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On Obama and Ill-Treatment: Interdisciplinary Policy Against Torture's Return

Steven J. Barela[1]

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Abstract By executive order—later passed into law—President Obama closed legal loopholes used to justify torture by his predecessor. Less often discussed, his administration also instituted scientific research into the most effective interrogation techniques. This dual-track approach already demands the use of two different methods to properly discuss the policy, and in this article, a third is put forward for a fuller interdisciplinary view. That is to say, although there are notable shortcomings, scientific and legal developments will be explored to illuminate how he also clarified a moral stance for the nation. Put all together, this article will show that Obama indeed achieved laudable steps towards preventing the reintroduction of torture.

Keywords Torture · Ill-treatment · Interdisciplinary · Efficacy · Legality · Morality

Introduction

President Barack Obama inherited a major policy challenge on torture. After extensive investigation, it had become near common knowledge that a program of ill-treatment had been initiated by his predecessor (U.S. Senate Committee on Armed Services 2008; Federal Bureau of Investigations (FBI) Inspector General 2008; International Committee of the Red Cross (ICRC) 2007; Church Report 2005; Schmidt and Furlow Report 2005; Taguba Report 2004; Central Intelligence Agency (CIA) Inspector General 2004). The president finally acknowledged this fact himself when he proclaimed, "We tortured some folks" (2014a). Further etching that truth into a government document, the Executive

✉ Steven J. Barela
Steven.Barela@unige.ch

[1] Global Studies Institute/Faculty of Law, University of Geneva, Sciences II, Quai Ernest-Ansermet 30, 1211 Geneva 4, Switzerland

Summary of the U.S. Senate Select Committee on Intelligence (SSCI) report was released in December of that same year detailing the CIA's detention and interrogation program under President George W. Bush.[1] As a starting point, the Obama administration spoke with the authority of the executive branch to provide an affirmative answer to whether ill-treatment had been inflicted by US agents. Considering the previous obfuscation, this qualifies as a modest advancement.

Such an observation opens an important question regarding the propriety of how the Obama administration dealt with the aftermath of an interrogational torture program. Notably, legal loopholes were closed. On his second day in office, Obama signed an executive order to restrict interrogations by all agents of government to the (largely) non-coercive tactics found in the 2006 Army Field Manual (Executive Order 13491). Knowing that this order could be easily overridden by the next president, a provision was ultimately signed into law to codify the constraint (National Defense Authorization Act (NDAA) for 2016). There are real deficiencies—along with a complete failure to prosecute offenders or offer any remedy and redress to victims—but a legal policy agenda was moved forward to impede a reinstatement.

Less often discussed, Obama's executive order also instituted research to scientifically study the most effective practices for gaining information through interrogation—a vital research question that had been ignored for decades (Fein et al. 2006). Indeed, the results now bolster an international movement by experts on torture towards a standard-setting legal instrument to encourage compliance with the laws and offer guidance for effectively interviewing suspects without coercion (Mendez Interim Report 2016). In this same vein, the president agreed to declassify a summary of the SSCI Report which probed into whether the techniques implemented were an "effective means of acquiring intelligence or gaining cooperation from detainees" (Findings and Conclusions: p. 3).

There are various and valid ways to examine the correctness of policy. Yet the fact that the Obama government explicitly pursued strategies on two different disciplinary tracks demands that discussion of this response employs a varied methodology. The integrated method to be applied in this article will be presented in "Methodology: Integrating Disciplines for Policy Analysis." There will then be full investigation into the two most salient aspects of the policy—the empirical research program will be surveyed first in "Efficacy," and the legal tack to re-codify the illegality of torture is discussed in "Legality." At the same time, a third approach will be incorporated throughout this article to illuminate how Obama clarified a moral stance for the nation. As a result, the interdisciplinary structure of this article will provide treatment of the efficacy, legality, and morality of torture as seen through the Obama policy.

But what was the overall objective of this reaction to the torture authorized by Bush? It will be argued that President Obama offered insight into his chief goal when he vowed to, "make sure we never resort to those methods again" (2014b). This will be

[1] Chair of the Committee, Senator Diane Feinstein, came to a personal conclusion that some detainees were "tortured" and the evidence was "overwhelming and incontrovertible," (SSCI Report 2014, Forward: p. xii).

taken as central to the policy, and it is suggested laudable steps were actually achieved towards preventing the reintroduction of torture (Cf. Jacobson 2017)—even if deterrence through accountability is the most commonly advocated route. Disturbingly, this hypothesis is already being tested. We know that President Donald Trump promised on the campaign trail to institute a "hell of a lot worse" than waterboarding and has shown little compunction about pushing forward on questionable policies (McCarthy 2016). Though the policy appears to be currently off the table, it remains to be seen whether Obama's course of action will be sufficient to stop any determined effort to bring back ill-treatment.

Methodology: Integrating Disciplines for Policy Analysis

There is no doubt that torture on behalf of a government creates concerns that cross disciplinary boundaries. Whether a policy is legal, moral, or effective are all questions that must be explored to discuss the legitimacy of an action in the first place or the propriety of how it was dealt with by a successor (Ost and van de Kerchove 2002; Barela 2014). In this case, a multipronged approach was implemented by the Obama administration—empirical research and codifying law—and so this must serve as the launching point. These policies, it will be argued, indeed open a view onto the traditional moral questions. Accordingly, these separate but overlapping inquiries will be pursued in an interdisciplinary manner that elucidates each perspective, without confusing the overall analysis (Repko 2011). In other words, the means, knowledge, and insights brought by separate fields of study are essential to begin the discussion.[2]

This will mean that "Efficacy" primarily surveys the conclusions from the scientific methods applied in the federally funded scientific research program carried out by cognitive psychologists to evaluate the effectiveness of different interrogation techniques. These include the following: (in vivo) observational studies of real interrogations, analysis and coding of video-recorded questioning, structured interviews, and surveys of interrogation professionals, along with (in vitro) controlled experiments in the laboratory to establish casual conclusions (Meissner et al. 2015).

Next, "Legality" will principally contain legal analysis of the anti-torture law signed by Obama in 2015. Through discussion of applicable international conventions and custom, general principles, judicial decisions, and normative provisions found in non-binding texts (soft law), both the strengths and weaknesses of the new law will be examined.

Though we will see that each of these methods brings us to the same end, the disciplinary route employed to arrive there is different.

Throughout our inquiry, the analysis will also touch upon the deontological and utilitarian ethics that traditionally frame the moral debate over interrogational torture in order to link together the questions of efficacy and legality that were explicitly addressed. Ultimately, because the Obama policy did not specifically include a moral dimension, this part of the analysis will act as a fastening tool in the article and shed

[2] There is a worthwhile recent trend of integrating law and ethics (e.g., Finkelstein et al. 2012; Ohlin et al. 2015; Bhuta et al. 2016). Yet the addition of empirical validity brought by scientific research renders the approach utilized here slightly different.

light on the disciplinary overlap in play. This will also mean that specialists in normative ethics will no doubt see avenues to dig much deeper.[3] Yet the moral discussion here will remain at a more surface level to help spotlight the interrelated nature of the different questions at issue on torture.

Essentially, this article strives for the interdisciplinary imperative brought on by the subject matter of torture itself and is further necessitated by the multifaceted approach under Obama. Put in another way, to only treat the question of science, law or ethics in this case would leave a lamentably incomplete picture of the policy.

Efficacy

To offer a philosophical underpinning for scientific research on the effectiveness of interrogation techniques, it is fitting to begin with utilitarian ethics. This moral theory holds that the right action is that which produces the greatest good. The generally accepted father of classical utilitarianism, Jeremy Bentham, expressed the formula as, "[a]n action then may be said to be conformable to then principle of utility … when the tendency it has to augment the happiness of the community is greater than any it has to diminish it" (Chapter I, VI 2000). Morality for utilitarians thus rests on the greater "tendency" of an action to augment happiness (Mill 1864: p. 5) and pivots in this context on the effectiveness of interrogation.[4]

The key here would be to probe what methods of interrogation can be systematically shown to increase the likelihood of gaining actionable intelligence and increasing security. John Stuart Mill argued in his own articulation of this ethic that humankind has been "learning by experience what sorts of consequences actions are apt to have" (1864: p. 16). And to address the objection that there is not "time to calculate" the consequences, Mill argued, "*there has been plenty of time*, namely, the whole past duration of the human species" (original emphasis: p. 16–17).

For this ethic, it is, accordingly, natural and necessary to continue this process of discovery with our modern scientific methods of data collection and analysis. In the simplest terms, we tackle the question of utility through empirical research. This section will hence relate utilitarianism to efficacy, scientific study, and the manner in which President Obama confronted one side of the moral argument—one brick in a bulwark against torture's return.

A Want for Records and Testing

As central as efficacy is to the utilitarian ethic, there is an alarming lacuna of empirical study on the question of what interrogation methods work best for gathering intelligence. This was evidenced in a landmark US government-backed review in 2006 conducted in the shadow of revelations about Abu Ghraib, interrogation abuses at

[3] Other sources might include the following: Bernstein 2015; Brecher 2007; Luban 2014; Scarry 1985; and Shue 1978.

[4] Bentham's quasi-mathematical "felicific calculus" includes seven variables: intensity, duration, certainty or uncertainty, propinquity or remoteness, fecundity, purity, and extent. However, as it has been said that applying this formula is impractical or "artificial" (Mitchell 1918), it is simplified and argued here that the scientific research carried out under Obama indeed elucidates the *tendency* to increase happiness.

Guantánamo, enforced disappearances to secret detention centers, and extraordinary renditions—all in the name of intelligence gathering. This report, *Educing Information*, revealed a stark (and disturbing) dearth:

- U.S. personnel have used a limited number of interrogation techniques over the past half-century, but virtually none of them—or their underlying assumptions—are based on scientific research or have even been subjected to scientific or systematic inquiry or evaluation.

  […]
- Although pain is commonly assumed to facilitate compliance, there is no available scientific or systematic research to suggest that coercion can, will, or has provided accurate useful information from otherwise uncooperative sources.

  (Fein et al. 2006: p. 35)

As bizarre as it sounds, while we have been experiencing remarkable leaps forward in the twentieth century and beyond—built on studied scientific enquiry—interrogation methods have generally been left to intuition, anecdotal experiences, and even myth.

This is not a unique observation. In his comprehensive study, Darius Rejali wrote about the deficiency in reporting on abusive programs. He cites cases where very limited data collection was further clouded by the classification of documents: the CIA Phoenix Program, the Franco-Algerian War, and the Parker Commission in Northern Ireland (2007: p. 521–3). These gaps led him to a condemning conclusion, "[t]here may be secret, thorough reports of torture's effectiveness, but historians have yet to uncover them for any government. Those who believe in torture's effectiveness seem to need no proof and prefer to leave no reports" (2007: p. 522).

For this reason, the 3-year investigation and report by the Senate Select Committee on Intelligence into the detention and interrogation of 119 individuals in CIA custody is a document of historic proportions. The detailed 6700 pages with close to 38,000 footnotes authenticate the history of the program and specify the capture, detention, interrogation, and conditions of confinement of each detainee (SSCI Report 2014: 25). Yet only the Executive Summary has been published to date, and researchers (among many others) anxiously await release of the document in its entirety.[5]

While the summary has clarified much of what happened and lends credence to the hypothesis "torture does not work," this was an investigation into a haphazard use of ill-treatment that did not systematically track results.[6] Namely, it was not an orderly program; torment never is (Rejali 2007: p. 447–458).

Despite this fact, two conclusions are worth highlighting: (1) the abuse was not an effective means for gathering intelligence or gaining cooperation, and (2) the justifications for its use were based on inaccurate claims of effectiveness by the CIA (Findings

[5] It is admittedly contradictory to the public view described in "Legality" that President Obama has preserved a copy of the full report in his presidential library—but it is to remain classified for 12 years (White House 2016). This is accentuated by fact that CIA "inadvertently" destroyed two of its own copies (Isikoff 2016).

[6] Mitchell suggests there was a systemization in the CIA program he designed, but it should be noted that he had no previous interrogation experience for comparison (Mitchell J with Harlow B, 2016). Nonetheless, one report claims this was indeed human experimentation (Physician for Human Rights 2017).

and Conclusions: p. 3–4). What is more, the CIA did not appraise its own experience with coercive interrogations, did not consult with agencies with interrogation experience, and had previously testified to Congress that such techniques "do not produce intelligence and will probably result in false answers" (Findings and Conclusions: p. 13). It also admitted a failure to complete comprehensive and independent analysis of the effectiveness of its program (Congressional Research Services 2016: p. 13). This lapse is all the more egregious since the CIA Inspector General was calling for just such an internal review as early as 2005:

> We make this recommendation because we have found that the Agency over the decades has continued to get itself in messes related to interrogation programs for one overriding reason: we do not document and learn from our experience—each generation of officers is left to improvise anew, with problematic results for our officers as individuals and for our Agency.
>
> (SSCI Report 2014: p. 116)

There is another conclusion that must not be overlooked: *no timely intelligence was ever gained*. In fact, this critical point was already settled in 2004 when the CIA Inspector General did not "uncover any evidence that these plots were imminent" (CIA Inspector General 2004: p. 88). This is significant because it means that other methods could have produced the very same results. Oddly, CIA Director John Brennan clung to this as a defense for the agency saying effectiveness "is and will forever remain unknowable" (2013: p. 3). However, ill-treatment based on something that cannot be known changes, at the very least, the utilitarian question: if we can never know if it will/did work, how can it be described as the morally superior choice?

The HIG Research Committee

At the outset, it should be understood that there is an inherent difficulty in choosing the correct subjects for interrogation. Ultimately, the innocent and ill-informed will always be mixed in with those who are knowledgeable since what resides inside the mind of a detainee can never be known with certainty or in its entirety—both before and after questioning (Rejali, 2007: p. 446–536; Barela 2014: Chapter 5).[7]

Nevertheless, there will always be detainees suspected of possessing information, and this might even be timely intelligence that can prevent a calamity. Rather than presume that torture will extract the requisite facts, an empirical and comparative question must be asked: what techniques have the greatest likelihood to quickly learn what an individual knows?

Though this question has certainly been considered taboo when it comes to torture (e.g., Amnesty International 2015; Cole, 2015; Basoglu 2009), Obama took the epistemological lacuna identified in *Educing Information* seriously and directed

[7] Rejali makes this point most clearly in his discussion of the CIA Phoenix Program: "[E]ven if torture was completely effective, the database indicates that it would still be unreliable as a source of information because the way individuals are chosen in insurgencies guarantees many prisoners with no information. But it seems plausible that torture compounded the selection errors: the ignorant fingered the innocent and deceived the torturers, and the innocent was then interrogated or terminated" (2007: p. 472).

administration efforts to this precise empirical question. Along with laying the groundwork for the legal policy, Executive Order 13491 also created an Interagency Task Force that would "study and evaluate whether the interrogation practices and techniques in Army Field Manual 2-22.3, […] provide an appropriate means of acquiring the intelligence necessary to protect the Nation" (2009). This is important because, as will be seen below, the new interrogation law restricts all agents of government to use of only the techniques found in the Manual.

The High-Value Detainee Interrogation Group (HIG) was officially created in 2009 as an outgrowth of this executive order to accomplish two primary missions. First, it created a mobile elite team of experienced interrogators, subject matter experts, intelligence analysts, and interpreters to collect intelligence without compromising future criminal prosecutions. Yet, there is little public information on this unit (McKelvey 2013).

Even more pertinent to our policy question, the HIG Research Committee was initiated, "with the goal of identifying the existing techniques that are most effective and developing new lawful techniques to improve intelligence interrogations" (Department of Justice (DoJ) 2009b). In contrast to the operational mission, it has followed academic practice by encouraging that studies remain in the public domain to spur dialogue and the testing of results among scientists, while also informing the general population (Kelly 2015).

Seasoned investigators have chaired the HIG Research Committee: Mark Fallon (2017), NCIS commander of the USS *Cole* Task Force and Special Agent-in-Charge of the task force created after 9/11 to bring terrorists to justice before military commissions; and Steven Kleinman, Colonel, U.S. Air Force (Ret), 30-year career military intelligence officer and a recognized expert in the fields of human intelligence, strategic interrogation, and special operations. This leadership helps explain why there has been a testing of results via "a continuous cycle of research advising training, training informing operations, and operational experience identifying research gaps and updating training models" (FBI 2016: p. 1).

Of great initial import, in March 2010, the HIG scientific program began to fill the gapping empirical hole as it was "the first federally funded research program on interrogation since the 1950s" (Meissner et al. 2015: p. 212). If only for this reason, it was a keen advancement put in place by Obama.

Social Science

One of the first queries that often leaps to mind is how can lawful and ethical studies on torture's effectiveness be carried out? Indeed, it is not uncommon for scholars to argue that there is no way to do so.[8] However, we can start with the simple fact that anecdotal reports offer extremely limited support for the efficacy of abusive tactics (Rejali 2007: p. 446–536; Fein et al. 2006: p. 35; Arrigo 2004; Bell 2008; Costanzo and Gerrity 2009; Pfiffner 2014). Even if not dispositive, this data is relevant. Moreover, in a 2016 interview with the HIG's chief researcher Christian Meissner (a professor of cognitive

[8] "Absent a sharp break with ethical and legal principles that have governed human subjects research for generations, comparative-effectiveness studies using suspects for whom harsh, real-world consequences loom are not possible" (Bloche 2017).

and behavioral psychology), it was reminded to me that we have learned enormous amounts about physical and mental health without crossing legitimate and essential research boundaries and that he himself had done so with previous work on the subject of false confessions (Lassiter and Meissner 2010).

In this instance, there has already been an accumulation of data coming from research on interrogations in the criminal justice system. Not only has there been study on effective interviews, but also on the conditions under which victim, witness, and suspect memories are most vulnerable, proven cues for deception, and the conditions under which persons provide false confessions. Additionally, there has been the development of science on resistance, persuasion, negotiation and social influence, and cognitive-based indications of duplicity. As it is explained in one HIG report, "the underlying processes of communication, decision-making, memory, cognition, and social dynamics are fundamentally the same in the law enforcement and intelligence gathering settings" (FBI 2016: p. 2). In other words, not only are there fertile and safe questions to pursue, there are studies which already exist as a foundation.

Building off of the established science and using long-recognized methods of the field, the HIG researchers conducted in vivo and in vitro investigations. The former refers to observational studies of live legal interrogations, along with surveys of interrogators and structured interviews. The latter denotes laboratory research that assesses the casual influence of interview approaches on true and false confessions. These procedures thus adhere to legal and ethical requirements by collecting what experienced interrogators already know into systematic paradigms and then push the bounds of this knowledge with controlled experimental testing for casual factors.

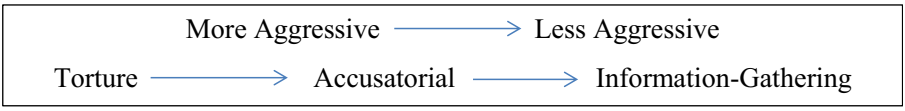
After 8 years of funded research, there is now a growing corpus of unclassified and peer-reviewed studies from the HIG found in over 120 published journal articles and book chapters produced by respected psychologists from the USA and abroad (including Australia, Great Britain, South Africa, Sweden, and parts of the Middle East). They can be explored individually and in literature reviews of leading academic journals (HIG Bibliography 2017), and principal parts are available in a special issue of *Applied Cognitive Psychology* (Granhag et al. 2014).

To capture a major conclusion of this work there is one particularly telling term found throughout the literature on successful interrogation: *rapport*. This element is described as foundational for the non-coercive information-gathering method and has been defined as, "a working relationship between operator and source based on a mutually shared understanding of each other's goals and needs, which can lead to useful, actionable intelligence or information" (Kelly et al. 2013: p. 169). Not only is rapport-building enumerated as an element of best practice to give a sense of "agency" and "autonomy"—the anti-thesis of ill-treatment—it has been explicitly underscored by the HIG that "[b]uilding rapport is generally accepted as the most important component of a successful interrogation" (HIG 2016: p. 3).

In order to further flesh out this scientific research, we can also look into one comprehensive recent article entitled "Psychological Perspectives on Interrogation." In it, researchers from the HIG evaluate three broad interrogation approaches within a spectrum from the most aggressive to the least. To assess such treatment, the authors "extrapolate from observations available within the historical record, from interviews with experienced interrogators and detainees subjected to such methods, from other forms of social influence that we study within the laboratory in an ethical manner, and

from the observed effects of laboratory studies involving high arousal" (Vrij et al. 2017: p. 929). Unsurprising to those who have looked at the anecdotal data, the science and most successful practice point us in one clear direction: away from ill-treatment.

Classic torture can be found on one end of the spectrum as the maximum violence (without death) that can be employed, and then the assessed techniques move towards less severe pain and suffering (Bell, 2008: p. 343). In the middle of our range, we find the accusatorial model that is psychologically manipulative and relies upon deception and trickery (Leo, 2008). The public is often familiar with this method as it is a legal technique frequently depicted in television and movies. The intention is to gain an admission of guilt; confession is the goal. This method bears a closer correlation to ill-treatment since it involves "emotional provocation and confrontation," along with promoting isolation and anxiety (Meissner et al., 2015: p. 216). At the other end of the band, we find the information-gathering method which involves "extensive rapport development" and the creation of contexts that "facilitate openness and cooperation"—again, the exact opposite of abuse (Meissner et al., 2015: p. 216). We can envision the spectrum as such:



In the article, the authors scrutinize each of these methods to analyze three key elements that define a successful interrogation: (1) overcoming resistance and achieving cooperation; (2) facilitating the retrieval of information from memory; (3) assessing credibility or truth of what is expressed by the detainee. The text fleshes out precisely how and why the available research on these essential elements—much of it from the HIG—steer us away from abuse and in the direction of information gathering. They conclude:

> Psychological theory and research show that harsh interrogation methods (including torture and accusatorial methods) are ineffective as a strategy for eliciting accurate and complete information from an interviewee for several reasons. First, they are likely to increase resistance by the interviewee and not decrease it. Second, the threatening and adversarial nature of harsh interrogation is often inimical to the goals of fostering efficient cognition. As a result, such methods reduce the likelihood that interviewees will provide reports that are extensive, detailed, and accurate. Third, harsh interrogation methods make lie detection—a challenging undertaking—even more difficult. To effectively identify verbal cues to deceit (the most reliable method of lie detection), interviewees must offer extensive narratives, something that rarely occurs in harsh interrogations. Evidence is accumulating for the effectiveness of information-gathering approaches as an effective alternative to harsh interrogations. Such methods promote cooperation, enhance recall of relevant and reliable information, and facilitate assessments of credibility.
>
> (Vrij et al. 2017: p. 946)

Finally, and in direct alignment with this article, the first major report from the HIG entitled "Interrogation: A Review of the Science" contains one overarching and momentous conclusion: "Based on the comprehensive research and field validation studies detailed in this report, it is concluded that the most effective practices for eliciting accurate information and actionable intelligence are non-coercive, rapport-based, information-gathering interviewing and interrogation methods" (FBI 2016: p. 1). Even if it is acknowledged by the scientists involved that there are further avenues to pursue to sharpen our understanding, the HIG research funded under Obama has helped us move "towards a science of interrogation" (Brandon, S in Granhag et al. 2014: p. 945).

Natural Science

Other experts formally outside this research group have also used safe scientific methods to directly confront the utility of inflicting severe pain and suffering. Shane O'Mara, a professor of experimental brain research at Trinity College Dublin, employs his neurological and biomedical expertise to do just this in the publication entitled *Why Torture Doesn't Work: The Neuroscience of Interrogation* (2015). The book stresses that cognitive memory is at the heart of intelligence gathering since a suspect must summon up information being sought by an interrogator, and he exposes that abuse directly disrupts the brain's ability to recall events clearly. O'Mara explains that information gained through ill-treatment is often worthless simply because "[t]orture is a profound and extreme stressor that causes widespread and enduring alterations to the very fabric of the brain—including in connections between brain cells (synapses) on which memory depends" (2015: p. 8). The victim is neurologically unable to retrieve what is technically known. Conversely, O'Mara also points out that the neural pathways actually open up when a subject feels safe.

When paired with the comparative analysis of the HIG, this is an incisive and cutting indictment of torture. While some have suggested this neuroscience is not dispositive on its own (Bloche 2017: p. 1331–2), O'Mara forcefully argued during the rollout of his book for the central position of science in the discussion:

> The question of how best to conduct interrogations, who should conduct them, and what training is required is not an issue of law enforcement; rather, it is an issue best addressed and solved by the behavioral and brain science community. Theory and data within these fields should be the driving factors behind policymaking, rather than ideological concepts of justice and thinly veiled hunger for retribution and punishment (2016).

International Movement for a Universal Protocol

At this point, it is well worth calling attention to the new initiative to integrate such science and practice into an international soft law instrument to set standards and encourage compliance with existing anti-torture law. Before stepping down in 2016, the now former UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, advocated for the creation of a "universal

protocol for non-coercive, ethically sound, evidence-based and empirically founded interviewing practices" (Interim Report: p. 7). Prof. Mendez has worked to gather testimony and records from professional investigators and researchers who have repeatedly emphasized that interviews are much more effective without resort to torture, ill-treatment, or coercion. In fact, the current and former chairs of the HIG Research Committee, along with O'Mara, have explained in interviews that they were invited to participate in the development of the thematic behind this initiative for a protocol to set universal standards and serve on a steering committee to guide its development.

Beyond reading the Interim Report for content and sources, it is also beneficial to view the launch event for this proposal to grasp how deeply science and practice undergird it (United Nations General Assembly Side-Event 2016). On top of all that the HIG has brought to the table, it is also the case that practitioners in the UK and Norway have already been successfully developing such techniques in the law enforcement context and been working to share their experiences across the globe (Bull 2014; Williamson et al. 2009). An eye should be kept on this international law initiative, clearly built on interdisciplinarity, as legal experts, scientists, and practitioners discuss next steps.[9]

Without Efficacy, No Utilitarian Argument

We should not to be lulled into thinking that harsh methods never bring results. Yet pointing to the existence of abusive programs that have at times yielded credible intelligence (e.g., the Battle of Algiers)[10] does not prove the techniques to be superior. Torture might work on occasion, but when this happens, it certainly does not prove a "tendency […] to augment the happiness of the community." The HIG research program was designed to clarify what techniques are *comparatively* more successful. So the fact that science is accumulating to show that building rapport is better and faster than other means clarifies our meaning of efficacy—along with directly affecting the moral argument.

Ultimately, by initiating federal funding for research and integrating it into training and practice, our knowledge has been advanced by the Obama policy on a vital question that has languished unexplored. We are learning through social science that building a connection with someone is the most likely way to get that person to open up verbally, and hard science confirms that the neural pathways to memory do the same. Further research is merited, but we are finding that the urban legend that torture "works" is not supported by the current science. Directly confronting this moral argument with scientific data and analysis can indeed act (particularly as it becomes more widely known) as a barrier to the reintroduction of torture.

[9] This author has been invited to be a member of the Advisory Council and attended a gathering at the European Union Delegation to the United Nations in New York: "Roundtable Meeting on Developing a Model for Investigative Interviewing by Law Enforcement Officials and Attendant Procedural Safeguards" (June 8, 2017).

[10] Although this is often cited to silence critics, Rejali's extensive analysis of the events concludes, "[t]he French gained accurate intelligence through public cooperation and informants, not torture" (2007: p. 481).

Legality

In deontological ethics, an act is moral if it adheres to duty. Of course, there is much discussion over who dictates this duty. While Immanuel Kant argued that it arises from personal will through rationality (2002: 58, p. 63–5), in this case, the prohibition of torture has reached an unprecedented level of worldwide agreement—both codified and rhetorical. Due to the conspicuous international effort to eliminate ill-treatment in all circumstances and in all places, it is argued here that this largely aligns with Kant's categorical imperative: "Act only in accordance with that maxim through which you can at the same time will that it become a universal law" (2002: p. 37). To wit, this acute international pursuit of proscribing torture represents—by analogy—a moral duty incumbent upon all states.[11]

We know that in international armed conflicts, the Geneva Conventions (GCs) have barred torture against detainees who qualify for prisoner of war status (GCIII, Art. 17), and civilians in occupied territory (GCIV, Art. 31 and 32). Furthermore, Common Article 3 to all four GCs (GCI, GCII, GCIII, GCIV) covering non-international armed conflict contains explicit prohibition of ill-treatment on all those found *hors de combat*. Not only is "cruel treatment and torture" banned, but so are "outrages upon personal dignity, in particular, humiliating and degrading treatment." Likewise, all such treatment has been established by state practice as illegal in customary law for both types of conflict (Henckaerts and Doswald-Beck 2005: Rule 90).

Beyond this wartime prohibition, a tightly woven web of illegality has been ponderously and methodically placed over torture in human rights law. It has been excluded in both customary- and treaty-based international law in all social contexts, and no exceptions have been made for emergency or geography. The non-binding Universal Declaration of Human Rights (1948, Art. 5), the International Covenant on Civil and Political Rights (1966, Art. 7), and regional human rights treaties all place a ban on ill-treatment.[12] Thus, unsurprisingly, human rights courts have regularly found it to enshrine "one of the fundamental values of democratic societies" (*Aydin v. Turkey* [1997]: ¶81).

Moreover, there is a specific treaty proscribing torture which places it into a special category of exclusion. Namely, in 1984, the UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which has now been ratified by 159 nations (out of 193 UN Member States).

In the simplest and most categorical terms, the prohibition of torture can be described as an absolute rule of *jus cogens*; it represents a peremptory norm to which derogation is never permitted (Rodley 2009: p. 81). As expounded by the U.S. Court of

[11] It should also be noted that another essential element of Kant's categorical imperative is that individuals are never to be used as a means to an end; each being must be treated "as an end in itself" (2002: p. 45–56). Of course, torturing a person for information would render them nothing more than a means to an end.

[12] American Convention on Human Rights, Art. 5 (22 Nov. 1969), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (*entered into force* 18 July 1978); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3 (20 March 1952), European Treaty Series No. 5, 213 U.N.T.S. 221 (*entered into force* 18 May 1954); African Charter on Human and Peoples' Rights, Art. 5 (27 June 1981), OAU Doc. CAB/LEG/67/3 rev. 5, 1520 U.N.T.S. 217 (*entered into force* 21 Oct 1986); Arab Charter on Human Rights, Art. 8 (22 May 2004), reprinted in 12 Int'l Human Rights Report 893 (2005) (*entered into force* 15 March 2008).

Appeals for the Ninth Circuit, "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*" (*Siderman de Blake* v. *Republic of Argentina* [1992]). Just as with piracy, slavery, or genocide, states cannot affect torture's illegality with changes in domestic law or practice.

Significantly, Article 4 of the CAT treaty also requires that "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law" and that such legislation "shall make these offences punishable by appropriate penalties which take into account their grave nature." As it was explained in the infamous 2002 "Bybee Memo" (though authored by John Yoo), the US legislature passed specific legislation on torture to meet this requirement (18 U.S.C. §§2340-2340A [1994]). Thus, the domestic legal order has been directly altered by international law on this question, and the lawyers in the Office of Legal Counsel (OLC) were required to pry into both international and domestic law to write their justifications in the "Torture Memos" (Office of Professional Responsibility 2009).

This brief overview of the painstakingly constructed legal edifice offers strong reasoning for the claim that the prohibition of torture is indeed a moral duty similar to Kant's categorical imperative of a maxim that can "make itself a universal law." In a formal sense, it has become one.[13] On its face, this would seem to contradict Kant's contention that each rational will must be autonomous and the author of the law that binds it. However, if we reason by analogy, there is a key distinction to note. We are speaking here of the moral duty of a state and its agents—not of an individual. As a democracy, the US government has arguably expressed its autonomous will by consenting to and consistently reiterating the ban.

Obama's challenge was therefore to confront the Bush policy that had supposedly found a legal dodge to slip through this extensive and clear prohibition.[14] What we find is that, in fact, a pullback from the brink was realized (even if the human rights community has largely focused on the shortcomings). More simply, unchallenged legal gaming can no longer be conducted in secret; all legal interrogation practices are now required to remain public to both a national and international audience.

Regression and an Imperfect Pullback from the Brink

This stark status of illegality in international and domestic law did not stop the use of "enhanced interrogation techniques" after 9/11. One important reason for this was that the OLC memos authorizing them were hidden from the public. The manufactured loopholes underwent no substantive internal resistance behind closed doors and remained concealed to limit critical assessments (Zelikow 2009). However, the Bybee Memo was leaked in the wake of the shocking photographs of gross detainee abuse in the Iraq detention facility of Abu Gharib, demonstrating a real discomfort with the secret justifications (Priest 2004).

[13] While torture persists worldwide, there is now a preference for techniques that leave no mark or "stealth torture" (Rejali 2007: p. 33–402). Until the Trump campaign, there has been next to no recent full-throated argument for outright torture.

[14] For in-depth analysis of the OLC Torture Memos, see Paust (2009).

Beyond this overt action by a whistle-blower, there was an overwhelmingly critical reaction from the legal community. Capturing the extent of alarm over this memo was a letter signed by nearly 130 lawyers, retired judges, law school professors, and a former director of the FBI condemning the OLC's effort to "circumvent long established and universally acknowledged principles of law and common decency" (Higham 2004). The uproar was so great that this memo was retracted within a week after being leaked and replaced with one meant for public consumption (Levin 2004). It was unable to withstand open scrutiny, and the impact of this pressure emanating from the eyes of citizens was a lesson learned by Obama.

After inauguration, the new president signed Executive Order 13491 as a first order of business (2009). This nullified all the secret directives, orders, and regulations on ill-treatment during the Bush era in order to reset the country's legal interpretations. The Obama administration also released the OLC memos that had not been previously leaked in order to expose the legal frailties involved and to construct a full public view (DoJ 2009a).

Most pertinently, the executive order restricted all interrogations to only the techniques found in the 2006 Army Field Manual (AFM). While the Detainee Treatment Act (2005) required this of the Department of Defense, the new restriction was expanded to all agents of the government—including the CIA and contractors (U.S. Department of State 2014: 48). Not only are the methods found within the AFM non-coercive in large measure, but it also has the great benefit of excluding any and all non-listed practices. That is, the distorted reasoning found in the OLC memos over the threshold of what constitutes torture became a debate without legal meaning: the AFM determines legality. Though there are still important concerns with the AFM (discussed below), this was a positive step.

Nevertheless, while this constraint remained an executive order, there were no guarantees that progress forward would remain in place given that the next president could simply override it.

For nearly 7 years, this presidential order stood as the defining legal act for Obama on torture. His administration pursued no charges, no prosecutions, no trials, and no punishment for the grave deeds; such impunity can be a violation in itself (Amnesty International 2015). The CAT treaty clearly lays out that when offenses have been committed, there is a duty to "submit the case to its competent authorities for the purpose of prosecution" (Art. 7(1)). As the United Nations Committee Against Torture explained, "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability" (2008: ¶5; Human Rights Committee 2004: ¶18).

Also of concern, the Office of Professional Responsibility in the Department of Justice retreated from holding architects of the torture program accountable. After a 5-year investigation, it had concluded that former Deputy Assistant US Attorney General John Yoo's legal work demonstrated "intentional professional misconduct" (2009). However, the recommendation that Yoo be referred to his state bar association for disciplinary proceedings, up to and including possible disbarment, was overruled (Margolis 2010: p. 68).

It would also be remiss to overlook the mental health problems plaguing the victims of ill-treatment. A *New York Times* investigation considered a broad sampling of cases

using outside experts to find "a pattern connecting the harsh practices to psychiatric issues" (Apuzzo et al. 2016). Most troubling is the fact that the US government "has never studied the long-term psychological effects of the extraordinary interrogation practices it embraced." The report detailing heinous abuse linked to hallucinations, depression, fits of anger, paranoia, and nightmares is deeply disturbing. Of course, this is an important reason why the CAT Treaty lays down an obligation for remedy and redress (Art. 14; Committee Against Torture 2012; United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation 2005); see also *Husayn* (*Abu Zubaydah*) *v. Poland* [2014] and *Al Nashiri v. Poland* [2014]).

Solidifying Advancement (with Shortcomings)

On November 25, 2015, President Obama signed into law a provision that codified his executive order in the NDAA for 2016. Section 1045 of the omnibus bill engraved into the law books the restriction that all agents of the government must adhere to the 2006 AFM. In it, the foulest types of cruelty are explicitly banned—e.g., waterboarding, beatings, electric shocks, hooding, sexual humiliation, mock executions, forced nudity, or the use of military dogs (5–21, ¶5–75).

Importantly, the law requires that the AFM remain public. Any modifications to the manual must be put forward by the Secretary of Defense (in consultation with the Attorney General, Director of the FBI, and Director of National Intelligence)—and made available 30 days before taking effect. Revisions must also comply with all "legal obligations of the USA" and the practices cannot "involve the use or threat of force." As we have seen that public scrutiny had an impact during the Bush era, this requirement is significant domestically. Ominously, it would also allow other states to adopt the same reasoning and methods opening a grave risk to US soliders.

The timing is also of interest since it captures the importance of the advancement. Just the day before the bill was signed by the president, the eventual Republican nominee, and now President Donald Trump, promised to bring back waterboarding (Jacobs 2015). At that specific moment, Trump could indeed override President Obama's executive order were he to win the general election. Yet 2 months later, he reaffirmed his intention to reinstitute the torturous technique and more (Todd 2016). But such a decision was no longer left to the executive; a change in the law would need to be passed through Congress. Hence, the line of questioning from the media should have changed since authorizing any excluded techniques now breaks domestic law, pure, and simple.

It is also important to note that in 2014, the Obama administration declared before the Committee Against Torture in Geneva that the CAT treaty is (1) applicable outside of the USA and (2) not displaced by armed conflict. In the simplest terms the treaty applies, "at all times in all places" (McLeod). This was a resolved departure from previous administrations and was heralded at that time as a "watershed moment" for US policy on human rights (Koh 2014). Indeed, this shift brought praise from the Committee (2014: ¶6 and ¶10).[15] This declaration closed another loophole created by the Bush administration.

[15] Unfortunately, the change applied solely to the CAT as the Obama administration declared earlier the same year that this was not the case for the International Covenant on Civil and Political Rights (Human Rights Committee 2014: ¶4(a)). This occurred despite internal efforts at the highest level (Koh 2010).

Furthermore, the new legal provision requires that the International Committee of the Red Cross must be promptly notified and given access to all detainees under the "effective control" of agents of the US government or those held within a facility connected to it. This represents further domestic codification of international law since the ICRC is charged with visiting detainees in international armed conflict by treaty and custom (GCIII, Art. 126; GCIV, Art. 76 and 143), and may offer its services in non-international conflict (Henckaerts and Doswald-Beck 2005: Rule 124). As detention without independent oversight is known for opening the door to abuse, this can also be touted as an accomplishment.

Now, as it has been alluded to above, the AFM is *largely* non-coercive because the grossest sorts of abuse are plainly forbidden. Only the 18 techniques listed in the manual can be used with detainees, even those who qualify for prisoner of war status (AFM 2006: p. 8–6). Considering humanitarian law requires that such detainees "may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind"; this is a meaningful constraint (GCIII, Art. 17).

However, there is also Appendix M of the AFM which outlines a technique that cannot be used with prisoners of war (M-1 – M-10), but only on "specific unlawful enemy combatants" that are deemed to possess important intelligence. Such a distinction already creates disquiet. The method entails physically separating a detainee from the rest of the population for a renewable 30-day period ("Physical Separation"), or in the field it allows for blindfolds or other stimuli-blocking material for up to 12 h at a time ("Field Expedient Separation"). It is meant to prevent communication between detainees, erode resistance, foster a feeling of futility, and extend the shock of capture.

These methods are only to be used by exception, and explicit precautions are delineated as it is understood the technique can lead to abuse—either intentionally or unintentionally. The worry is conspicuous: "Separation requires special approval, judicious execution, special control measures, and rigorous oversight" (M-2). In particular, the concern is that the procedure might be used for sleep deprivation since the manual requires only 4 h of continuous sleep for each 24-h period when applying the technique. As approval is renewable without limit, there has been notable attention. Not only have non-governmental groups claimed that it transgresses human rights and humanitarian law (Amnesty International 2013: p. 25–6), the CAT Committee zeroed in on Appendix M in 2014 (¶17). We already know there is danger in reducing the number of witnesses, and here it is during the attempt to "gain actionable intelligence" (M-1).

In fact, one media outlet gained access to documents in 2016 which offer a view into the use of Appendix M during the Obama presidency (Watkins 2016). According to the released material for the US detention facility in Bagram, Afghanistan, this separation technique was authorized for 58 detainees during a 16-month period, and only one request for its use was denied. Since the docs are limited in time and place, one can guess that this method has been authorized elsewhere when the USA is involved in hostilities. The (now former) UN Special Rapporteur on Torture, Juan Mendez, was asked to examine some of the files and is reported as saying they raise serious legal concerns and "should spark an investigation."

As Article 11 of the anti-torture treaty establishes the legal duty to "keep under systematic review interrogation rules, instructions, methods and practices," it is important that the new NDAA law requires an update to the manual every 3 years. Key members of the HIG research team have indeed expressed concern that Appendix M might be read to allow abuse (Stone 2015) and even explained in interviews that their advocacy for the new law was contingent on this mechanism for reform—ideally based on science.

Categorically Prohibited Always and Everywhere

Although this movement back from the brink is imperfect, it is advancement nonetheless. Whereas lawyers in the Bush era toyed with the threshold of what constitutes torture, this debate has lost its legal relevance. Authorized techniques are clearly and publicly listed; otherwise, they are illegal. What can be understood as a universal law was codified anew.

Here, the international prohibition of torture has been equated by analogy to a deontological duty. It is categorically prohibited always and everywhere for the near unanimity of states that have consented to the extensive treaty provisions. The argument can also be extended to say the customary *jus cogens* prohibition indicates that this is a universal moral duty for all states.

The generally accepted weakness of deontological ethics is that such duties might just make the world morally worse. On the theory commonly put forward, to refuse to torture because it is morally unacceptable could fail to avert a disaster.[16] As we have seen, however, this dilemma was treated under the other prong of the Obama response. That is, the policy directly addressed the traditional foil of deontological ethics: utilitarianism. Put all together, it can be argued that the Obama policy—even with its failure on deterrence through accountability—is a coherent firewall.

Conclusion: a Bulwark Against Torture's Return

The Obama administration funded a scientific program to study the most effective methods for gaining intelligence from detainees. While there is more to be learned, the findings direct us away from the utility of torture. Furthermore, this research has helped spark a movement in the international law community for a standard setting, soft law instrument.

Though it was already patently unlawful in both international and domestic law, President Obama also re-codified the illegality of torture. He closed loopholes contrived by the previous administration and provided a full view onto the only interrogation techniques authorized. This includes the CIA, or any other agents of government, anywhere in the world.

So where does this leave us today? The AFM must remain available to the public by law, and Secretary of Defense James Mattis (in consultation with Attorney General Jeff Sessions, FBI Director Christopher Wray and Director of National Intelligence Daniel Coats) must openly promote any revisions. While many rightfully fear citizens supporting a grim backtracking, forcing government officials to publicly support an amendment to allow the return of abusive practices—which could be emulated by both friendly and rival states—raises a daunting barrier. These requirements have arguably had an impact since, at the time of this writing in May 2018, the campaign promises of ill-treatment have fallen off the policy agenda for President Trump (Wong 2017).[17]

[16] This, of course, refers to the challenge posed by the ticking bomb scenario—the quandary of whether the torture ban should be contravened if life-saving information is known to exist inside the mind of a detained prisoner. For a more direct and sharp refutation, see Brecher (2007) and Luban (2014: p. 43–107).

[17] At the same time, we should not overlook the fact that a US citizen is currently being held without access to a lawyer in Iraq (Lederman 2017) and Gina Haspel—known to have directly participated in parts of the torture program and destroyed evidence—has been nominated to be the Director of the CIA (Hawkins 2018). Of course, the Haspel nomination sharply clarifies Obama's failure of accountability.

Under the dual-track approach employed by President Obama, we have seen that this policy can be said to have simultaneously treated the traditional moral questions at stake. As a result, the simple question has now become:

> How could an act that is manifestly prohibited in all places and at all times—and shown by the accumulating science to lessen our chances of saving lives—possibly be considered legitimate policy?

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