultimately, he makes the notion that treaties, when self-executing, are legally binding as “the Supremacy Clause provides that ‘treaties,’ like statutes, count as ‘the

¹⁷⁹ Lionel Beehner, "The United States and the Geneva Conventions," Council on Foreign Relations, September 20, 2006, accessed December 14, 2018, <https://www.cfr.org/background/usa-and-geneva-conventions>.

¹⁸⁰ Ibid.

¹⁸¹ Ted Cruz, "Limits on the Treaty Power," Harvard Law Review, accessed February 4, 2018, <https://harvardlawreview.org/2014/01/limits-on-the-treaty-power/>.

¹⁸² Ibid.

¹⁸³ Ibid.

supreme law of the land.”¹⁸⁴ Applying this logic to the Geneva Conventions, the signing of the treaty makes it the supreme law of the land, which clearly and blatantly indicates the absolute prohibition of torture, which in this case includes a strict definition of any “use of force to obtain information.”¹⁸⁵

The United States has also consented to other international agreements relating to the prohibition and prevention of torture more recently than the Geneva Conventions. Most notably, the government officially signed onto the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in New York City on April 18, 1988.¹⁸⁶ The Convention produced three sections of agreements comprised of a total of thirty-three articles to which the states participating agreed upon.¹⁸⁷ Before going into detail on the Convention’s strict outlawing of torture, it is helpful to discuss Article 1, which offers a clear and specific definition (which is also used as the basis for defining torture for this work as a whole) for how torture should be defined for the purposes of holding countries around the world accountable. Article 1 asserts that “For the purposes of this Convention,” and in holding its participants and all nations of the world accountable:

“the term "torture" means 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

¹⁸⁴ Ted Cruz, "Limits on the Treaty Power," Harvard Law Review, accessed February 4, 2018, <https://harvardlawreview.org/2014/01/limits-on-the-treaty-power/>.

¹⁸⁵ “The Legal Prohibition Against Torture,” Human Rights Watch, 11 March 2003, <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture>.

¹⁸⁶ "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," United Nations, December 10, 1984, accessed November 12, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

¹⁸⁷ "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)," United Nations High Commissioner for Refugees, December 10, 1984, accessed April 10, 2019, <https://www.unhcr.org/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html>.

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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”¹⁸⁸

In summary, the United Nations defines torture as any act that causes severe pain or suffering for the purposes of obtaining information.

With a strict and specific definition for torture in place, Article II of the UNCAT explicitly states the outlined legal prohibition against torture. It states that:

- “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No 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 of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”¹⁸⁹

According to torture’s opponents, with these statements being clear at face value and with the United States’ signing of the document, it is overwhelmingly apparent that the prohibition of torture is in direct violation of U.S. law for the same reasons mentioned above in reference to the Geneva Conventions – if a treaty is signed by the Federal government, then its provisions become Federal law. In similar fashion to the Geneva Conventions, according to the logic outlined in Senator Cruz’ essay, signing the UNCAT represents an agreement to its provisions and provides that they become the supreme law of the land.¹⁹⁰

¹⁸⁸ "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)," United Nations High Commissioner for Refugees, December 10, 1984, , accessed April 10, 2019, <https://www.unhcr.org/protection/migration/49e479d10/convention-against-torture-other-cruel-inhuman-degrading-treatment-punishment.html>.

¹⁸⁹ Ibid.

¹⁹⁰ Ted Cruz, "Limits on the Treaty Power," Harvard Law Review, accessed February 4, 2018, <https://harvardlawreview.org/2014/01/limits-on-the-treaty-power/>.

As mentioned above, Lionel Beehner, author of “The United States and the Geneva Conventions,” explains that other than fully withdrawing, the only other way for a nation to make legal distinctions to a treaty is to outline reservations prior to signing.¹⁹¹ In the case of the UNCAT, the United States did outline and communicate several reservations before signing. While torture’s supporters may attempt to argue that these reservations may permit the use of torture under specific circumstances or simply allow torture’s definition to be softened, opponents maintain that in no way can the government find any means to legally circumvent the prohibition on torture. Perhaps the most legally controversial of these reservations is that “the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing.”¹⁹² While it is true that Senator Cruz explained that treaties must be self-executing to automatically transform international law into domestic law, opponents of torture would still maintain that torture is prohibited. The reasoning behind this claim is that not only does the U.S. accept the definition of torture discussed in Article I of the convention, but a separate U.S. reservation to UNCAT holds:

“That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments.”

This reservation provides for the legal adoption and implementation of the Convention’s provisions. Specifically, the United States not only accepts the definition of torture (with minor reservations dealing with its ability to interpret it), but also acknowledges that it will take

¹⁹¹ Lionel Beehner, "The United States and the Geneva Conventions," Council on Foreign Relations, September 20, 2006, accessed December 14, 2018, <https://www.cfr.org/background/usa-and-geneva-conventions>.

¹⁹² "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," United Nations, December 10, 1984, accessed November 12, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

measures to implement and uphold the Convention's prohibition of it in concurrence with signing the treaty.¹⁹³

Even though torture's foes will vehemently contend that these above-discussed international treaties are more than sufficient in legally justifying the proscription of torture, supporters may still solicit more to furnish an adequate legal justification. They suggest that international law in the case of torture is not *necessarily* binding because both the Geneva Conventions and the UNCAT are not self-executing treaties, and, as a result, not automatically inscribed in law despite U.S. signatures. To this solicitation, torture opponents respond with legalese found directly in the U.S. Code. Under Title 18 – Crimes and Criminal Procedure, Part 1 – Crimes, Chapter 113C – Torture, Section 2340 – Definitions, torture is defined under Federal law as:

“(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

¹⁹³ "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," United Nations, December 10, 1984, accessed November 12, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en.

In its reservations, the U.S. does not reject any of the concepts presented in the definition of torture found in Article 1. It does, however, provide several instances of clarification for various concepts that reach beyond the explanation and detail offered by the Convention. These clarifications largely relate specific concepts to constitutional amendments found in the Bill of Rights as well as the assertion “that noncompliance with applicable legal procedural standards does not *per se* constitute torture” even if it does represent a breach of the signed agreement.

(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; and

(3) ‘United States’ means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.”¹⁹⁴

This definition reiterates the definitions formulated by both the Geneva Conventions and the UNCAT and codifies them into Federal law, which is inarguably binding on all government actors.

Beyond this definition and prohibition outlined in the U.S. Code, torture is further outlawed by the Department of Defense. In its June 2015 Law of War Manual published by the Department of Defense Office of General Counsel, all acts of torture in war are expressly forbidden in concurrence with the UNCAT. More specifically, the manual holds “that a state of war could not justify a State’s torture of individuals during armed conflict.” In other words, regardless of armed conflict or diplomatic dispute, the government (especially government officials under the domain of the Department of Defense) is not permitted to exercise torture against any individuals, combatant or civilian.¹⁹⁵ However, critics of this argument may attempt to argue that, in many cases, the holding and torture of enemy combatants does not constitute war as these individuals do not necessarily represent a larger entity with which war can be waged. While this is an interesting point, it falls flat as it is nearly impossible to make these distinctions between actors, so we must default to a standardized all or none philosophy, which in this case should be a complete ban of torture.

¹⁹⁴ "18 U.S. Code § 2340 - Definitions," Legal Information Institute, accessed October 18, 2018, <https://www.law.cornell.edu/uscode/text/18/2340>.

¹⁹⁵ “Department of Defense Law of War Manual,” Office of General Counsel Department of Defense, June 2015, Accessed March 26, 2019. <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>

A final support for the legal argument against torture is a discussion of relevant landmark Supreme Court cases concerning torture and the detention of suspected terrorists that have been decided in the post 9/11 era. While many relevant cases exist, for the sake of brevity, focusing on the following four cases will provide paramount legal justification without being unnecessarily exhaustive: *Hamdi v. Rumsfeld* (2004), *Rasul v. Bush* (2004), *Hamdan v. Rumsfeld* (2006), and *Boumediene v. Bush* (2008). The first two of these four cases concerned the ability of detainees to file *habeas corpus* petitions to challenge their detentions (typically at CIA Black sites in foreign nations). In *Hamdi v. Rumsfeld*, the legal question was whether the government violated Hamdi's (an American citizen) Fifth Amendment right to Due Process by holding him indefinitely "based solely on an Executive Branch declaration that he was an 'enemy combatant' who fought against the United States?"¹⁹⁶ The Court provided a landmark decision that set the precedent for cases concerning torture and the detention of enemies. The Court sided with Hamdi, determining that "due process guarantees give a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decisionmaker."¹⁹⁷

The Court delivered its opinion on the same day for *Rasul v. Bush*, which asked the same question of the Court's jurisdiction to hear the petitions of non-citizen enemy combatants questioning their detentions. The Court decided in a 6 – 3 opinion in favor of the foreign nationals detained at Guantánamo Bay, Cuba, with the resulting implication "that hundreds of foreign nationals held at the camp had a legal right to challenge their imprisonment."¹⁹⁸ These two decisions have wider-reaching implications for the legality of torture as the Supreme Court determined that officials are not authorized to hold individuals in custody without giving them

¹⁹⁶ "Hamdi v. Rumsfeld," Oyez, accessed March 14, 2019, <https://www.oyez.org/cases/2003/03-6696?page=3>.

¹⁹⁷ Ibid.

¹⁹⁸ Brian Duignan, "Rasul v. Bush," Encyclopædia Britannica, June 21, 2018, accessed March 17, 2019, <https://www.britannica.com/event/Rasul-v-Bush>.

the ability to oppose their detentions. These decisions make a legal argument in favor of torture even more difficult to develop as they prevent officials from torturing before a Court hears a detainee's case if they were to request it, in turn making the benefits of the ticking time bomb argument null.

In a case more closely related to international law, the question to be answered by the Court in *Ramdan v. Rumsfeld* was whether the "rights protected by the Geneva Convention [could] be enforced in Federal court through habeas corpus petitions?"¹⁹⁹ In similar fashion to the preceding cases, the Supreme Court delivered its opinion on June 29, 2006 that despite the fact that "Congress authorized Hamdi's detention, Fifth Amendment due process guarantees give a citizen held in the United States as an enemy combatant the right to contest that detention before a neutral decisionmaker."²⁰⁰ This decision again reinforced the many legal prohibitions against holding enemy combatants against their wills without the option for contesting their detentions. The final of these four cases and arguably one of the most influential cases, *Boumediene v. Bush* was decided on June 12, 2008.²⁰¹ This case again challenged the Bush administration's detention policies, with the Court once again deciding in favor of the detainees. Kenneth Roth, Executive Director at Human Rights Watch, characterized the importance of this decision by saying:

"The Supreme Court decision has stripped Guantanamo of its reason for being: a law-free zone where prisoners can't challenge their detention... The ruling is not only a landmark victory for justice, it's a big step toward establishing a smarter, more effective counterterrorism policy."²⁰²

¹⁹⁹ "Hamdan v. Rumsfeld." Oyez. Accessed March 15, 2019. https://www.oyez.org/cases/2005/05-184?mod=article_inline.

²⁰⁰ Ibid.

²⁰¹ "US: Landmark Supreme Court Ruling on Detainees." Human Rights Watch. April 17, 2015. Accessed March 18, 2019. <https://www.hrw.org/news/2008/06/12/us-landmark-supreme-court-ruling-detainees>.

²⁰² Ibid.

While these cases are primarily concerned with the legality of holding enemy combatants in custody, they are still very pertinent to the torture debate as legal custody with options for an appeal is a necessary prerequisite to torture the accused. If a suspect has the right to challenge his or her detention and the torture must be postponed, then the intention of the torture is undermined, defeating the purpose. The collective impact of these four Supreme Court cases was an enhancement of the legal provisions that prohibit torture in this country. The Supreme Court clearly determined that a detainee cannot be held indefinitely or subjected to any unreasonable “questioning” without first having the ability to question his or her detention.

According to opponents of torture, the legal arguments discussed above provide an abundance of evidence to demonstrate that the practice is expressly and undeniably illegal and unjustifiable under any circumstances under existing law. The use of arguments relating to the Constitution, treaties signed into international law, excerpts from the U.S. Code, and relevant Supreme Court cases provides an all-encompassing explanation of torture’s illegality from the viewpoints of each of the three branches of government. Even more so, the Kantian argument discussed in the preceding section further suggests that citizens have a moral duty to fulfill their legal obligations as long as those obligations are just. The opponents similarly posit that even if their other arguments concerning the morality and ethics of the matter are not enough to convince, the legal arguments are clear and indisputable; even if one disagrees, the law is the law and therefore torture is impermissible. Nonetheless, despite the moral, ethical, and legal concerns that have already been presented, proponents may still attempt to argue that torture should be made legal even if it is not already. To this, opponents are likely to respond that there is no benefit in such an action as torture is not even effective in the first place, which is the topic of the final argument to be presented in opposition of torture.



Torture is Ineffective as an Information-Seeking Method

Even if all of the other arguments that opponents look to in order to dispute torture are ineffective in convincing its proponents, a pragmatic argument showing how the practice is ineffective as an information-seeking method is likely to change opinions. In other words, despite the moral, ethical, and legal challenges that torture presents, it is not even useful in achieving its end-goal of “obtaining valuable and correct information in a timely manner.”²⁰³ In a *Newsweek* article titled “Science Shows That Torture Doesn’t Work and Is Counterproductive,” Rupert Stone makes the case that torture is ineffective because it does not produce credible and reliable intelligence. Stone begins his article with an anecdote from 2003 regarding Glenn Carle, a CIA interrogator.²⁰⁴ He begins, saying that Carle:

“arrived at a secret detention facility overseas to question a recently captured Al-Qaeda suspect. The jail, whose location remains classified, was cold and dark—so dark Carle could not see his own hands—and music blared loudly all around. Inside the cell, a man lay shivering under a flimsy blanket; Carle called to him, and he looked up slowly, weary and confused, when Carle entered. When questioned, the man could manage only a rambling, incoherent reply. ‘He was a wreck,’ Carle says.”²⁰⁵

Carle believed the “man’s dilapidated state of mind” was attributable to a systematic program of torture inflicted on suspected terrorists by the CIA following 9/11.²⁰⁶

The CIA’s “enhanced interrogation tactics” which included nudity, extreme temperatures, sensory deprivation, waterboarding and more were intended to slowly dismantle a detainee’s

²⁰³ Matthew Fisher, “Ethics of the Use of State-Sponsored Torture for National Security” (POL 318: Applied Political Ethics, Rollins College, 2017).

²⁰⁴ Rupert Stone, “The Science Is Clear: Torture Doesn’t Work,” *Newsweek*, June 11, 2016, accessed February 19, 2019, <https://www.newsweek.com/2016/05/20/science-shows-torture-doesnt-work-456854.html>.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

resistance to interrogation. The rationale was that the “stress and disorientation induced by these methods... would force them to cooperate and release whatever precious information they were hiding.”²⁰⁷ However, based on observation, Carle asserted that this is not the case, saying that “information obtained under duress is suspect and polluted from the start and harder to verify.”²⁰⁸ In a book titled *Why Torture Doesn't Work: The Neuroscience of Interrogation*, Shane O'Mara seeks to verify this claim with scientific research. In conducting such research, O'Mara finds that beyond being an ineffective method of intelligence gathering, torture can produce false information as the areas of the brain tasked with memory and recall are placed under stress, yielding the opposite of the desired result of obtaining critical intelligence.²⁰⁹

In a 2006 experiment that O'Mara referenced in his work, psychiatrist Charles Morgan subjected a group of special operations soldiers to conditions similar to those faced by prisoners of war (such as sleep and food deprivation and extreme temperatures).²¹⁰ Despite being highly trained, physically fit, and willing to cooperate, unlike most detainees, Morgan found that “even they exhibited a remarkable deterioration in memory as a result of these stressful conditions.”²¹¹ A related study published in *Proceedings of the National Academy of Sciences* in February 2016 analyzed the impacts of sleep deprivation on false confessions. In a study of 80 individuals who were asked to complete various computer tasks with the disclaimer that pressing the ‘escape’ key would ruin essential data were split into two groups: one which slept the whole night and one

²⁰⁷ Rupert Stone, "The Science Is Clear: Torture Doesn't Work," *Newsweek*, June 11, 2016, accessed February 19, 2019, <https://www.newsweek.com/2016/05/20/science-shows-torture-doesnt-work-456854.html>.

²⁰⁸ *Ibid.*

²⁰⁹ Shane O'Mara, *Why Torture Doesn't Work the Neuroscience of Interrogation* (Cambridge, Massachusetts; London, England: Harvard University Press, 2015).

²¹⁰ Rupert Stone, "The Science Is Clear: Torture Doesn't Work," *Newsweek*, June 11, 2016, accessed February 19, 2019, <https://www.newsweek.com/2016/05/20/science-shows-torture-doesnt-work-456854.html>.

²¹¹ *Ibid.*

which had to stay awake. The following day, the students were asked to sign a statement admitting that they had pressed the escape key. The sleep deprived group was 4.5 times more likely to sign the false-confession.²¹² Glenn Carle argues that the same effects of these two studies are present, and potentially more significant from enhanced interrogation techniques and even more disorienting torture practices, saying:

“It is obvious that sleep deprivation and temperature extremes disorient the detainee—they are designed to do so...if one is disoriented, virtually by definition one’s memory is impaired. It is simply shocking one could be so stupid as to argue the opposite.”²¹³

Torture opponents argue that regardless of intentions, process, or legality, the findings and independent analyses done by Stone, Carle, O’Mara, Morgan, and Frenda clearly demonstrate that torture is ineffective in reliably obtaining useful information.

A Senate Intelligence Committee report titled “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program,” which was declassified in 2014, came to the same conclusion as the independent researchers: that torture was ineffective and, in some cases, even counterproductive.²¹⁴ The report states that:

“The CIA itself determined from its own experience with coercive interrogations, that such techniques ‘do not produce intelligence,’ ‘will probably result in false answers,’ and had historically proven to be *ineffective*. Yet these conclusions were ignored.”²¹⁵

These conclusions have been further echoed in analysis of the more than 500 page report done by *NBC News*. This analysis showed that “the CIA’s own records found that seven of 39 detainees

²¹² Steven J. Frenda et al., "Sleep Deprivation and False Confessions," PNAS, February 8, 2016, accessed February 12, 2019, <https://www.pnas.org/content/113/8/2047.abstract>.

²¹³ Rupert Stone, "The Science Is Clear: Torture Doesn't Work," Newsweek, June 11, 2016, accessed February 19, 2019, <https://www.newsweek.com/2016/05/20/science-shows-torture-doesnt-work-456854.html>.

²¹⁴ "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program," Senate Select Committee on Intelligence, December 3, 2014, accessed November 24, 2018, https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf.

²¹⁵ Ibid.

subjected to especially aggressive interrogation yielded no intelligence, and that others provided useful information without being subjected to the harsh techniques.”²¹⁶ Additionally, the Senate committee reviewed 20 of the most commonly cited examples of CIA enhanced interrogation successes and found each of these examples to be wrong; they were all ineffective.²¹⁷ In fact, the report found that some of the detainees who were interrogated harshly fabricated information including information about “the terrorist threats which the CIA identified as its highest priorities.”²¹⁸ Perhaps even more damning was the report’s realization that of the 119 known detainees in CIA custody, at least 26 were wrongly held. Even worse was the revelation that the CIA paid \$80 million to hire two psychologists to carry out the interrogation techniques, neither of which had any interrogating experience, “expertise in counterterrorism or specialized knowledge of al Qaeda.”²¹⁹

In a political science research paper titled, “The (In)effectiveness of Torture for Combating Insurgency” Christopher Michael Sullivan claims that not only is torture ineffective in reducing killings and other violence perpetrated by enemy insurgents, but it can actually induce even worse retaliatory effects.²²⁰ He argues that it is ineffective “both because it fails to reduce insurgent capacities and because it can increase insurgent incentives for future killings.”²²¹ He even reaches far enough to claim that torture is “expected to be associated with

²¹⁶ "Senate Report Finds CIA Interrogation Tactics Were Ineffective," NBCNews.com, December 9, 2014, accessed January 29, 2019, <https://www.nbcnews.com/storyline/cia-torture-report/senate-report-finds-cia-interrogation-tactics-were-ineffective-n264621>.

²¹⁷ Ibid.

²¹⁸ "Senate Report Finds CIA Interrogation Tactics Were Ineffective," NBCNews.com, December 9, 2014, accessed January 29, 2019, <https://www.nbcnews.com/storyline/cia-torture-report/senate-report-finds-cia-interrogation-tactics-were-ineffective-n264621>.

²¹⁹ Ibid.

²²⁰ Christopher Michael Sullivan, "The (in)effectiveness of Torture for Combating Insurgency," SAGE Journals, 2014, accessed March 6, 2019, <https://journals.sagepub.com/doi/pdf/10.1177/0022343313520023>.

²²¹ Ibid.

an increase in killings perpetrated by counterinsurgents” in retaliation to the torture itself.²²² He asserts that torture is a remarkably undesirable tactic as it not only fails to provide any useful information, but also directly leads to an increase in the initial problem it was seeking to solve, killings by terrorists.²²³

An additional argument regarding the ineffectiveness of torture championed by opponents is a rebuttal to the case for torture warrants made by Professor Alan Dershowitz. As mentioned earlier in this paper, Dershowitz argues that when given the choice between “two evils,” being torture or letting civilians die, leaders of a democracy will always choose torture in avoidance of great loss of life.²²⁴ In asserting his point that the question is not whether officials will torture (he says they will), but whether torture should be legalized, he claims that torture warrants would at least allow for regulation and transparency if torture must be used.²²⁵ Opponents, however, argue that this argument is unsubstantiated and not well thought-out. Lukas Feick, author of “Between No-Go and Necessity: A Review Essay on International Legal Responses to Torture” is one such critic of Dershowitz. While he admits that his claims “may be compelling to some extent *in theory*,” they are “questionable” in practice.²²⁶ In particular, he attacks Dershowitz’ invocation of the ticking time-bomb scenario, saying that:

“given the issue of immediacy, which is by definition at the heart of this scenario, it is doubtful whether institutional practices such as the solicitation of “torture warrants” and their approval by a judge is a realistic assumption within such a short timeframe. A

²²² Christopher Michael Sullivan, "The (in)effectiveness of Torture for Combating Insurgency," SAGE Journals, 2014, accessed March 6, 2019, <https://journals.sagepub.com/doi/pdf/10.1177/0022343313520023>.

²²³ Ibid.

²²⁴ Alan Dershowitz, "The Case for Torture Warrants," Reuters, September 07, 2011, accessed February 16, 2019, <http://blogs.reuters.com/great-debate/2011/09/07/the-case-for-torture-warrants/>.

²²⁵ Ibid.

²²⁶ Lucas Feick, "Between No-Go and Necessity: A Review Essay on International Legal Responses to Torture," Rutgers School of Arts and Sciences, accessed January 19, 2019, <https://polisci.rutgers.edu/news-publications/occasional-paper-series/345-occasional-paper-7-lucas-feick/file>.

possible alternative, perhaps closer to reality, would be the obtainment of approval ex post, which in a way would defeat the purpose of a warrant.”²²⁷

In other words, he seeks to demonstrate that the benefits outlined by Dershowitz are dismantled by the issue of time sensitivity as warrants could not realistically be granted in the ticking time bomb scenario.

Feick is not the only critic of Dershowitz’s argument. Uwe Steinhoff seeks to expose the weaknesses in the case for torture warrants in an essay published in the *Journal of Applied Philosophy* called “Torture – The Case for Dirty Harry and Against Alan Dershowitz.” The first of these weaknesses that he focuses on is Dershowitz’s assumption that there are only two alternatives in the torture debate: closing one’s eyes as it happens or introducing torture warrants. Steinhoff criticizes this false dichotomy, saying “Dershowitz seems to have difficulties grasping the difference between closing one’s eyes on the one hand and exposing and condemning on the other.”²²⁸ He also moves to criticize Dershowitz’ admission that he “certainly cannot prove ... that a formal requirement of a judicial warrant as prerequisite to nonlethal torture would decrease the amount of physical violence directed against suspects.”²²⁹ He asserts that this argument is inherently weak in its basis on personal beliefs rather than facts and substantiated evidence.

In seeking to explain and provide substantial reasoning for opponents’ arguments for the absolute prohibition of torture I have presented four different arguments that approach the topic from a variety of angles. These arguments, a moral argument based in the fundamental violation of human rights, an ethical argument stemming from deontology, a legal argument based on

²²⁷ Lucas Feick, "Between No-Go and Necessity: A Review Essay on International Legal Responses to Torture," Rutgers School of Arts and Sciences, accessed January 19, 2019, <https://polisci.rutgers.edu/news-publications/occasional-paper-series/345-occasional-paper-7-lucas-feick/file>.

²²⁸ Uwe Steinhoff, "Torture — The Case for Dirty Harry and against Alan Dershowitz," *Journal of Applied Philosophy* Vol. 23, No. 3, Themed Issue: The Ethics of War (2006), Pp. 337-353, 2006, accessed January 12, 2019, https://www.jstor.org/stable/24355181?seq=1#page_scan_tab_contents.

²²⁹ Ibid.

binding domestic and international legislation, and a pragmatic argument concerning the ineffectiveness of torture as an information-seeking method, all work to show that torture is not an ethical or effective method of ensuring public safety, especially not for a modern democracy. Opponents ultimately seek to reject the arguments of torture's supporters as unrealistic, inaccurate, and simply immoral. Instead, they maintain that state-sponsored torture should absolutely and *necessarily* be prohibited in any place and time and under any and all circumstances.



Analysis of Arguments

The arguments that I have introduced and explained in the preceding sections of this work, both in favor of and in opposition to torture are all compelling in many ways. Each of these arguments cater to different types of reasoning (emotional, pragmatic, legal, etc.), which give both sides of the debate quite exhaustive and comprehensive cases. Even if one does not necessarily agree with the arguments presented by one side, it is very easy to see where their arguments come from, how they are appropriately applied, and how conclusions are formed. The wealth of strengths on each side of the debate are perhaps a key indicator of why American public opinion on state-sponsored torture is split nearly evenly. However, in taking the time to analyze the arguments and evidence provided in existing literature on the topic, it has slowly become very clear where weaknesses in the logic develop on each side. Even more, in undertaking and completing this research project, it has become remarkably lucid which side of the debate presents a more substantiated, persuasive, and outwardly *superior* argument.

At the beginning of this research project I posed the following research question: Is it ever justifiable for the United States government to use state-sponsored torture for national security purposes? Throughout the course of this research, it has become abundantly clear that any and all forms of torture, state-sponsored or otherwise, should be expressly prohibited and punishable by law. In addition to the many weaknesses that have been uncovered in the arguments of supporters, the reasoning employed by opponents is all-encompassing in comparison and significantly more difficult to refute. More specifically, the utilitarian, ticking time bomb, philosophical, and institutionalization arguments have significant inherent weaknesses that dramatically reduce the strength of the pro-torture argument. On the other hand, while not perfect, I find the arguments made by the proponents to be more evidence-based and less theoretical, making them dramatically more credible.

Upon first glance, the utilitarian case for torture is compelling: torture one to save many. However, when deconstructing the philosophy, it becomes apparent the dangerous slippery slope that is embedded. The theory holds that the morally correct decision is that which maximizes utility for the maximum number of people.²³⁰ However, it allows for the justification of *any* means as long as the desired end result is achieved. While this may sound palatable to some when applied to the case of one criminal and thousands of innocent civilians, it becomes significantly less so when applied to other hypothetical or real-life situations. Consider the case presented earlier in this work, of five people in need of organ transplants, but the only available source for such organs is from a healthy young man arriving at a hospital for a checkup. Utilitarianism would tell us to take the man's organs as saving five lives is certainly preferable to

²³⁰ Jeremy Davies, "Interdisciplinary Studies in the Long Nineteenth Century," 19, December 01, 2012, accessed December 05, 2018, <https://19.bbk.ac.uk/articles/10.16995/ntn.643/>.

losing one. This example easily shows the slippery slope that can develop with the utilitarian argument, demonstrating why it is not an appropriate or convincing argument for this debate. By extension, the ticking time bomb argument is invalidated, as its logic relies largely on a utilitarian premise. Despite being a largely unrealistic scenario in the first place, using the utilitarian argument, there is no arbitrary and objective way to quantify suffering placed on tortured suspects as opposed to innocent civilians, and there is certainly no way to answer the question of how many people we can torture before it's no longer maximizing utility.

The philosophical argument is riddled with holes and oversights as well. Like the proponents of the argument, I wholeheartedly agree that the government's number one purpose is to serve its people and ensure their rights and safety. However, torturing suspected terrorists strips them of their naturally derived civil liberties, which is what we consent to a civil society for in the first place. If the state is able to decide when it would like to uphold these civil liberties, then it is no longer serving its people and the people should no longer submit to it. They should exercise the right to overthrow it if it cannot serve their interests as Locke claims in *The Second Treatise on Civil Government*.²³¹ Torturing even one person and invalidating his or her civil liberties represents a systematic degradation of civil liberties for all who reside within the state's borders.

The argument presented by Alan Dershowitz calling for torture warrants is similarly perplexing. I object to his initial assumption that officials will torture anyway, even if it is prohibited. We should not accept such complacency. If an act, such as torture, is morally and ethically irreprehensible, as citizens we should not allow for its continued practice by simply

²³¹ John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).

seeking to be transparent. We should instead do what is morally correct by denouncing it, illegalizing it, and implementing consequences for its use. Furthermore, while I do understand Dershowitz' plea for regulation and transparency, the analysis on the topic discussed in previous sections has shown that torture warrants would not be effective anyway and would potentially lead to negative retaliatory effects instead. Additionally, it is unrealistic to obtain a torture warrant in the case of the ticking time bomb as time is so crucial.

As discussed above, any instance of torture is an egregious assault on fundamental human rights and a dereliction of our duty to do what is morally right, even if the consequences are less than ideal. We consented into a civil society for the protections that the state can provide in protecting our lives, liberties, and property.²³² Torture degrades these promises and renders the state worthless in its purpose of upholding these ideas. Even if the moral and ethical arguments are not compelling enough as standalone points, which I argue they ought to be, the legal analysis presented above directly and undeniably requires an absolute prohibition of torture according to both domestic and international law and is supported and confirmed by all three branches of the United States government. Even beyond the legal argument, torture has been shown to be ineffective in nearly every case that has been investigated and reviewed since the beginning of the War on Terror. Even if one disagrees with the rest of the opposing arguments presented, it is clear that there is no logical reason to invoke torture and suffering if no benefit or life-saving information can be reliably obtained. Ultimately, reviewing and analyzing the entirety of this research on both sides of this debate has made clear to me that no other logical conclusion can be reached than the absolute prohibition of state-sponsored torture.

²³² John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 1986).



Conclusion

The findings of this research project have determined that the United States government's use of state-sponsored torture for any purpose cannot be justified. While proponents of torture do present some mildly compelling arguments, they all fall short of justifying torture as their reasonings have shown to be flawed through the analyses presented above. On the other hand, the arguments in opposition to torture are based less on hypotheticals and assumptions and more on studied outcomes, evidence, and the law. In contrast, it has become apparent throughout the course of this research that despite being convincing, the majority of the arguments in favor of torture are emotional and reactionary as a result of the pain felt by many Americans in response to repeated terror attacks over the years. Aside from the moral and ethical arguments against torture, which are convincing, but only subjective, the legal and pragmatic arguments against torture provide evidence and analysis to show that it is both legally impermissible and ineffective as a method of obtaining critical information from enemy combatants. These considerations demonstrate definitively that torture is an ineffective and uncivilized practice that does not stand to serve any useful or lawful purpose in modern democratic societies.

Channeling this concept further, torture is a harrowing and inhumane practice that leads to the systematic and controlled reduction in the democratic values of life, liberty, and the pursuit of happiness that this country was will built on, as outlined in the Declaration of Independence and the Bill of Rights. Covertly administering torture to our enemies, or even worse institutionalizing and accepting it, diminishes these values and renders the government ineffective as it no longer serves the interests, rights, and liberties of *all* its people. We cannot

allow the pain and suffering we experience to allow are emotions to get the best of us and lead us to atrocities such as torture. We must remain strong and steadfast to the values that have made this nation truly exceptional. It is our duty as American citizens to make sure that our government continues to protect our persons and privileges.

An especially disturbing thought is the consideration of how torture's use might be viewed in the future. Many points in our nation's history are now remembered with remorse and sorrow. Slavery, Japanese internment, and usurpation of Native American lands all serve as examples of darker times where our democratic values have taken second place to bigotry, hatred, and ignorance. In response to this idea, Senator Dianne Feinstein said that "history will judge us by our commitment to a just society governed by law and the willingness to face an ugly truth and say: Never again."²³³ Ultimately, this fate and truth that we must face will only become clear over time. In reference to Guantanamo Bay and other sites of torture, John Le Cerré said "don't imagine you'll be unscathed by the methods you use. The end may justify the means.... But there's a price to pay, and the price does tend to be oneself."²³⁴



²³³ "Senate Report Finds CIA Interrogation Tactics Were Ineffective," NBCNews.com, December 9, 2014, accessed January 29, 2019, <https://www.nbcnews.com/storyline/cia-torture-report/senate-report-finds-cia-interrogation-tactics-were-ineffective-n264621>.

²³⁴ John Le Cerré, *The Secret Pilgrim: A Novel* (New York, NY: Penguin Random House, 2008).

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