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Francesca Laguardia

Montclair State University, laguardiaf@montclair.edu

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Deterring Torture: The Preventive Power of Criminal Law and its Promise for Inhibiting State Abuses

Francesca Laguardia*

ABSTRACT

The use of torture in the War on Terror reinvigorated a longstanding debate about how to prevent such human rights violations, and whether they should be criminalized. Using US history as a case study, this article argues that the criminal sanction is likely to be more successful in preventing such abuses than many other often suggested methods. Analyzing thousands of pages of released government documents as an archive leads to the counterintuitive finding that torturers were often deterred, at least momentarily, by fear of criminal liability, and would have been successfully deterred if not for the lack of prior prosecutions.

I. INTRODUCTION

Immediately following the terror attacks of 11 September 2001, the Central Intelligence Agency (CIA) requested authority to detain and interrogate suspected terrorists, an authority that was quickly granted.¹ By December

* *Francesca Laguardia* is Assistant Professor, Justice Studies, Montclair State University. J.D. 2007, Ph.D. 2012, Institute for Law and Society, New York University. Former Director of Research, Center on Law and Security at NYU School of Law. The author is extremely grateful to David Greenberg, Mihaela Serban, Jessica Henry, Venezia Michaelson, Calvin John Smiley, Gabriel Rubin, Stephen Schulhofer, Candace McCoy, Charles Strozier, George Andreopoulos, John Kleinig, and Mihaela Serban for their comments on earlier drafts of this article.

1. John Rizzo, *9/11: Three Major Mistakes*, *DEFINING IDEAS* (8 Sept. 2011), available at <http://www.hoover.org/research/911-three-major-mistakes>.

of 2002, reporters were exposing rumors that United States government agents were using stress positions and other physically coercive methods to gather intelligence from detainees seized in the War on Terror.² In 2004, pictures of detainee abuse at Abu Ghraib detention facility became public, as did the first of the legal memos, written for the White House, authorizing the use of torture.³ By 2006, the field of human rights scholarship was flooded with articles and reports attempting to prove the criminality of the US government's torture policy; a government sanctioned, institutionalized, gross violation of human rights.⁴

But this strategy of criminalization and prosecution of human rights violations, while lauded by activist organizations such as Amnesty International and Human Rights Watch,⁵ has also been heavily criticized. Scholars have cited evidence that such changes have resulted in more careful abuse, rather than substantive change.⁶

This article argues that such pessimism ignores the promise of deterrence for the social control of states. Using the United States' formal utilization of torture as a case study, this article suggests several points at which actors in the process of legitimizing and employing torture were deterred. Indeed, contemporary analyses of deterrence offer reasons to believe that similarly situated persons, generally high level government employees, are likely to be deterred from abuse if they believe their actions might qualify as criminal. At the same time, the development of the United States' torture policy gives reason to believe that efforts to socialize populations or build institutional oversight (standard noncriminal solutions to the problem of state violations of human rights) are unlikely to be as effective as the personal deterrence of government actors.

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2. Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations: "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, 26 Dec. 2002, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356_pf.html.
 3. THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005); SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004).
 4. See, e.g., M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. J. INT'L. L. 389 (2006); AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE "WAR ON TERROR," Index No. AMR 51/145/2004 (2004); HUMAN RIGHTS FIRST, ATTORNEY GENERAL CONFIRMATION HEARINGS, BACKGROUND PAPERS ON ALBERTO GONZALES: TORTURE, EXECUTIVE POWER, THE GENEVA CONVENTIONS AND MILITARY COMMISSIONS (2004), available at http://www.humanrightsfirst.org/wp-content/uploads/pdf/brief_20041220_Gonz_all.pdf.
 5. *Id.*; AMNESTY INT'L, USA: CRIMES AND IMPUNITY (2015), available at http://www.amnestyusa.org/sites/default/files/cia_torture_report_amr_5114322015.pdf; HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES (2011); see also Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015).
 6. Courtenay Ryals Conrad & Will H. Moore, *What Stops the Torture?* 54 AM. J. POL. SCI. 459 (2010); DARIUS M. REJALI, TORTURE AND DEMOCRACY (2007); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); James Ron, *Varying Methods of State Violence*, 51 INT'L ORG. 275 (1997).

This article begins with a brief description of the current state of research on curbing abuse by states in emergency. I then turn to current research on deterrence, and note the likelihood that individuals in prestigious positions after long careers are particularly deterrable.

After describing my methodology, I explain why those persons instituting torture in the United States fit the category of highly deterrable actors. I then use the history of the torture policy to illustrate the fact that federal agents (both CIA agents and attorneys) were intensely concerned with the threat of criminal sanctions, and that they changed their behavior based on that concern. In sharp contrast to the fictional depiction of the dedicated spy who acts in spite of the knowledge that he will be abandoned by his country the moment he is discovered, CIA agents in the thick of the interrogation program showed a firm interest in ensuring they would not be prosecuted, and refused to act until those assurances were given. Those moments when the approval was sought, and the fact that CIA agents refused to move forward until it was received, are moments when we can see the strength and deterrent effects of criminal law. At the same time, the CIA's self-protective secrecy successfully disabled common mechanisms of oversight, including public outcry, institutional oversight, and the socialization of elites.

I conclude that activists have ignored traditional criminological reasoning to their own detriment, and that (as is logically suggested by deterrence theory), prosecutions are necessary in order to successfully prevent future reoccurrences of this crime.

A. A Note on Terminology

Throughout this article, I refer to the tactics used by the CIA as torture. This term has been hotly debated, as is the extent to which CIA agents understood their actions to qualify as such. To some, there is a vital distinction between "torture," and "merely" inhumane and degrading, or abuse.⁷

But these qualifications only matter in the context of legal proceedings. Those activists and organizations that work to make human rights abuses illegal uniformly agree that the CIA's conduct was torture.⁸ A plain language understanding of the word torture would be satisfied with the infliction of severe pain, particularly with the intent of gaining information from someone.⁹ Alvin Krongard, who held the third highest position in the CIA from

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7. Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture*, 1 J. NAT'L. SEC. L. & POL'Y. 231 (2005); Michael M. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77 (2010).
 8. AMNESTY INT'L, *supra* note 5; HUMAN RIGHTS WATCH, *supra* note 5; AMNESTY INT'L, *supra* note 4; HUMAN RIGHTS FIRST, *supra* note 4.
 9. See Merriam-Webster dictionary's definition of torture, available at <http://www.merriam-webster.com/dictionary/torture>.2015.

2001-2004, recently echoed this sentiment. He stated, “[CIA tactics were] meant to make [detainees] as uncomfortable as possible. So I assume for, without getting into semantics, that’s torture. We were told by legal authorities that we could torture people.”¹⁰

Krongard’s statement highlights the fact that actors implementing torture policy were highly concerned with whether or not their torture was legal, or more accurately, whether using torture would put them at risk of criminal sanctions, even while they were aware that their actions fit the category of social harms the Torture Statute was written to prevent.¹¹ Yet countless scholarly works have been mired in arguments about whether or not the extreme abuse utilized by the Bush Administration amounted to torture. Rather than compound this confusion, I use the word “torture” to describe these actions.

B. Preventing Human Rights Abuses: The State of the Field

Determining what stops governments from abusing human rights (for instance, by instituting torture) has become one of the great projects of the late twentieth and early twenty-first centuries.¹² While acceptance of human rights treaties and increasing passage of human rights legislation generated hope among advocates, these formal legal outcomes have largely proven to be “empty promises,” as states have continued to engage in abuses and repression.¹³ The pessimism regarding the law’s potential to change state practices is even more extreme regarding states in emergency.¹⁴ In regards to torture specifically, research and long debated political philosophies suggest

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10. Dan Froomkin, *New Effort to Rebut Torture Report Undermined as Former Official Admits the Obvious*, THE INTERCEPT, 5 Aug. 2015, available at <https://firstlook.org/the-intercept/2015/08/05/new-campaign-rebut-torture-allegations-undermined-former-official-admits-obvious/>.
 11. Definition of Torture Under 18 U.S.C. §§2340-2340A, 28 Op. O.L.C. 297 (2004), available at <https://www.justice.gov/sites/default/files/olc/opinions/2004/12/31/op-olc-v028-p0297.pdf>.
 12. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 J. PEACE RES. 407 (2007).
 13. *Id.*; Conrad & Moore, *supra* note 6; REJALI, *supra* note 6; EPP, *supra* note 6; Ron, *supra* note 6; A. E. Dick Howard, *The Essence of Constitutionalism*, in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA: POLAND, AND FRANCE: A BICENTENNIAL COLLOQUIUM AT THE MILLER CENTER 3 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).
 14. Steven C. Poe, C. Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 INT’L STUD. Q. 291 (1999); Claudio Grossman, *States of Emergency: Latin America and the United States*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 176, 188 (Louis Henkin & Albert J. Rosenthal eds., 1990); Jose Luis Cea, *Chile’s Difficult Return to Constitutional Democracy*, 20 PS 665 (1987); Hugo E. Frühling, *Human Rights in Constitutional Order and in Political Practice in Latin America*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITION IN THE CONTEMPORARY WORLD 85 (Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero & Steven C. Wheatley eds., 1993).

that reluctance to engage in torture is substantially diminished in the face of a violent threat to the state.¹⁵

Still, researchers have found reason to hope that state abuses of human rights can be prevented. Some have focused on institutional constraints, including the ability of an independent judiciary to oversee executive excesses.¹⁶ Some look to the presence of training programs (within organizations responsible for detention) that emphasize the importance of human rights and the possible penalties for violations.¹⁷ Constructivist scholars have argued that implementation of human rights norms requires the internalization of those norms among governmental elites.¹⁸

Scholars have also suggested that human rights advocates, among the populace, the international community, and the NGO community, might apply sufficient pressure to force states to abide by human rights-protective treaties.¹⁹ However, this claim is subject to substantial criticism by skeptics focusing on the long history of human rights violations in the face of constitutional and international proscriptions.²⁰

These methods exhibit a fundamental flaw, in that they rely on discovery of abuse by human rights (or rule of law) advocates. In the case of interfer-

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15. Conrad & Moore, *supra* note 6, at 468; Christian A. Davenport, Will H. Moore & David Armstrong *The Puzzle of Abu Ghraib: Are Democratic Institutions a Palliative or Panacea?* (8 Dec. 2007) (unpublished, University of Maryland), available at <http://ssrn.com/abstract=1022367>; see also Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).
 16. Linda Camp Keith, C. Neal Tate, & Steven C. Poe, *Is the Law a Mere Parchment Barrier to Human Rights Abuse?*, 71 J. POL. 644 (2009); Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87 (1999); Gerard J. Blasi & David Louis Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?*, in 4 POLICY STUDIES AND DEVELOPING NATIONS: HUMAN RIGHTS AND DEVELOPING COUNTRIES 223 (David Louis Cingranelli ed., 1996); Christian A. Davenport, "Constitutional Promises" and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties are Suppressed, 58 J. POL. 627 (1996); L.W.H. Ackermann, *Constitutional Protection of Human Rights: Judicial Review*, 21 COLUM. HUM. RTS. L. REV. 59 (1989); SUBRATA ROY CHOWDHURY, *RULE OF LAW IN A STATE OF EMERGENCY: THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY* (1989).
 17. Conrad & Moore, *supra* note 6.
 18. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004); THOMAS RISSE, STEPHEN C. ROPP, & KATHRYN SIKKINK, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (1999); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996).
 19. Hafner-Burton & Tsutsui, *supra* note 12; BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689 (2008); Kiyoteru Tsutsui, *Global Civil Society and Ethnic Social Movements in the Contemporary World*, 19 Soc. F. 63 (2004); Risse et al, *supra* note 18; KECK & SIKKINK, *supra* note 18; see Conrad & Moore, *supra* note 6.
 20. EPP, *supra* note 6; Howard, *supra* note 13.

ence from NGOs or the public, pressure to abandon torture appears only after the torture has been discovered. Similarly, in order for institutional oversight to successfully prevent torture, there must be: 1) government actors who are sufficiently committed to anti-torture norms that they will interfere with plans to torture; and, 2) iron-clad mechanisms by which plans to torture will be discovered. As is shown below, the existence of holes in these defenses—either a failure to socialize every single government actor or a failure to make mechanisms of discovery iron-clad-will will be seized upon by a motivated government.

Finally, order for abuse to be discovered, it must occur in the first place. In contrast, prevention has always been one of the primary purposes of criminal law.²¹ Rather than interrupting or punishing abuse, it would be far preferable to prevent its occurrence entirely. Perhaps surprisingly, criminal sanctions offer great promise in this regard.

C. The Promise of Deterrence

The preventive potency of the threat of criminal prosecution may surprise readers, as many of the hurdles facing the institutional solutions above should also prove problematic for the strength of deterrence. Moreover, every crime committed in the United States today stands as a stark reminder that deterrence fails regularly.²²

But research suggests that, for certain people, deterrence can be effective. And an examination of the CIA's use of torture leads to the conclusion that many of those factors that increase the efficacy of deterrence may be particularly present in the types of individuals who are likely to become official torturers in established democracies.

While formal sanctions may themselves be rather ineffective at deterring potential criminals,²³ the shame associated with those sanctions may have a strong deterrent effect.²⁴ Alex Piquero et al. relate this effect to the strength of the (potential) offender's social bonds, an argument that has much support in criminological literature.²⁵ According to this research, offenders who

21. ANDREW ASHWORTH & LUCIA ZEDNER, *PREVENTIVE JUSTICE* (2014).

22. DAVID M. KENNEDY, *DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION* (2009).

23. Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment: A Review of the Evidence and Issues*, 4 *JUST. Q.* 173 (1987).

24. JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989); Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 *L. & SOC'Y REV.* 467 (1993).

25. Alex R. Piquero, Raymond Paternoster, Greg Pogarsky & Thomas Loughran, *Elaborating the Individual Difference Component in Deterrence Theory*, 7 *ANN. REV. L. & SOC. SCI.* 335 (2011).

have made a large investment in social conformity will be highly unlikely to threaten their standing by breaking the law and risking formal sanctions (which would indicate, socially, a sharp break from conformity).²⁶

Investments in conformity would include successful employment.²⁷ Satisfying employment and careers rather than “jobs” are particularly related to successful social control.²⁸ They offer a reason to conform and greater social investment.²⁹

Additionally, criminal sanctions more effectively deter individuals who exhibit greater self-control and constraint.³⁰ For deterrence to be effective, individuals must rationally evaluate the possible repercussions of their actions. Therefore, only those who are predisposed to engage in analysis of future repercussions may be deterred.³¹

It may be in part for this reason that studies suggest criminal regulation has a strong deterrent effect on potential white-collar offenders.³² This effect appears to be related to the fact that potential white-collar criminals are particularly concerned about their reputation and social standing.³³

The same might be said of attempts to deter elite government officials debating the use of torture. The very nature of the positions these individuals hold constitutes investment in social conformity. Even without assuming that

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26. *Id.*; Daniel S. Nagin & Raymond Paternoster, *Personal Capital and Social Control: The Deterrence Implications of a Theory of Individual Differences in Criminal Offending*, 32 CRIMINOLOGY 581 (1994); FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).
 27. Robert J. Sampson & John H. Laub, *Crime and Deviance Over the Life Course: The Salience of Adult Social Bonds*, 55 AM. SOC. REV. 609 (1990); John H. Laub & Robert J. Sampson, *Turning Points in the Life Course: Why Change Matters to the Study of Crime*, 31 CRIMINOLOGY 301 (1993).
 28. NEAL SHOEVER, *GREAT PRETENDERS: PURSUITS AND CAREERS OF PERSISTENT THIEVES* (1996); Troy Duster, *Crime, Youth Unemployment, and the Black Urban Underclass*, 33 CRIME & DELINQ. 300 (1987).
 29. Christopher Uggen, *Ex-Offenders and the Conformist Alternative: A Job Quality Model of Work and Crime*, 46 SOC. PROBS. 127 (1999); Laub & Sampson, *supra* note 27; Jackson Toby, *Social Disorganization and Stake in Conformity: Complementary Factors in the Predatory Behavior of Hoodlums*, 48 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 121 (1957).
 30. Piquero et al, *supra* note 25; Nagin & Paternoster, *supra* note 24; MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990); ZIMRING & HAWKINS, *supra* note 26.
 31. Piquero et al, *supra* note 25; Nagin & Paternoster, *supra* note 24; GOTTFREDSON & HIRSCHI, *supra* note 30; ZIMRING & HAWKINS, *supra* note 26.
 32. Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO STATE J. CRIM. L. 481 (2011); SALLY S. SIMPSON, JOEL GARNER & CAROLE GIBBS, *WHY DO CORPORATIONS OBEY ENVIRONMENTAL LAW? ASSESSING PUNITIVE AND COOPERATIVE STRATEGIES OF CORPORATE CRIME CONTROL* (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/220693.pdf>; Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement*, 30 ENVTL. L. REP. 10245 (2000).
 33. Sally S. Simpson, Carole Gibbs, Melissa Rorie, Lee Ann Slocum, Mark A. Cohen, & Michael Vandenberg, *An Empirical Assessment of Corporate Environmental Crime-Control Strategies*, 103 J. CRIM. LAW & CRIMINOLOGY 231, 238–39 (2013); SIMPSON ET AL., *supra* note 32.

individuals who choose to work in law enforcement may have heightened belief in conventional norms and legality, a long and successful career is, in itself, a social investment—one made by most authors of the torture policy, and likely to add to the deterrent effect of criminal prohibitions.

D. Methodology

In analyzing the development of the US policy of torture, I look to the reports and documents that have been released by the government over the past ten years. In 2004, the Senate Armed Services Committee (SASC) began an investigation into the use of torture by US government agents. Eventually, SASC released not only the declassified portions of the report, but supporting documents related to their investigation.³⁴ Additionally, investigations into later discoveries that the CIA had destroyed videotapes of interrogation sessions led to the release of additional documents, as did the CIA Inspector General's investigation into the controversy³⁵ and the investigation by the Office of Professional Responsibility (OPR) at the Department of Justice.³⁶ These included faxes and emails between attorneys and officials describing the legal reasoning as it evolved, and notes from meetings concerning the practices. Finally, and most recently, the Senate Select Committee on Intelligence (SSCI) released a detailed report on the development of the CIA's use of "Enhanced Interrogation Tactics".³⁷

Using these documents, I analyzed the development of the torture policy to determine the thought processes and motivations of the lawyers who attempted to justify torture in the post-2001 era. While these documents remain incomplete, and therefore limited, they corroborate each other in multiple areas, including timeline and stated purpose. The candid nature of notes, drafts, and emails adds to their reliability. Together, they offer an archival history of the development of the legal reasoning used to justify torture.

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34. SENATE ARMED SERVICES COMMITTEE, US SENATE, INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (2008), available at http://www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.
 35. CENTRAL INTELLIGENCE AGENCY (CIA), OFFICE OF THE INSPECTOR GENERAL, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001–OCT. 2003) (2004), available at <https://fas.org/irp/cia/product/ig-interrog.pdf>.
 36. U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF 'ENHANCED INTERROGATION TECHNIQUES' ON SUSPECTED TERRORISTS (2009), available at https://www.aclu.org/files/pdfs/natsec/opr20100219/20090729_OPR_Final_Report_with_20100719_declassifications.pdf.
 37. SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CIA'S DETENTION AND INTERROGATION PROGRAM EXECUTIVE SUMMARY (2014), available at <https://www.amnestyusa.org/pdfs/sscistudy1.pdf>.

II. TORTURERS' POTENTIAL TO BE DETERRED

The decision to utilize torture is not (and was not) made by low-level officers or recent hires. To the contrary, the program was debated and created with the input of the Director of the CIA, George Tenet, CIA Deputy Director of Operations, James Pavitt, Chief of the Counterterrorism Center, Joseph Cofer Black, and Black's successor at the Counterterrorism Center, Jose Rodriguez.³⁸ The SSCI Report describes an interrogation program conceived of and run by "CIA Headquarters," implying consistent oversight by high-level members of the CIA. For instance, while Abu Zubaydah was still hospitalized, personnel at CIA Headquarters discussed the use of coercive interrogation techniques against Abu Zubaydah and the "CIA Headquarters formally proposed that Abu Zubaydah be kept in an all-white room that was lit 24 hours a day, that Abu Zubaydah not be provided any amenities, that his sleep be disrupted, that loud noise be constantly fed into his cell, and that only a small number of people interact with him."³⁹

These high level CIA officials are almost certainly long-term CIA employees with a high level of investment in the agency. As an example, Alfreda Bikowsky, one of the primary actors in the CIA's torture policy, appears to have had an almost ten-year career in the CIA prior to the commencement of the enhanced interrogation program.⁴⁰ Over the course of her career she was promoted several times.⁴¹ George Tenet had worked his way up from public schools and state college to a Master's degree from Columbia

38. See, e.g., *id.* at 11–13, 37, 41, 43.

39. *Id.* at 26.

40. While Bikowsky's biography has been removed from government web pages, she is described in Jane Mayer's *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 34–36 (2008) as a former Soviet analyst who was brought in to Alec Station by Michael Scheuer when it was set up in 1996, suggesting that she had already worked at the CIA prior to that time. She is similarly identified as "a former Soviet analyst who has worked in the CIA's Counterterrorist Center and in the al Qaeda unit since the mid-1990s," by Matthew Cole in one of the first articles identifying her as a key to the CIA's use of rendition and torture, *Bin Laden Expert Accused of Shaping CIA Deception on "Torture" Program*, NBC NEWS, 16 Dec. 2014, available at <http://www.nbcnews.com/news/investigations/bin-laden-expert-accused-shaping-cia-deception-torture-program-n269551>. While unnamed in these articles, the agent was later identified as Bikowsky in Glenn Greenwald & Peter Maass, *Meet Alfreda Bikowsky, the Senior Officer at the Center of the CIA's Torture Scandals*, THE INTERCEPT, 19 Dec. 2014, available at <https://theintercept.com/2014/12/19/senior-cia-officer-center-torture-scandals-alfreda-bikowsky/>; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, 2 Nov. 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

41. JANE MAYER, *supra* note 40, at 273; see Adam Goldman & Matt Apuzzo, *CIA Officers Make Grave Mistakes, Get Promoted*, ASSOCIATED PRESS, 9 Feb. 2011, available at http://www.nbcnews.com/id/41484983/ns/us_news-security/t/cia-officers-make-grave-mistakes-get-promoted/#.WC32eLrK70; see also Greenwald & Maass, *supra* note 40.

University.⁴² He began working for the Senate in 1982 and eventually became Staff Director for the SSCI.⁴³ Tenet worked in the SSCI for eight years, then two years at the National Security Council, before becoming Deputy Director of Central Intelligence, then Director of Central Intelligence two years after that.⁴⁴

Similarly, Jose Rodriguez was employed by the CIA for over two decades before being selected to head the Counter Terrorism Center, achieving a series of promotions over that time.⁴⁵ James Pavitt progressed from an intelligence officer in the Army to a legislative assistant in the House of Representatives, to a career in the CIA that spanned twenty-four years and a series of senior positions (Chief of Station, Chief of the Directorate of Operations Counterproliferation Division) and culminated in his position as Deputy Director of Operations from 1999–2004.⁴⁶ Cofer Black's career at the CIA lasted nearly three decades, including roles such as Chief of Station and Deputy Chief of the Latin American Division.⁴⁷

Careers such as these are to be expected at high levels of government office—they consist of decades of increasing responsibility and increasing prestige, which suggest a high level of investment. We should expect that high achieving government actors would be reluctant to lose these positions, as tends to occur when criminal activity is revealed.⁴⁸

The successes of these individuals also imply their own capacity for self-control and analysis of future repercussions. Indeed, these are individuals in jobs that specifically require future oriented analysis and evaluation of possible repercussions from foolish actions. We should expect that career employees would display low levels of impulsivity, at least in regards to their professional reputations, and high levels of forethought.

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42. Anne E., James Kornblut, Jere Rutenberg & Hester, *A Hungry Kid May Lead CIA*, DAILY NEWS, 21 Mar. 1997, available at <http://www.nydailynews.com/archives/news/hungry-kid-lead-cia-article-1.763910>; *George Tenet Fast Facts*, CNN, 29 Dec. 2015, available at <http://www.cnn.com/2013/08/06/us/george-tenet-fast-facts/index.html>.
 43. *Nomination of George J. Tenet to be Director of Central Intelligence: Hearing Before the Select Committee on Intelligence*, S. Hrg. 105–314, 105th Cong. (1997), available at http://fas.org/irp/congress/1997_hr/tenet.pdf.
 44. John Diamond, *CIA Director's Allies Outnumber His Enemies*, USA TODAY, 9 Oct. 2002, available at http://usatoday30.usatoday.com/news/washington/2002-10-09-tenet_x.htm.
 45. Commending Jose A. Rodriguez, Jr., H.R. Res. 139, 113th Cong. (2014) (enacted), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+HR139+pdf>.
 46. Vernon Loeb, *Rebuilding Clandestine Operations*, WASH. POST, 20 Sept. 1999, available at <http://www.washingtonpost.com/wp-srv/national/loeb/loeb092099.htm>.
 47. *Biography of J. Cofer Black*, U.S. DEP'T. ST. ARCHIVE (21 Nov. 2002), available at <http://2001-2009.state.gov/outofdate/bios/b/15367.htm>.
 48. See, for instance, the description of General Petraeus' fall from grace in Justin Wm. Moyer, *Gen. David Petraeus: From Hero to Zero*, WASH. POST, 24 Apr. 2015, available at <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/24/gen-david-petraeus-from-hero-to-zero/>.

In other words, we might assume that high-level state officials would be some of the most deterrable potential offenders. The personal characteristics and situations of these individuals fall into categories of potential offenders who are most likely to be deterred by formal sanctions and the informal losses that would follow. These individuals are likely to look for and avoid the social stigma, loss of prestige, and personal difficulties associated with criminal prosecution.

And in fact, this is what we see in multiple reports and released documents describing the CIA's utilization of torture. Indeed, the success of the threat of prosecution in deterring government actors considering the use of torture is shocking, given the level of secrecy these actors secured for themselves. While deterrent effect is heavily dependent on the perceived likelihood of apprehension,⁴⁹ government actors debating the use of torture were deterred several times, even while confident in their insulation from oversight. They modified their actions based on the possibility of prosecution. They hesitated before utilizing torture and at times, for brief periods, they stopped.

III. THE DEVELOPMENT OF THE TORTURE POLICY

As I noted above, following the terrorist attacks of 11 September 2001, the CIA immediately became interested in the use of torture.⁵⁰ But the speed of the CIA's interest in interrogation is rivaled by its concern over criminal prosecution. Two months later, well before any terrorist had been captured rising to the level of sufficient importance to torture, the CIA was already investigating its own possible criminal liability. This research began as early as November 2001,⁵¹ while the first terrorist to be considered for torture, Abu Zubaydah, was not captured until March 2002.⁵²

Nor did this concern disappear in the face of the (presumably immediate) need to obtain whatever information Abu Zubaydah had. Indeed, in the spring of 2002, the United States intelligence community believed itself to be running against the clock, desperately trying to determine the structure of al-Qaeda and its next targets while convinced that a nuclear attack was imminent. The torture of Abu Zubaydah was believed to be necessary to

49. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *CRIME & JUST.* 199 (2013); Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 *ANN. REV. ECON.* 83 (2013).

50. Rizzo, *supra* note 1; SENATE ARMED SERVICES COMMITTEE, *supra* note 34.

51. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 19.

52. David Rose, *Tortured Reasoning*, *VANITY FAIR*, 16 Dec. 2008, available at <http://www.vanityfair.com/magazine/2008/12/torture200812>.

reveal information to prevent that attack.⁵³ Still, the CIA insisted on obtaining legal approval for the specific tactics it desired to use.

A. The CIA's Preoccupation with Prosecution

The CIA first approached its own General Counsel, and when that attorney was uncertain about his response, continued to wait for the approval of the Department of Justice (DOJ).⁵⁴ The CIA first hoped for an advance declination to prosecute, which might have insulated CIA torturers from any future prosecution.⁵⁵ When no such promise was forthcoming, the CIA turned to the DOJ's Office of Legal Counsel (OLC) for an explanation of the extent to which interrogators could apply pressure without running afoul of the Torture Statute.⁵⁶

By mid-April 2002, John Yoo and Jennifer Koester of OLC were researching the legal implications of proposed CIA tactics.⁵⁷ By early July 2002, CIA agents had met personally with Yoo in order to discuss twelve particular techniques, and they quickly received a letter in response stating that Yoo did not believe the techniques would violate any criminal statutes.⁵⁸ But this statement was not enough reassurance for the CIA to begin using torture. Instead, the CIA continued to wait for a more convincing assurance that there would be no criminal prosecutions.

On 24 July 2002, Attorney General John Ashcroft gave oral approval of ten out of twelve proposed techniques, including attention grasp, walling,

53. Lesley Stahl, *Hard Measures: Ex-CIA Head Defends Post 9/11 Tactics*, 60 MINUTES, 29 Apr. 2012, available at <http://www.cbsnews.com/news/hard-measures-ex-cia-head-defends-post-9-11-tactics/>; CLASSIFIED RESPONSE TO THE U.S. DEPT. OF JUSTICE OFFICE OF PROFESSIONAL RESPONSIBILITY CLASSIFIED REPORT DATED JULY 29, 2009, at 14–15 (9 Oct. 2009), available at <https://fas.org/irp/agency/doj/opr-bybeefinal.pdf> [hereinafter CLASSIFIED RESPONSE TO THE U.S. DEPT. OF JUSTICE].

54. SENATE ARMED SERVICES COMMITTEE, *supra* note 34, at 33, 37; CIA, *supra* note 35, at 14; CLASSIFIED RESPONSE TO THE U.S. DEPT. OF JUSTICE, *supra* note 53, at 14, 15.

55. U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 37; see also SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 33; For a discussion of declinations to prosecute see, e.g., John Sifton, *The Get Out of Jail Free Card for Torture*, SLATE.COM, 29 Mar. 2010, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2010/03/the_get_out_of_jail_free_card_for_torture.html (describing other cases in which advance declinations prevented prosecution of CIA agents for abuse of detainees).

56. SENATE ARMED SERVICES COMMITTEE, *supra* note 34, at 38–39; U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 37, 39; 18 U.S.C. §§2340–2340A.

57. *Id.*

58. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 33–34; Letter from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to John Rizzo, Acting General Counsel, Central Intelligence Agency (13 July 2002), available at <http://www.justice.gov/olc/olc-foia-electronic-reading-room>.

facial hold, facial slap, cramped confinement, wall standing, stress positions, sleep deprivation, use of diapers, and use of insects (Abu Zubaydah was known to have a fear of insects), but still the CIA waited. On 26 July 2002, Attorney General Ashcroft orally approved the use of the waterboard as well, but still the CIA waited for written authorization.⁵⁹

On 1 August 2002, OLC completed two memos, signed by Jay Bybee but authored by Yoo. One memo was a broad discussion of the elements of the crime of torture and the conditions necessary to violate that statute sufficiently to make prosecution likely,⁶⁰ the other a specific examination of the tactics the CIA had proposed.⁶¹ Only once the OLC had promised in these formal memos that prosecutions were unlikely, and specifically outlined the manner in which interrogators could act to avoid prosecutions, did the “enhanced interrogation” of Abu Zubaydah begin.⁶² That interrogation was limited to the eleven techniques that had been approved in the memos—a final technique never received approval and, as far as we know now, was not employed.⁶³ Even these promises were insufficient to maintain the CIA’s activities.

Over and over again, CIA agents and officials doubled back to reassure themselves that no prosecutions were forthcoming. Interrogators remained concerned about the legality of their actions. At one point, interrogators voiced concerns that they were “approach[ing] the legal limit” of the interrogation techniques.⁶⁴ Rodriguez responded that discussion of legality should be avoided in emails, a clear reference to concerns about future legal proceedings.⁶⁵ When CIA agents became interested in using water in what appeared to be a variation of waterboarding, they returned to the CIA General Counsel’s office to check with attorneys before proceeding.⁶⁶

In 2003, after President George W. Bush assured the public that detainees were being treated “humanely,” the CIA became concerned again that its actions might result in criminal prosecutions. CIA officials briefed members of Congress and requested new written approval from OLC. Once again,

59. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 32, 35–37.

60. John Yoo, Memorandum from Jay S. Bybee for Alberto R. Gonzales, Counsel to the President, *Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A* (1 Aug. 2002), available at <https://www.justice.gov/olc/file/886061/download>.

61. John Yoo, Memorandum from Jay S. Bybee for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative* (1 Aug. 2002), available at <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>.

62. Indeed, Bybee claims he only signed off on the memos because the CIA was refusing to interrogate Abu Zubaydah, and the pressure to interrogate (based on the belief of impending threat) was so great. CLASSIFIED RESPONSE TO THE U.S. DEPT. OF JUSTICE, *supra* note 53, at 14.

63. *Id.*; CIA, *supra* note 35, at 14.

64. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 43.

65. *Id.*

66. *Id.* at 107.

until those reassurances of protection from prosecution were granted, the CIA refrained from engaging in torture.⁶⁷

In 2006, when the Supreme Court decided in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applied to detainees at Guantanamo,⁶⁸ the CIA's concerns about criminal prosecution returned. Once again, the CIA ceased torturing detainees until it was granted specific, written reassurance from the OLC that its activities did not violate criminal prohibitions.⁶⁹ Indeed, the CIA appears to have returned often for this reassurance. In 2004, the OLC wrote a series of letters to the General Counsel for the CIA, apparently in response to requests for specific clarification that interrogation of specific detainees was authorized.⁷⁰ In May 2005, the OLC wrote two memos, providing once again the authority provided in the original August 2002 memos.⁷¹ As noted above, in 2006 the CIA actually ceased torturing detainees until it could be reassured that it was not violating any criminal statutes. In 2007, it apparently required these reassurances again, as

67. *Id.* at 116–17.

68. 548 U.S. 557 (2006).

69. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 159, 162–63; see also Memorandum from Steven G. Bradbury for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, *Re: Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (31 Aug. 2006), available at http://www.washingtonpost.com/wp-srv/nation/documents/2006_0831_OLC_memo_to_Rizzo.pdf; Letter from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (31 Aug. 2006), available at <https://www.justice.gov/olc/file/886291/download>.

70. Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (26 Aug. 2004), available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-rizzo2004-3.pdf>; Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (6 Sept. 2004), available at <https://www.justice.gov/olc/file/886101/download>; Letter from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency (20 Sept. 2004), available at <https://www.justice.gov/olc/file/886266/download>.

71. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (10 May 2005), available at <https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005-2.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (10 May 2005), available at <https://www.justice.gov/olc/file/886271/download>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* (30 May 2005), available at <https://www.justice.gov/olc/file/886281/download>.

the OLC provided still another memo in response to a CIA General Counsel request for clarification of the legality of six interrogation tactics, as well as four other letters regarding the legality of specific interrogations.⁷²

Perhaps most importantly, mock burial was not employed by the CIA, not because the OLC stated it would be illegal but because the OLC had not yet made a determination on the technique, and the CIA did not want to wait any longer for legal authorization.⁷³ While the SSCI states that this technique was never “formally considered by the OLC,” it appears the tactic was abandoned because Yoo had already determined that it would constitute torture.⁷⁴ Either way, the possibility of prosecution (i.e. engaging activity that had not received the blessing of the DOJ as “legal”) was enough to deter the CIA.

This history suggests that the CIA, on both an individual and agency-wide level, was highly concerned with the threat of legal sanctions. Further, the CIA would have refrained from torturing detainees, based on its fear of prosecution, if not for the legal approval it had received, and certainly if it had been told that prosecution was likely.⁷⁵ As John Rizzo, former General Counsel to the CIA, admitted to a newspaper, “I could have stopped waterboarding before it happened.”⁷⁶

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72. Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Associate General Counsel, Central Intelligence Agency (7 Nov. 2007), available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-bradbury2007-2.pdf>; Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Associate General Counsel, Central Intelligence Agency, (6 Nov. 2007), available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-bradbury2007-2.pdf>; Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Associate General Counsel, Central Intelligence Agency (23 Aug. 2007) available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-bradbury2007.pdf>; Letter from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to the Associate General Counsel, Central Intelligence Agency (24 July 2007), available at <https://www.justice.gov/sites/default/files/olc/legacy/2009/12/30/aclu-ii-072407.pdf>; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* (20 July 2007), available at <https://www.justice.gov/olc/file/886296/download>.
 73. CLASSIFIED RESPONSE TO THE U.S. DEPT. OF JUSTICE, *supra* note 53, at 14, 15; CIA, *supra* note 35, at 14.
 74. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 37; U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 178.
 75. See Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, 9 June 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A26401-2004Jun8.html>.
 76. John Rizzo, *I Could Have Stopped Waterboarding Before it Happened*, POLITICO MAG., 5 Jan. 2014, available at <http://www.politico.com/magazine/story/2014/01/waterboarding-cia-lawyer-john-rizzo-torture-101758.html#.UyyBaVclNyU>.

To be sure, this concern was less than universal, and seemed to exist only at the extremes. The CIA waited for legal approval to begin using its twelve tactics, and once it gained that approval for a single detainee, it applied those techniques to numerous detainees without approval.⁷⁷ CIA interrogation training in November 2002 already included two techniques that had not been approved by the DOJ.⁷⁸ The SSCI lists numerous times when lawyers' requests for review were not heeded⁷⁹ or the advice of attorneys was ignored.⁸⁰ Indeed, the CIA regularly used techniques that were not approved, or interrogated detainees for whom enhanced interrogation had not been approved, or otherwise acted in contradiction with established guidelines.⁸¹

But at the margins, in terms of decisions whether or not to use torture at all, the CIA continued to return to the OLC and other branches of government in order to ensure that it was still working within the bounds of its legal authority. Of course, seeking legal approval means very little if lawyers can bend law into meaninglessness. But in fact, the torture archive suggests that the law was far from trivial, even to those lawyers who found ways to authorize torture.

B. The Lawyers and the Criminal Law.

As noted above, DOJ refused to grant an advance declination to prosecute to the CIA. The SSCI states that there is no evidence the request for a declination to prosecute ever reached the Attorney General,⁸² while the OPR report states that Michael Chertoff refused to give this declination.⁸³

But the OLC, led by Yoo, pursued narrow and at times incredible interpretations of relevant law in an apparent effort to insulate the CIA from legal liability. While a full discussion of the flaws of Yoo's analyses are beyond the scope of this article, the majority of legal scholars agree that his analysis was highly flawed, and in places blatantly contradicted established law.⁸⁴ Central to these criticisms are Yoo's inclusion of defenses to possible prosecutions,⁸⁵

77. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 411.

78. *Id.* at 58.

79. *Id.* at 61.

80. *Id.* at 58, 74, 124, 424 n. 2378.

81. *Id.* at 28–29, 54, 56 n. 278, 60, 63–64, 69, 85, 99–105, 112, 113 n. 665.

82. *Id.* at 33.

83. U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 47, 48–49.

84. See, e.g., THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed., 2009); Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 Hous. L. Rev. 71, 74, 86 (2012); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 172–205 (2007); FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWERS IN A TIME OF TERROR (2007); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L. SEC. L. & POL'Y 455 (2005).

85. Yoo, *Memorandum for Alberto R. Gonzales*, *supra* note 60, at 39–46.

an inclusion that many claim was both inaccurate and inappropriate,⁸⁶ as well as his claims that the Torture Statute would only be violated if government agents successfully and purposefully caused a detainee a level of pain “that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions,”⁸⁷ and that the President’s inherent Commander in Chief authority would allow the commission of even this level of abuse, as part of Executive wartime powers.⁸⁸

Yet, even given the shocking inaccuracy of the above claims, the memos show some restraint, given the history of the person writing them. Critics of the memos acknowledge that Yoo’s own legal ideologies would have allowed for complete approval of any abuse committed under orders from the Executive, as part of the Commander in Chief’s wartime powers.⁸⁹ Yoo had expressed this belief in prior writings.⁹⁰ Moreover, Yoo was under no institutional constraints—he was working closely with the Vice President’s legal advisor, David Addington, and was insulated from most official oversight.⁹¹ Yoo hesitated, but did in fact limit his final recommendations. This suggests a surprising amount of influence from legal doctrine.

Yoo’s hesitance is evident in the time it took him to complete the memos. Yoo and Koester began working on the memo on 11 April 2002.⁹² Koester wrote four drafts of the memo, each time responding to comments Yoo made.⁹³ In all, Yoo spent four months working on the memos, in the face of perceived nuclear threat, when complete approval might have been granted on the sole basis of a summary of his argument regarding executive powers (which he had already published once). Indeed, he only added a discussion of those powers after (and apparently in response to) a mid-July meeting with then-White House Counsel Alberto Gonzales.⁹⁴ The defenses portion of the memos, similarly criticized, was also a late addition seemingly in response to that meeting.⁹⁵

The memos did not suggest that all actions would be safe from prosecution. One warned that a jury likely would not be swayed by its reasoning. It

86. See, e.g., Cole, *supra* note 84; Danner, *supra* note 84, at 74; LUBAN, *supra* note 84, at 172–205.

87. Yoo, *Memorandum for Alberto R. Gonzales*, *supra* note 60, at 6.

88. *Id.* at 31–39. For criticism of this logic see Cole, *supra* note 84, at 8; Danner, *supra* note 84, at 78; LUBAN, *supra* note 84, at 174; SCHWARTZ & HUQ, *supra* note 84; Clark, *supra* note 84; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005). As is discussed below, another source of criticism was the inclusion of possible defenses to prosecution (see *id.*).

89. Cole, *supra* note 84.

90. John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

91. PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

92. U.S. DEPT. OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *supra* note 36, at 39–40.

93. *Id.* at 40–43.

94. *Id.* at 50.

95. *Id.*

further mentioned the authors' inability to address the question of whether "rogue" ICC prosecutors might attempt prosecution. The memo also specified tactics that would go too far, including burning, and threats of imminent death. These warnings were a response to Yoo's examination of prior cases where allegations of torture had resulted in lawsuits (attached as an appendix to the memo).⁹⁶ Whether Yoo was genuinely concerned with the law or only protecting his clients from prosecution, the legal precedent proved too great to distinguish in these cases.

Yoo has been criticized for finding ways to say yes to every request made by the CIA,⁹⁷ but in fact he did say no to one tactic. As was noted above, Yoo never addressed mock burial in writing, suggesting his reluctance to contradict a legal proscription he could not distinguish.

IV. EXEMPLIFYING THE FAILURES OF ADMINISTRATIVE OVERSIGHT AND SOCIALIZATION OF ELITES

The case study of the US torture policy highlights the fundamental weakness of traditional efforts to curb state abuse: namely, the reliance on discovery of abuse as it occurs. The SSCI's report demonstrates that the CIA consciously planned for no party, ever, to discover their actions. Seemingly verifying threats made to Abu Zubaydah that he would only leave CIA custody in a coffin-shaped box,⁹⁸ and to Hambali that "he would never go to court, because 'we can never let the world know what I have done to you,'" ⁹⁹ the CIA took extreme steps to make sure its program remained hidden, until its disclosure in 2004. Very few were informed of the program. Ambassadors, warned of the program so they would not hear about it from officials of countries hosting blacksites, were instructed not to discuss the program with any other State Department officials.¹⁰⁰ Secretary of State Colin Powell and Secretary of Defense Donald Rumsfeld were not briefed on the program before it began.¹⁰¹ This was apparently purposeful, out of awareness that, at least Secretary of State Powell, would strongly oppose the program.¹⁰² It appears a conscious decision was made not to brief the President in 2002, and that he was not briefed on the program until 2006 (although his own memoir contradicts this claim).¹⁰³

96. Yoo, *supra* note 59.

97. Cole, *supra* note 84, at 10.

98. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 42.

99. *Id.* "Findings and Conclusions" at 4.

100. See, e.g., *id.* at 98–99.

101. *Id.* at 38.

102. *Id.* at 119.

103. *Id.* at 38, 40.

But the most telling factor of the CIA's plan of secrecy is the lengths to which it was willing to go regarding the disposal of detainees. In July 2002, even as legal approval for "enhanced interrogation" was still being contemplated, the CIA discussed tactics that might be necessary should Abu Zubaydah die while being interrogated. The CIA determined that the best option would be cremation. The CIA interrogation team emphasized the need to make sure that Abu Zubaydah never revealed what had been done to him, specifically by keeping him isolated and incommunicado. CIA headquarters agreed, stating

There is a fairly unanimous sentiment within HQS that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. . . . [Abu Zubaydah] should remain incommunicado for the remainder of his life. This may preclude [Abu Zubaydah] from being turned over to another country.¹⁰⁴

In other words, monitoring and oversight was specifically and consciously avoided. The program was shielded from any possible disagreeing voices. The torture, therefore, could not be prevented via concerns of public opinion, pressure from international or domestic NGOs, or institutional oversight, as torturers were assured that their activities would never be discovered.

It is unclear whether disclosure to the public would have mattered. While polls disagree regarding the precise percentage of the population that accepts torture as a legitimate interrogation tactic, it appears that a majority of the public approves of the use of torture, at least in rare circumstances.¹⁰⁵ An analysis of public opinion polls over eight years suggests that the public is at least evenly split regarding acceptance of torture.¹⁰⁶ This even split would be unlikely to exert the type of political pressure necessary to fully disincentivize the use of torture (and in fact, it appears it was not).

CIA officials were aware of this opening in public opinion, and strategically utilized it. Once discovery of the program appeared inevitable, the Deputy Director of the Counter Terrorism Center emphasized the need to "sell" the program to the public, so that Congress would not cut authorities or funds.¹⁰⁷ Shortly thereafter, CIA officials began appearing on news programs, emphasizing the "successes" of the program.¹⁰⁸ Claiming that torture had saved lives was a preemptive public relations strategy that CIA officials exploited to prevent public pressure to abandon the program.

104. *Id.* at 34–35.

105. Paul Gronke, Darius Rejali, Dustin Drenguis, James Hicks, Peter Miller & Bryan Nakayama, *U.S. Public Opinion on Torture, 2001–2009*, 43 *PS* 437 (2010).

106. *Id.*

107. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 194–95.

108. *Id.* at 196. As the Senate Select Committee on Intelligence's report makes clear, these claimed successes were rarely, if ever, due to the use of torture.

Rather than taking action from the outside, some have argued that instilling human rights norms in government actors could lessen the likelihood of human rights violations, such as torture.¹⁰⁹ One might hope that torture will cease to exist if those who are in a position to torture are socialized so that such behavior is “unimaginable.”¹¹⁰

Yet here, again, the post-2001 use of torture by the CIA highlights the problems of relying on this approach. First, the relevant actors in this case took care to avoid the watchful eyes of those members of the executive branch who had been successfully socialized to respect human rights, i.e. the Secretary of State and Secretary of Defense. Second, the development of the program by, seemingly, very few actors shows the inherent difficulty of successfully socializing every single member of the executive branch. Coercive interrogations appear to have been largely led by one CIA officer who had been involved in abusive interrogation over the course of the 1980s and was put in charge of the interrogation program in fall of 2002,¹¹¹ as well as a pair of contractors who had no training in interrogation.¹¹² In such cases, it is unlikely that human rights training could be assured; certainly, it seems unlikely that all such actors could be socialized to the point where human rights abuses are “unimaginable.”

Finally, even where socialization has been successful, personal reluctance may be overcome in the climate of fear and irrationality that follows violent attacks. The tendency to follow orders even in the face of extreme abuses is well documented,¹¹³ particularly where the orders given are justified based on a cause the actor identifies with and finds to be convincing.¹¹⁴

This dynamic can be seen in the SSCI Report as well. The Report shows that, on orders from CIA headquarters, interrogation teams continued to torture detainees even in the cases of detainees who, they believed, were compliant.¹¹⁵ The Report describes the team’s negative reaction to this pressure,¹¹⁶ and even the personal dislike (at least some) interrogators had of their activities:

109. Conrad & Moore, *supra* note 6.

110. JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE (2010).

111. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 19.

112. *Id.* at 21.

113. Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57 (1965); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?* 64 AM. PSYCHOL. 1 (2009).

114. S. Alexander Haslam, Stephen D. Reicher, & Megan E. Birney, *Nothing by Mere Authority: Evidence That in an Experimental Analogue of the Milgram Paradigm Participants are Motivated Not by Orders But by Appeals to Science*, 70 J. SOC. ISSUES 473 (2014).

115. SENATE SELECT COMMITTEE ON INTELLIGENCE, *supra* note 37, at 41 n. 188, 43, 67–68, 122.

116. *Id.* at 122.

CIA personnel at DETENTION SITE GREEN reported being disturbed by the use of the CIA's enhanced interrogation techniques against Abu Zubaydah.

CIA records include the following reactions and comments by CIA personnel:

- August 5, 2002: "want to caution [medical officer] that this is almost certainly not a place he's ever been before in his medical career. . . It is visually and psychologically very uncomfortable."
- August 8, 2002: "Today's first session. . . had a profound effect on all staff members present. . . it seems the collective opinion that we should not go much further . . . everyone seems strong for now but if the group has to continue. . . we cannot guarantee how much longer."
- August 8, 2002: "Several on the team profoundly affected. . . some to the point of tears and choking up."
- August 9, 2002: "two, perhaps three [personnel] likely to elect transfer" away from the detention site if the decision is made to continue with the CIA's enhanced interrogation techniques."¹¹⁷

Yet the torture continued, suggesting once again that fostering respect for human rights and personal aversion to torture is not the best way to protect these interests.

Instead, we should look to what did work to prevent and pause the torture, if only briefly, in the history of the CIA's detention program. That was the threat of criminal prosecutions.

V. CONCLUSION

In the wake of the discovery of the CIA's institutionalized torture, there have been repeated calls for "truth commissions" and tell-all reports to clear the air and establish what exactly occurred.¹¹⁸ These calls are based on several considerations, including the likelihood of prosecutions occurring, the usefulness of obtaining a full and honest retelling of what actually occurred from 2002 to 2008, and a desire to allow victims the opportunity to make their narratives known to the general public so that society can heal from its wounds.¹¹⁹ In what appears to be a peak of desperation, the American

117. *Id.* at 44–45.

118. Steven Mufson, *Six Years Later, Political Debate Over CIA Interrogations Hasn't Gone Away*, WASH. POST, 9 Dec. 2014, available at http://www.washingtonpost.com/business/economy/six-years-later-political-debate-over-cia-interrogations-hasnt-gone-away/2014/12/09/6e1be114-7fd4-11e4-81fd-8c4814dfa9d7_story.html; Kim D. Chanbonpin, *We Don't Want Dollars, Just Change: Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth about Torture Commission*, 6 N.W. J. L. & SOC. POL'Y, 1 (2011); Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture By US Forces Since 9/11*, 16 ILSA J. INT'L & COMP. L. 115 (2009).

119. Chanbonpin, *supra* note 118.

Civil Liberties Union called for the pardoning of those responsible for the CIA's use of torture, if only to reiterate to the public that torture is in fact a crime, even if politicians refuse to pursue prosecutions.¹²⁰

Those who have called for prosecutions have done so on the basis of the legal obligations of the United States, the legal support for prosecutions, the general effects on broader culture that are caused by a failure to prosecute, and the need to silence continuing efforts to defend the program.¹²¹

This article suggests a more direct reason to strengthen calls for prosecution rather than truth commissions or national inquiries. Specifically, this article suggests that prosecutions can work. As has been shown above, those individuals responsible for instigating and perpetuating torture diligently researched their own legal liability. The likelihood of prosecution was specifically evaluated and found to be negligible before offenders proceeded. In moments when offenders believed they might be held criminally responsible for their actions, the use of torture ceased. Specific tactics that individuals or agencies believed might bring criminal responsibility were avoided.

The power of criminal sanctions is understandable when examined in the context of criminological literature on deterrence. This literature reminds us that the promise of deterrence must be evaluated in relation to the specific characteristics of the individuals one is trying to deter. While criminal prohibitions of torture might not deter many individuals, the difficulty of achieving policymaking positions in government make institutionalized torture far more deterrable than most street crimes. This fact is evidenced by the CIA's long debates and hesitations regarding their own policy.

Importantly, this hesitation remained in the face of numerous other protections from (noncriminal) liability that human rights scholars have traditionally suggested as ways by which to curb human rights violations. Many elite government actors had been socialized to respect human rights, but this was overcome, in some cases by perceived need, and in other cases by purposeful avoidance and concealment. Institutional oversight, therefore, was doomed from the beginning. Yet somehow, the threat of criminal prosecution remained a powerful deterrent even in the face of the CIA's faith in its secrecy. This suggests not only that criminal prosecution can prevent future abuses, but that it may work where nothing else will.

The CIA's use of torture and its moments of hesitation, offer an important reminder that government policies are imagined and carried out by individuals acting under the influence of their social situation and personal char-

120. Anthony D. Romero, *Pardon Bush and Those Who Tortured*, N.Y. TIMES, 8 Dec. 2014, available at <http://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html>.

121. See, e.g., Francesco Messineo, "Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy, 7 J. INT'L CRIM. JUST. 1023 (2009); Bassiouni, *supra* note 4.

acteristics. It suggests that disciplines, such as criminology and psychology may have far more to offer in this area, and that criminological, as well as psychologically based research should be utilized by human rights activists, rather than purely political science perspectives. Indeed, rather than insulating potential offenders, the complexity of government institutions appears to provide the opportunity for potential criminal offenders to be refocused on their own rational interests, and to see the possible conflict between their own interests and potential criminal behavior.

This case study suggests that deterrence may be even more effective in these circumstances than in response to the conventional criminal behavior against which it is most often tested. It is possible, as I have suggested above, that this strength is due to the high social investment of these actors. However, it is also possible that it is in part due to the uncertain ground upon which the actors found themselves. Domestic criminal liability for torture had only been available since 1994, and there have been no prosecutions since that time.¹²² But the elite government actors involved in creating the US torture policy were likely aware of its passage, and of the possibility of criminal liability. This may have created a heightened perception of risk, i.e. the amount of consideration and credence that these potential offenders gave to the idea that they might be caught and prosecuted.¹²³

Moreover, with the availability of legal personnel to explain the extent of that risk, it was easy to investigate the matter rather than hazard a guess and risk prosecution. The attorneys' warnings that some, but not all activity created a high risk of sanctions may have carried more weight at that point. The opportunity to engage in some abusive questioning, even if refraining from the extent of abuse originally desired, may have offered a desirable compromise that also served to remind government actors to protect themselves from prosecution.

It is also interesting to note the restraint of government attorneys in attempting to find legal justifications for clearly illegal behavior. These efforts show the need for further research to evaluate the strength of legal socialization as another way to further the strength of the rule of law and human rights.

In sum, this article presents a ray of hope, but also a warning. The fact that the United States government officially instituted a torture policy in the wake of the terror attacks of 2001 should not be seen as proof that all states behave exceptionally, ignoring the rule of law and human rights in

122. Indeed, the first such indictment occurred in 2006. See ELISE KEPPLER, SHIRLEY JEAN & J. PAXTON MARSHALL, HUMAN RIGHTS WATCH, *FIRST PROSECUTION IN THE UNITED STATES FOR TORTURE COMMITTED ABROAD: THE TRIAL OF CHARLES "CHUCKIE" TAYLOR, JR.* (2008).

123. Perception of risk is one of the primary factors necessary for deterrence to be successful; Nagin, *Deterrence in the Twenty-First Century*, *supra* note 49.

times of crisis. To the contrary, statutes prohibiting the use of torture may be extremely effective in preventing, rather than merely rectifying, abuses. The rule of law showed its weaknesses, but also its strengths in the CIA's moments of debate and hesitation.

Deterrence theory also suggests that the failure to prosecute is likely to breed more lawless behavior if it is allowed to stand. Perception of risk is strongly affected by past experience or knowledge of criminal behavior, and whether that behavior was punished.¹²⁴ The history of torture in the United States post-2001, the CIA's careful research into the legality and possible criminal liability of CIA actions, and Yoo's legal research performed into prior cases, highlight the prominence of prior examples of criminality and responses to that criminality in the rational analyses of these particular types of offenders.

These facts underscore the need to press for criminal prosecutions internationally and domestically. The CIA's enhanced interrogation program shows both the promises and the failures of human rights law to date. Here, we have an opportunity for prosecutors to engage in behavior that will actually prevent crime. All that is required is for those prosecutors to act.

124. *Id.*