Jan Goldman has focused attention on the potential tension between ethics and the practice of intelligence in arguing that "ethics-phobia"—defined as the "fear of performing ethical conduct"—exists in the U.S. intelligence community.¹ In this paper, I explore the sources of this tension, one that applies in varying degrees in all liberal democratic contexts, and the ways in which policymakers seek to bypass or neutralize ethical issues that arise from contemporary intelligence practices. It is often claimed that ethics begin where the law ends, but the argument here is that the relationship between law and ethics in the field of security intelligence is far more complex than this suggests. Assertions of legality can be used in order to preempt the ethical question where there is implicit recognition of the difficulty of reconciling values with intelligence practice. Alternatively, utilitarian defenses of intelligence practices rooted in the idea of exception can be constructed, similarly designed to neutralize the ethical question. At different times these approaches have been used separately and in combination. In making this argument this paper focuses on two cases: the relationship between ethics and law in relation to the U.S. policy of using armed drones to kill suspected militants, and the question of U.K. complicity in extraordinary rendition and torture.

Sources of Tension

At the outset it is worth emphasizing that many of the ethical dilemmas that face intelligence professionals, agencies, and governments arise from a simple tension. On the one hand, ethical issues are usually articulated via the vocabulary of universal human rights, one of the foundational texts of which is the 1948 Universal Declaration of Human Rights. This established formal interna-
national recognition of core universal rights—for example, that “all human beings are born free and equal in dignity and rights,” that their entitlement to these rights was unaffected by “the political, jurisdictional or international status of the country or territory to which a person belongs,” that everyone “has the right to life, liberty and security of person,” and that no one “shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment.” On the other hand, the primary responsibilities and obligations of national intelligence agencies are far more circumscribed; they are defined by reference to the state for which they are an information-gathering and early-warning arm. Intelligence professionals, certainly in Western states, tend to view the world in neorealist terms—as a self-help system in which their role is to identify risks in a sufficiently timely manner to prevent them from becoming threats, and so avoid strategic surprise. Hence, debates about the relationship between ethics and intelligence do not exist in a vacuum; they are mediated via specific national contexts. In these national contexts, intelligence agencies and missions are an outgrowth of—and to a large extent reflect—political cultures.

The importance of national political cultures can be illustrated by considering a study of professional intelligence ethics published in 1998. In this study Kent Pekel discussed CIA ethics in terms of integrity at both the organizational and individual levels. His research was based upon structured interviews with a cross-section of fifty CIA professionals. Here ethics was understood in terms of the integrity of analysis, telling truth to power, the ethics of good management, responses to employees who do not display appropriate integrity, and more. Significantly, his opening question was: “Please agree or disagree with this statement by a career CIA officer: ‘Espionage is essentially amoral.’ How do you think about the ethical implications of your job?” Hence, the default position of the professional was to see intelligence as being, in essence, ethically neutral.

In his interviews Pekel found that eight themes regularly resurfaced. The first of these was “belief in and awareness of the moral purpose of the Agency mission.” This is significant, in that it was this moral force that, for intelligence professionals, legitimated actions which they were required to carry out but which would be ethically unacceptable if carried out by an ordinary citizen. While this sense of moral purpose had been clear to intelligence
professionals during the Cold War, Pekel found that the immediate post-Cold War threats lack the obvious moral dimension presented by the expansionist ideology of the Soviet Union, and they are thus less compelling motivators for doing a difficult job with integrity. As one case officer told me, “Now the only thing that matters is: Is it good for the United States?”

Also during the Cold War, what was good for the United States was seen to be a matter of principle, while today it is often more clearly seen as an issue of national interest. Many people I interviewed felt that this shift has had significant implications for the intensity with which agency personnel approach their jobs and also for the caliber of individual who will be attracted to a career in intelligence. Others suggested that this cloudier sense of moral purpose might in the future also have ethical implications. They worried that, if the [Directorate of Operations] case officers of tomorrow are less clear about the goals to which their profession is dedicated, they will be more likely to become “soiled” by the “dirty” aspects of their craft.

This suggests that there is a need to focus attention on the stories told by policymakers in developing this sense of “moral dimension” to intelligence work, and the way in which what constructivists would term the social construction of threats can legitimize not just the collection of intelligence on a particular target, but the extension of permissible methods to embrace some that—shorn of this justification—would be regarded as ethically impermissible. As we will see, one way of doing this is to assert that the circumstances in question constitute a double exception. That is, that the wider context is itself exceptional, requiring an exceptional response—one which would not be countenanced under “normal” conditions—and that the care and discrimination involved in avoiding the ethically dubious means that it occurs so very rarely that it is exceptional and, as such, represents an acceptable price. The key point here is that the question of intelligence ethics is intimately linked to questions of policy direction and broader political culture. This means that it is important to be able to demonstrate the compatibility of the practice or method with wider societal values, or present it as an exception.

In his 1985 memoir, Secrecy and Democracy, former U.S. director of Central Intelligence Stansfield Turner directly addressed this tension. Turner argued that “there is one overall test of the ethics of human intelligence activities. That is whether those approving them feel they could defend their actions before the public if the ac-
tions became public." As we will see below, this is precisely what policymakers have sought to do when either they judged it prudent in the case of unavowed but widely reported practices (as in the case of armed drone attacks) or when previously secret activities were exposed to public view and they were left with little choice but to attempt a defense (as in complicity in extraordinary rendition or torture).

This test—what we might call the Stansfield Turner test—is essentially a "national interest" test. By definition, it attaches a high value to questions of national security and citizen protection—the job, after all, of national intelligence agencies and the purpose of state investment in intelligence—and this high value informs the price it is considered worth paying in ethical terms. This is far from being an ethics-free zone, but it is a zone governed by a utilitarian ethic. Even as Stansfield Turner was outlining his test, however, the rise of the idea of universal human rights was challenging its core logic. Despite the rhetorical promise of the Universal Declaration of Human Rights, the advent of the Cold War and post-1945 wars of decolonization militated against the development of an international agenda around individual rights and instead contributed to a greater commitment to the advancement of communal rights. It was widely understood that in this context human rights "were to be achieved through the construction of spaces of citizenship in which rights were accorded and protected." During this period the consensus on the Cold War contest with the Soviet Union and its allies was strong; the ideology of anticommunism exerted a far stronger pull than that of human rights and was held to justify a range of secret wars, assassination attempts, and other ethically dubious practices in what Dean Rusk termed "the back alleys of the world." "If the use of covert action has been indiscriminate," wrote Loch Johnson, "then perhaps this is because America's reaction to tumult and revolution in other lands has been indiscriminately driven by an obsessive fear of communism—regardless of how distant the bayou in which it might arise or how feeble its effects on the United States. Yet, the very secrecy of the decisions to use paramilitary and other covert operations has prevented adequate debate about the wisdom of intervention."

Understandings of "human rights" and the importance attached to the idea of universal human rights had evolved by the latter part of the Cold War to bring them closer to the formulation contained in the Universal Declaration of Human Rights. They came to be
understood “as entitlements that might contradict the sovereign
nation-state from above and outside rather than serve as its founda­
tion.” Hence, individual human rights transcended states. They
were not state given but existed independently of states. Not only did
states have an obligation to avoid engaging in activities that would
infringe these rights but they also had an obligation to intervene
where these rights were being denied or seriously compromised by
other states. The broadly concurrent development of international
law provided a framework for promoting and protecting human
rights. These developments posed a challenge for Western intelli­
gence agencies with fundamentally neorealist understandings of the
international system and Cold War mind-sets. As Stansfield Turner
had written in the mid-1980s, arguments that U.S. intelligence inter­
fERENCE in other states “undermines our own moral standards of de­
cency, openness, and honesty” were “flawed attempts to transform
an idealized view of morality between individuals to a standard of
morality between nations.” Citing a catalogue of Soviet and Cuban
interventions in other states, he invoked John Stuart Mill’s argument
that

the doctrine of nonintervention, to be a legitimate principle of moral­
ity, must be accepted by all governments. The despot must consent to
be bound by it as well as the free states. Unless they do, the profes­
sion comes to this miserable issue—that the wrong side may help the
wrong, but the right must not help the right.13

The key source of tension, then, is clear. In the contemporary
world, the pursuit and defense of human rights has come to con­
stitute a goal in its own right, the realization of which has at times
required that various problems be overcome (see figure 1).14 Con­
versely, for national intelligence agencies, the concept of human
rights has itself at times presented a problem lying in the way of real­
zizing goals framed in relation to national security and, on such occa­
sions, has had to be bypassed or neutralized (see figure 2). This has
meant that while national intelligence agencies have at times been
able to assist in international human rights contexts—for example,
in tracking down fugitive war crimes suspects15—at other times,
where there was a tension or conflict between understandings of the
requirements of national security and human rights, the role and
activities of national intelligence agencies could themselves represent
the problem or obstacle in the way of securing human rights (figure
1). It follows from this that the relationship between national intel­
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Intelligence agencies and human rights have not been fixed. Instead, it has had the capacity to alter depending on judgments about the relative merits of ethical and national security considerations in individual circumstances. 16

This rise of the idea of universal human rights as "a moral alternative to [the] bankrupt utopias" 17 that dominated the twentieth century would have represented a challenge to those charged with guaranteeing national security (that is, retaining the state-centric view of the world central to the purpose of national intelligence
agencies) in any context, but especially in the post-9/11 international climate, and particularly in the case of the United States where an explicit shift to a preemptive (in reality, preventive) approach to defense was mirrored by a shift in the posture of national intelligence agencies from "gatherers" to "hunters." This shift also involved an ethical shift, one that was inevitable in moving to more vigorously break down uncertainty so as to prevent another 9/11 or equivalent attack. It is captured well in journalist Ron Suskind's account of Director of Central Intelligence (DCI) George Tenet's post-9/11 explanation to a colleague:

You're gonna be wrong sometimes, okay? You've got to be. You've got to be so far out in front on this WMD [weapons of mass destruction] issue, calling the shots, spotting potential threats . . . You've got to protect us, you've got to protect the country on this one . . . in terms of being way out front . . . You've got to be wrong—not analytically wrong . . . but just way out front . . . You see, all our failures are because we failed to anticipate. Intelligence failures follow a failure of anticipation. They come from only following the information you know and not worrying about what you don't know . . . You need to be passionate—passionate about what you don't know.

The implicit ethical shift is also reflected in Vice President Dick Cheney's post-9/11 explanation:

We also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objectives.

**Law and Ethics**

Such a shift would clearly require justification if it was to pass the Stansfield Turner test. This was attempted via arguments of exception and legality. One way of legitimating practices that raise ethical issues is to argue that they are legal. Jan Goldman has pointed to the fact that "for most Americans, law and ethics are intertwined, leading most people erroneously to believe that if it is legal it must be ethical and all things ethical are legal." The important point here is that there is a relationship between legality and what we might
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term social acceptability. To be able to demonstrate, or argue with a degree of plausibility, that something is legal impacts on the way people come to view it—on perceptions of its social acceptability. In some cases, asserting the legality of a practice preempts the ethical question; in light of an assertion of its legality it does not even need to be asked. Ethical cover is provided by the legal judgment, hence separate ethical judgment is superfluous. Jose Rodriguez, a CIA officer responsible for helping develop the CIA’s post-9/11 “enhanced interrogation techniques,” provides a good example of this in his memoir. This emphasizes assurances as to the legality of the practices, bypassing normative ethical questions and not even requiring any reference to human rights. As Rodriguez writes:

Less than a week after 9/11, the president provided us with written authorization that allowed us to capture, render, and interrogate terrorists. As with all such authorizations, these documents are the bedrock of what we could and could not legally do as an organization. They were briefed to the congressional leadership, who, to a man and woman, expressed no objection, even to the very specific authorization of what we could do against al-Qa’ida operatives. Armed with new authorities and with the full backing of a united government and the American people, we went to war.

The assertion of legality preempts the ethical question in a way that allows the policy to pass the Stansfield Turner test. It also helps meet the requirement of establishing Pekel’s sense of “moral purpose of the Agency mission” for intelligence professionals (and, to an extent, for the doctors necessary to the use of this method, although this is a somewhat different case).

There are now several analyses based on declassified Bush administration documents demonstrating how this process operated with regard to the effective redefinition of torture in order to render legitimate practices—such as waterboarding—that would otherwise have been impermissible. Of course, the primary purpose of this exercise was to demonstrate the legality of Bush administration policy, but it also meant that administration principals did not need to confront the ethical question—because it was legal, it was socially acceptable. As George Tenet explained in his memoirs: “Despite what Hollywood might have you believe, in situations like this you don’t call in the tough guys; you call in the lawyers.” Consideration of whether proposed “enhanced interrogation techniques” constituted “torture” was rooted in an understanding of physical torture as only occurring when the pain it caused was “equivalent in intensity
to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” However, by no means did everyone agree with this definition or think the legal advice being proffered, in what collectively came to be termed the *torture memoranda*, was good law. To take just one illustrative example, Columbia University law professor José Alvarez considered these memoranda to be a massive retrograde step wherein those sources of international obligation that are not ignored or relegated to mere considerations of “policy” are mangled beyond recognition. The memoranda writers . . . attempt to return us to an age when international law protected only the perceived needs of certain states as determined by the states themselves. To the extent the memoranda excuse torture or inhuman treatment when it occurs outside US territory or is committed by foreigners with US acquiescence, it returns us to a dark period when colonial powers renounced torture for their citizens while deploying it on those whom they called, with no sense of irony, the “uncivilized.”

**Ethics, Law, and Drone Attacks**

We can observe a similar process of neutralizing ethical considerations by asserting both a state of exception and the legality of the practice in question in the Obama administration’s approach to the legitimization of armed drone attacks. Here arguments of legality and exception were used in combination. The need for a public defense of the armed drone policy had been growing since the early stages of the “war on terror.” For example, in November 2002, National Security advisor Condoleezza Rice had explained to a television interviewer, in the context of the drone killing in Yemen of Qaed Salim Sinan al-Harethi, the al-Qaeda operative believed responsible for the 2000 bombing of the USS Cole: “We are in a new kind of war. And we’ve made very clear that it is important that this new war be fought on different battlefields.” This, then, is an example of the exception approach and reflected the language contained in contemporaneous legal advice from White House lawyers, as in Alberto Gonzales’s January 2002 argument, contained in a memorandum for President Bush, that the Geneva Convention did not apply in the context of the “war on terror”:

As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW [Geneva Convention III on the
Treatment of Prisoners of War. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians.\textsuperscript{32}

However, not everyone accepted this "new war" line of drone defense. With regard to the case of al-Harethi, for example, Swedish foreign minister Anna Lindh called it "a summary execution that violates human rights."\textsuperscript{33} Amnesty International termed it an extrajudicial execution.\textsuperscript{34} As the use of armed drones increased and the number of victims grew, so did the number of critics. Moreover, in 2009 President Obama was awarded the Nobel Peace Prize—during which year there were, according to the BBC, 473 deaths from U.S. drone strikes\textsuperscript{35}—lending greater urgency to a defense that addressed in greater detail the objections raised by erstwhile allies such as Anna Lindh, respected nongovernmental organization (NGOs) such as Amnesty International, and international lawyers. This was the context in which, in March 2010, legal advisor to the State Department Harold Koh set out a legal defense of armed drone use, based on what he termed the "Law of 9/11" and which both made a legal defense and addressed ethical questions by reference to just war theory. Koh argued:

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians . . . In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.
In U.S. operations against al-Qaeda and its associated forces—including lethal operations conducted with the use of unmanned aerial vehicles—great care is taken to adhere to these principles in both planning and execution to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.36

Nevertheless, questions and concerns that had the potential to impact on international acceptance of the drone strategy continued to be aired. A clear example of such concerns was contained in a May 2010 report by Philip Alston, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions. Alston regarded Koh’s defense as inadequate, and recommended that states should be much more transparent about the rationale for targeted killing in each case it was used and publicly identify the basis for such action in international law. In particular, Alston was clearly skeptical about the extent to which the United States could be held to be in a state of armed combat with al-Qaeda—the foundation of the Koh defense, but a contentious claim in international law37—and drew parallels between elements of drone defense and lines of advocacy of interrogational torture:

Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL [international humanitarian law] would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor. It could also theoretically claim that human rights law’s requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defense—necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”—would be met. This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception.38

Partly in response to Alston, a series of further interventions providing assurances as to the legality of the drone policy was made by Attorney General Eric Holder, general counsel at the Department of Defense Jeh Johnson, and general counsel at the CIA, Stephen Preston. In turn, these were followed, on April 30, 2012, by a speech by
John Brennan, the Obama administration's adviser on Homeland Security and Counterterrorism. This set out another detailed account, one that reiterated the points made by Koh regarding the ethical assurances that being guided by the principles of distinction and proportionality provided, and of the legal standing of the armed conflict with al-Qaeda. To the principles of distinction and proportionality, Brennan introduced the concept of "humanity"—that "targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering." Hence, Brennan assured his audience, "these targeted strikes against al-Qaida terrorists are indeed ethical and just."

Such public arguments have clearly impacted on the social acceptability of the armed drone policy with the U.S. public, to the extent that armed drone use has been effectively normalized. A February 2012 Washington Post/ABC News poll of one thousand adults found that 83 percent approved of their use against terrorist suspects overseas, and that 79 percent still approved if the suspects were U.S. citizens. Indeed, according to the poll, this was by some margin the most popular area of Obama administration policy. The domestic popularity of the drone policy is unlikely to be affected by Pakistan's Parliament twice demanding an end to the campaign, which it regards as a breach of its sovereignty. However, such demands do weaken both the legal and the ethical case for continuation.

The secrecy that attaches to the CIA's drone campaign makes arriving at reliable data, and so testing the administration's ethical claims, problematic. For example, in his April 2012 defense, John Brennan assured his audience:

Targeted strikes conform to the principles of distinction, the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaida terrorist and innocent civilians.

President Obama himself, in reply to a questioner, in January 2012 said: "I want to make sure that people understand that drones have not caused a huge number of civilian casualties. For the most part, they have been very precise, precision strikes against al-Qaeda and their affiliates." There is a clear ethical tension here. Koh stated
that the principle of distinction meant that civilians “shall not be the object of the attack.” Brennan, similarly, that “only military objectives may be intentionally targeted.” However, none of this sheds light on the utilitarian calculation involved in determining what level of civilian death is acceptable in killing a suspected militant leader or rank-and-file militant (presumably the cost/benefit analyses differ). Moreover, Koh’s reference to the principle of proportionality raises the question of how “distinction” is understood in that it signals an acceptance of a level of civilian death so long as it is not “excessive” in relation to the “military advantage” to be gained. In effect it undermines the principle of distinction.  

Obama administration assurances as to the low level of civilian deaths resulting from drone attacks are also problematic because “militant” is defined in such a way as to minimize the number of “nonmilitant” deaths recorded. This undermines administration claims about the efficiency of targeting and, by extension, the ethicality of armed drone use. The method used to calculate civilian casualties “in effect counts all military-age males in a strike zone as combatants, according to several administration officials, unless there is explicit intelligence posthumously proving them innocent.” This method allowed John Brennan to claim in 2011 that no noncombatants had been killed in the previous year’s strikes, and for an Obama administration official to characterize the number of civilian deaths from drone attacks throughout Obama’s term of office as being in “single digits.” This is a far different picture from that presented by Christof Heyns, the UN Special Rapporteur for summary executions and extrajudicial killings, who in October 2011 said that “the current use of drones and raids into countries where there is not a recognized armed conflict to kill an opponent, such as in Pakistan or Yemen, is highly problematic. While these operations may be designed to hit a particular target, civilian casualties remain, and it is used on such a large scale that it can hardly be described as targeted.” The Obama administration clearly has an interest in promoting the idea of drones as a means of avoiding civilian deaths, both in terms of the Stansfield Turner test as drones become a normalized part of U.S. foreign policy and in terms of international law. As Philip Alston has observed: “Drone killings of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.”
Ethics, Law, Extraordinary Rendition

Hence, the case of armed drones is one in which arguments about legality have been used alongside the application of just war principles in an attempt to bypass or neutralize ethical concerns rooted in understandings of universal human rights. The next case I want to discuss relates to the U.K. experience and develops a theme introduced at the end of the drones discussion—how national law may well have its limits in offering protection for intelligence actions which, while covered by national law, undermine principles of human rights enshrined in international law.

In the U.K. context, the rise of human rights can be seen as a decisive driver leading to greater intelligence accountability—in particular via the impact of the European Convention of Human Rights. It was the prospect of the government continually falling foul of this—in the wake of a string of adverse judgments—that led it to introduce the 1989 Security Service Act. This put MI5 on a statutory footing for the first time. The subsequent Intelligence Services Act (1994) extended this to MI6 (Secret Intelligence Service) and Government Communications Headquarters (GCHQ). Unlike the 1989 Act, the 1994 Act contained the so-called James Bond clause; Section 7, Authorisation of acts outside the British Islands. This clause states that "a person would be liable in the United Kingdom for any act done outside the British Islands, he shall not be so liable if the act is one which is authorised to be done by virtue of an authorisation given by the Secretary of State under this section." The very existence of Section 7 highlights the tension between the practice of intelligence and ethics, between the requirements of national security and understandings of universal human rights. This is well illustrated by the case of MI6 complicity in extraordinary renditions to Libya.

In January 2012, a criminal investigation was opened into MI6 involvement in the 2004 rendition of leading Libyan dissidents Abdul Hakim Belhaj and Sami al-Zaadi to the regime of Muammar Gaddafi. This followed the discovery of documents relating to their abduction in an abandoned government building in the chaos that followed the overthrow of Gaddafi. In March 2004 Belhaj had been in Malaysia, considering traveling to the United Kingdom in order to apply for political asylum. A friend approached the British Embassy to inquire into this possibility. "Perhaps," Belhaj told journalist Peter Taylor, "this gave an indication of my presence and this was delivered to the intelligence service which subsequently
acted in an attempt to hand me over. When I entered the flight, I knew that things had been organised for my handover. The last seats in the plane were reserved and the last section was empty of passengers.” Belhaj seems to have been intercepted by the CIA when his flight stopped off in Bangkok and flown to Libya via the British Indian Ocean territory of Diego Garcia—the site of several reports of U.S. rendition and detention and a corresponding number of U.K. government denials of any knowledge of this. Once in Libya, he was incarcerated for over four years in the Abu Salim prison, during which time he was allegedly tortured.

A letter from senior MI6 officer Sir Mark Allen to then head of Libyan intelligence Moussa Koussa, dated March 18, 2004, read: “I congratulate you on the safe arrival of [Belhaj]. This was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over the years.” The national security context lay in the Blair government’s rapprochement with the Gaddafi regime in the immediate post-Iraq War period—indeed, the rendition occurred just weeks before Blair was to meet Gaddafi in Libya, where Blair explained that “the world is changing and we have got to do everything we possibly can to tackle the security threat that faces us,” but that “trust on both sides will take time to establish.” Here, it would seem, intelligence was being called upon to play a role that prioritized the immediate national political goal—rewarding the Libyan regime for “coming in from the cold”—at the expense of universal human rights obligations. To be consistent with Section 7 of the 1994 Act, and therefore legal under U.K. law, this operation needed to be authorized by the Foreign Secretary. Subsequently though, both former Prime Minister Tony Blair and former Foreign Secretary Jack Straw denied any knowledge of the rendition. Straw argued that “no foreign secretary can know all the details of what... intelligence services are doing at any one time.” However, Sir Richard Dearlove, head of MI6 at the time of the renditions, subsequently made clear that “it was a political decision, having very significantly disarmed Libya, for the government to co-operate with Libya on Islamist terrorism.”

Post-9/11, the possibility that Section 7 might be used to authorize acts of torture or complicity in torture, as in the Libyan cases, rather than be restricted to the three Bs that it was essentially understood to cover when the Intelligence Services Bill was being debated in Parliament during 1993 to 1994—burglary, blackmail, and bugging—is greatly increased. The government has refused to provide
details of the number of authorizations issued under Section 7 "for security reasons," although one report puts the number of requests at five hundred for 2009 alone. A key question is whether Section 7 is subject to, and superseded by, the 1998 Human Rights Act and the 2001 International Criminal Court Act, both passed to bring the United Kingdom into compliance with the European Union and international law on human rights. Will it, in fact, provide the immunity from prosecution it was designed to? If not, could the ministers who signed the authorizations be charged with complicity in any offences committed? As this case shows, the rise of the ideology of universal human rights has created acute difficulties for intelligence because it has been accompanied by the development of frameworks of international human rights law that exist in tension with national laws legitimizing otherwise unlawful intelligence actions, and perhaps render them invalid.

As noted earlier, one approach to addressing the ethical issues that arise from intelligence practice, in the event that the secrecy surrounding them fails, is to argue that the case represents an exception. This will doubtless be an element in the defense of the Libya renditions, when public explanations are finally offered. A further example can be found in the wake of allegations of British intelligence complicity in the torture of terrorist suspects, when Foreign Secretary David Miliband and Home Secretary Alan Johnson produced a newspaper article that explained:

When detainees are held by our police or Armed Forces we can be sure how they are treated. By definition, we cannot have that same level of assurance when they are held by foreign governments, whose obligations may differ from our own. Yet intelligence from overseas is critical to our success in stopping terrorism. All the most serious plots and attacks in the UK in this decade have had significant links abroad. Our agencies must work with their equivalents overseas. So we have to work hard to ensure that we do not collude in torture or mistreatment.

Whether passing information which might lead to suspects being detained; passing questions to be put to detainees; or directly interviewing them, our agencies are required to seek to minimise, and where possible avoid, the risk of mistreatment. Enormous effort goes into assessing the risks in each case. Operations have been halted where the risk of mistreatment was too high. But it is not possible to eradicate all risk.

However, there is no clear guide as to what is regarded as acceptable here or how to balance the demands of national security and
universal human rights. Moreover, the human rights requirement is absolute and so allows for no balancing. What is the most appropriate ethical course in these circumstances? In practice, it has been to resort to forms of utilitarian justification, the implicit basis of the exception argument, which are held to balance human rights alongside national interest/national security considerations. One problem here is that, as Richard Norman has observed, utilitarian approaches accord a low priority (if any at all) to values such as freedom and autonomy, values that “include a respect for life, whereas utilitarian thinking by itself justifies too easily the sacrificing of someone’s life to promote the good of others.” Even setting that consideration aside, the way in which this balance is determined is inherently subjective. Who applies this judgment? How can we be sure that these judgments—taken in secret—reflect wider societal values? This is a question that the Libyan case clearly raises. It again highlights the problem posed by Loch Johnson in relation to U.S. Cold War intelligence practices—how to ensure adequate debate about the ethics of an action and the compatibility with wider societal values when such a high degree of secrecy attaches. How reliably can the Stansfield Turner test be applied in such cases?

A key point here is that those applying these utilitarian judgments must implicitly reject the core universal human rights proposition that all human life is of equal value and importance regardless of national boundaries. In practice, in prioritizing the security of their own citizens, at times those making the utilitarian judgments have had to countenance the possibility of the rights of others being infringed—for example, via complicity or acquiescence in interrogations in states known to practice torture, such as Pakistan. The well-being of citizens is, after all, a core business of national governments. Former MI5 director-general Eliza Manningham-Buller highlighted the general dilemma facing intelligence managers in her 2011 Reith Lectures:

From my own perspective in the security service, I know that protecting British citizens would be impossible if we were restricted to talking to those whose values we share. I can remember plots to attack us, for example, with links to Indonesia, Somalia, the Philippines, Kenya, Algeria, Jordan, and, of course, most importantly, Pakistan. That list is not comprehensive. We cannot just talk to the Swiss however enjoyable and easy that might be.

Speaking at the time that the details of the renditions to Libya first emerged, Manningham-Buller said she thought it was right to
make a political opening to the Gaddafi regime, but that there "are clearly questions to be answered about the various relationships that developed afterwards and whether the UK supped with a sufficiently long spoon." But this question—of the length of the spoon, and the related question of which dishes it dips into—is crucial. Who should make these decisions, and on what basis? Ultimately, decisions such as that about the length of the spoon in the Libyan case cannot be taken objectively because they exist in subjective national contexts. They also have a clearly political dimension. As Sir John Sawers, the head of MI6, said in his first-ever public speech in October 2010:

How can the public have confidence that work done by us in secret is lawful, ethical and in their interests? Let me explain how it all works in practice. SIS does not choose what it does. The 1994 Intelligence Services Act sets the legal framework for what we do. Ministers tell us what they want to know, what they want us to achieve. We take our direction from the National Security Council. As chief of SIS, I am responsible for SIS operations. I answer directly to the foreign secretary. When our operations require legal authorisation or entail political risk, I seek the foreign secretary’s approval in advance. If a case is particularly complex, he can consult the attorney general. In the end, the foreign secretary decides what we do. Submissions for operations go to the foreign secretary all the time. He approves most, but not all, and those operations he does not approve do not happen. It’s as simple as that.

This is the approach that Section 7 leads us to expect, and it illustrates again how the ethics of intelligence need to be considered beyond the level of the intelligence agencies themselves and to be extended to the level of policymakers.

Secrecy is clearly a problem here, one that oversight and accountability is meant to overcome. The formal oversight body in the United Kingdom, the parliamentary Intelligence and Security Committee, was clearly unaware of the renditions to Libya. This meant that although it investigated other cases of rendition in 2007—that is, after the renditions to Libya occurred—the hardly irrelevant information about the Libyan dimension was not volunteered by the intelligence agencies. As the Chair of the Intelligence and Security Committee, Sir Malcolm Rifkind, told the BBC: "I think one’s entitled to be extremely uneasy. It’s very, very worrying indeed, because if [Belhaj] was rendered to Libya and if the UK intelligence agencies and the UK government were involved, that is not only contrary to the policy the British government has pursued for a long number of
years, but also to the assurances that were given to the intelligence and security committee and to parliament as a whole." In essence, oversight was ineffective here, as it has been to a greater or lesser extent throughout the post-9/11 era when required to deal with normative issues generated by the "war on terror."

Conclusions

There is, then, an inherent tension between the practice of intelligence and ethics. Arguably, this tension has been heightened in the post-Cold-War era, with the rise of the ideology of universal human rights. In addition, with the end of the Cold War contest and its rationale for exceptionalism, and the spread of civilian oversight of intelligence agencies—to the extent that it has become a liberal democratic norm and generated notions of "democratic intelligence"—normative expectations around intelligence were high. Intelligence had been normalized. However, this normalization has been challenged by the further exception that the "war on terror" is held to represent.

In this context, publics, legislators, oversight bodies, and NGOs should not simply accept assertions of legality or exception as sufficient and should recognize that these can constitute ethics bypassing or neutralization strategies. Instead, they should probe and press for fuller ethical discussion and ensure that policy is subject to fuller debate to ensure that ethics inform policy rather than policy dictate ethical standards. This should also involve taking on utilitarian justifications on utilitarian grounds in order to challenge their logic. For example, it is not at all clear that extraordinary rendition and armed drone attacks do not generate additional recruits to militant ranks, or that there will not be unanticipated consequences in terms of either the erosion of the prohibition on assassination that the drone policy represents or the low threshold it establishes for drone use, which could well have implications as the technology spreads and more states come to operate armed drones.

This paper has set out the nature of the ethics-intelligence tension, but national intelligence agency, policymaker, and legislator understandings of the nature of the international system, and differing national risk and threat analyses, represent barriers that make the notion of a single "solution" highly problematic. The only certainties are that there is no silver-bullet solution, ongoing professional reflection on and discussion of the relationship between ethics and intelligence is key, oversight bodies have a very important role to
play, and that all of this should be informed by wider public discussion of notions of national security in ethical terms. The revelations arising from working on the “dark side” in the “war on terror” have placed the question of intelligence ethics center stage, and the opportunity to develop public debate about the meaning of this concept, and the possibilities it entails, should not be squandered, especially as we stand on the edge of a new era of national intelligence competition in the anarchic world of cyberspace.

Notes

3. This is based on the definition of intelligence in Peter Gill and Mark Phythian, Intelligence in an Insecure World (Cambridge: Polity, 2006), 7.
5. Pekel initially found “integrity” to be a useful concept around which to frame his interviews with CIA employees. As he explained: “After the first few sessions, I found that these discussions yielded greater insight when they focused more broadly on integrity than on ethics. This was in part because the word ‘ethics’ often invokes thoughts of compulsory annual briefings in the Agency auditorium, while ‘integrity’ more clearly connotes commitment without coercion to deeply held priorities and values.” Ibid.
6. Ibid.
8. Utilitarianism is a form of consequentialism. For a wider discussion of consequentialism as a framework for thinking about intelligence ethics, see Toni Erskine, “‘As Rays of Light to the Human Soul’? Moral Agents and Intelligence Gathering,” Intelligence and National Security 19, no. 2 (2004): 359–81.


13. John Stuart Mill, *A Few Words on Non-Intervention*, cited in Turner, *Secrecy and Democracy*, 86. It is worth noting that the context of Mill's 1859 essay is that of nineteenth-century European imperial expansion, and that it can be viewed as a defense of imperial intervention. As he also wrote in it: "There is a great difference . . . between the case in which the nations concerned are of the same, or something like the same, degree of civilization, and that in which one of the parties to the situation is of a high, and the other of a very low, grade of social improvement. To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error." Mill, *A Few Words on Non-Intervention*, *Fraser's Magazine*, 1859, http://www.liberarian.co.uk/lapubs/forep/forep008.pdf.

14. Figure 1 and figure 2 are taken from Sir David Omand and Mark Phythian, “Ethics and Intelligence: A Debate,” *International Journal of Intelligence and Counterintelligence* 26, no. 1 (2013): 38–63.


16. This paragraph reiterates an argument set out in Omand and Phythian, “Ethics and Intelligence.”


20. Ron Suskind, *The One Percent Doctrine: Deep Inside America’s Pursuit of its Enemies since 9/11* (New York: Simon & Schuster, 2006), 51. Tenet's immediate concern here was that al-Qaeda either could have or was close to acquiring a nuclear device, but the logic can be applied to the role of U.S. intelligence in the "war on terror" more generally.


37. In addition to O’Connell, “When Is a War Not a War?,” see, for example, A. P. V. Rogers and Dominic McGoldrick, “Assassination and


42. Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy.”


44. For a good example of a case where the target was held to be significant enough to justify the civilian deaths that were likely to also occur, see the account of the decision to kill Baitullah Mehsud in Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012.

45. Ibid.

46. Ibid.


49. For further detail on these developments, see Mark Phythian, “The British Experience with Intelligence Accountability,” *Intelligence and National Security* 22, no. 1 (February 2007): 75–98.


58. Cobain, “Yard Inquiry into MI6 Role.”


64. See the cases documented in the 2009 Human Rights Watch report, *Cruel Britannia*.


66. Ibid.


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